

GAO

Report to the Ranking Minority
Member, Committee on Governmental
Affairs, U.S. Senate

July 2001

FBI INTELLIGENCE INVESTIGATIONS

Coordination Within Justice on Counterintelligence Criminal Matters Is Limited



G A O

Accountability * Integrity * Reliability

Report Documentation Page

Report Date 00JUL2001	Report Type N/A	Dates Covered (from... to) -
Title and Subtitle FBI INTELLIGENCE INVESTIGATIONS: Coordination Within Justice on Counterintelligence Criminal Matters Is Limited	Contract Number	
	Grant Number	
	Program Element Number	
Author(s)	Project Number	
	Task Number	
	Work Unit Number	
Performing Organization Name(s) and Address(es) U.S. General Accounting Office P.O. Box 37050 Washington, DC 20013	Performing Organization Report Number GAO-01-780	
Sponsoring/Monitoring Agency Name(s) and Address(es)	Sponsor/Monitor's Acronym(s)	
	Sponsor/Monitor's Report Number(s)	
Distribution/Availability Statement Approved for public release, distribution unlimited		
Supplementary Notes		
Abstract Recent Federal Bureau of Investigation (FBI) intelligence investigations identifying possible significant criminal violations have brought to light serious problems that have limited whether and when the FBI coordinates its investigations with the Department of Justices (DOJ) Criminal Division. These investigations involved allegations that the Peoples Republic of China was seeking to influence the 1996 Presidential election in the United States and that nuclear weapons design secrets at the Los Alamos National Laboratory had been compromised. Timely coordination 1 on such intelligence investigations can be important because the Criminal Division may be able to advise the FBI on ways to (1) preserve its intelligence sources so that they would not be compromised in the event of subsequent prosecution and (2) enhance the evidence needed to prosecute the alleged crimes. In addition, prosecutors need sufficient time to familiarize themselves with a case in order to address any court proceedings emanating from the perpetrators arrests.		
Subject Terms		
Report Classification unclassified	Classification of this page unclassified	

Classification of Abstract unclassified	Limitation of Abstract SAR
Number of Pages 48	

Contents

Letter		1
	Results in Brief	3
	Background	6
	Scope and Methodology	9
	Concern Over Possible Adverse Consequences of Judicial Rulings Has Been a Key Factor Impeding Coordination	11
	Procedures Established to Ensure Proper Coordination Led to Problems	16
	DOJ Has Taken Additional Action to Address Coordination, but Some Impediments Remain	21
	Mechanisms Created to Ensure Compliance With the Procedures Have Not Been Institutionalized	26
	Conclusions	30
	Recommendations for Executive Action	32
	Agency Comments and Our Evaluation	32
Appendix I	Chronology of Key Events Relating to FBI/DOJ Coordination	36
Appendix II	Comments From the Department of Justice.	37
	GAO Comments	43
Tables		
	Table 1: Key Events Relating to FBI/DOJ Coordination	36

Abbreviations

FBI	Federal Bureau of Investigation
DOJ	Department of Justice
FISA	Foreign Intelligence Surveillance Act
OIPR	Office of Intelligence Policy and Review



United States General Accounting Office
Washington, DC 20548

July 16, 2001

The Honorable Fred Thompson
Ranking Minority Member
Committee on Governmental Affairs
United States Senate

Dear Senator Thompson:

Recent Federal Bureau of Investigation (FBI) intelligence investigations identifying possible significant criminal violations have brought to light serious problems that have limited whether and when the FBI coordinates its investigations with the Department of Justice's (DOJ) Criminal Division. These investigations involved allegations that the Peoples Republic of China was seeking to influence the 1996 Presidential election in the United States and that nuclear weapons design secrets at the Los Alamos National Laboratory had been compromised. Timely coordination¹ on such intelligence investigations can be important because the Criminal Division may be able to advise the FBI on ways to (1) preserve its intelligence sources so that they would not be compromised in the event of subsequent prosecution and (2) enhance the evidence needed to prosecute the alleged crimes. In addition, prosecutors need sufficient time to familiarize themselves with a case in order to address any court proceedings emanating from the perpetrators' arrests.

Most of the coordination problems have arisen in the context of foreign counterintelligence investigations that involve or anticipate the use of electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act of 1978, as amended.² The act was designed to strike a balance between the government's need for intelligence information to protect the national security and the protection of individual privacy rights. The act provided the first legislative authorization for wiretapping and other forms of electronic surveillance for intelligence investigation purposes of foreign powers and their agents in the United States. The act, among other things, established (1) requirements and a process for

¹For this report, coordination includes the initial notification of case activity by the FBI, subsequent consultation with the Criminal Division, and any other exchange of information.

²Foreign Intelligence Surveillance Act of 1978, P.L. 95-511, 92 Stat. 1783 (1978).

seeking electronic surveillance and physical search authority³ in national security investigations seeking to obtain foreign intelligence and counterintelligence information⁴ within the United States and (2) a special court—the Foreign Intelligence Surveillance Court—with jurisdiction to hear applications for and grant orders approving Foreign Intelligence Surveillance Act surveillance and searches. Because the standards for obtaining a foreign intelligence surveillance order are different than those required to obtain authorization for a search or a surveillance in a criminal investigation, there will often be situations in which it is possible to obtain a foreign intelligence surveillance order that would not satisfy the standards for a criminal search warrant or electronic surveillance order.

At your request, we reviewed the current policies, procedures, and processes for coordinating FBI intelligence investigations within DOJ, as well as DOJ's efforts to resolve problems that were identified in recent internal reviews of this issue.⁵ Specifically, we agreed to determine the following:

1. The key factors that have affected coordination.
2. The DOJ and FBI policies, procedures, and processes that are in place for coordinating with appropriate DOJ units foreign counterintelligence investigations that indicate possible criminal violations.
3. The actions DOJ has taken to address identified coordination problems and the concerns and impediments that remain.

³Hereafter referred to as “surveillance and searches.”

⁴This report focuses on the coordination efforts involved in foreign counterintelligence investigations where the Foreign Intelligence Surveillance Act has been or may be employed. According to DOJ, foreign counterintelligence investigations nearly always include an inherent criminal violation (e.g., espionage, sabotage, or international terrorism), regardless of the government's ultimate decision whether or not to prosecute the target. In some circumstances, the FBI, as a member of the intelligence community, may collect foreign intelligence information, but such cases are less likely to result in criminal prosecutions than foreign counterintelligence investigations.

⁵Office of Inspector General's report on “The Handling of FBI Intelligence Information Related to the Justice Department's Campaign Finance Investigation” (July 1999). The Attorney General's Review Team's report on the “Handling of the Los Alamos National Laboratory Investigation” (May 2000).

-
4. The mechanisms that have been put into place to ensure compliance with the policies, procedures, and processes.

Results in Brief

Coordination between the FBI and the Criminal Division has been limited in those foreign counterintelligence cases where criminal activity is indicated and surveillance and searches have been, or may be, employed. A key factor inhibiting this coordination is the concern over how the Foreign Intelligence Surveillance Court or another federal court might rule on the primary purpose of the surveillance or search in light of such coordination. The judicially established “primary purpose” test has been adopted as a test by most federal courts in such foreign counterintelligence cases where evidence gathered by surveillance and searches was challenged. Under the primary purpose test, most federal courts have held that foreign intelligence information may subsequently be used in criminal prosecutions so long as the primary purpose of the Foreign Intelligence Surveillance Act surveillance or search was to obtain foreign intelligence information. According to officials of the Office of Intelligence Policy and Review—the DOJ unit responsible for overseeing Foreign Intelligence Surveillance Act surveillance and search applications—the Foreign Intelligence Surveillance Court also has used this test to determine whether to grant DOJ’s requests for Foreign Intelligence Surveillance Act surveillance and searches. According to Criminal Division officials, since the act was enacted, no court using the primary purpose test has upheld a challenge to the government’s use of Foreign Intelligence Surveillance Act obtained intelligence information for criminal prosecution purposes. Moreover, according to Office of Intelligence Policy and Review officials, no surveillance or search request has been denied by the Foreign Intelligence Surveillance Court. These officials said that, nonetheless, FBI and Office of Intelligence Policy and Review officials remain concerned that coordination with the Criminal Division, on court review, could raise the primary purpose question, and, thus, place at risk the FBI’s authorization to use the intelligence surveillance and search tools and/or lead to the suppression of evidence gathered from them. On the other hand, Criminal Division officials believe these concerns, while well-intentioned, are overly cautious. These officials contend that their advice can help preserve and enhance the criminal prosecution option.

Policies for coordinating FBI foreign counterintelligence investigations involving suspected criminal violations with the Criminal Division were promulgated by the Attorney General in procedures that were issued in July 1995. However, rather than ensuring that DOJ’s intelligence and

criminal functions are properly coordinated, according to Division officials, the implementation and interpretation of the procedures and the previously noted concerns led to a significant decline in coordination between the FBI and the Criminal Division. These procedures, which were in effect at the time of our review, require, in part, that the FBI notify the Criminal Division and the Office of Intelligence Policy and Review whenever a foreign counterintelligence investigation utilizing authorized surveillance and searches develops "...facts or circumstances...that reasonably indicate that a significant federal crime has been, is being, or may be committed..."⁶ However, according to Criminal Division officials, subsequent to the procedures' issuance, required notifications did not always occur and often, when they did, were not timely. In January 2000, to address some coordination concerns, the Attorney General issued additional coordination procedures. These procedures (1) required the FBI to share with the Criminal Division memorandums summarizing certain types of foreign counterintelligence investigations involving U.S. persons, (2) established a core group of high-level DOJ officials to identify from among the FBI's most critical investigations those that met the Attorney General's requirements for notification, and (3) established a protocol for briefing Criminal Division officials about those investigations. Criminal Division officials opined that these procedures had helped to improve coordination. The core group and briefing protocol were discontinued in October 2000, but were replaced in April 2001, by a reconstituted core group with broader oversight responsibilities.

Despite the additional January 2000 coordination procedures and the reconstituted core group, impediments to coordination remain. For example, Office of Intelligence Policy and Review, Criminal Division, and FBI officials disagreed as to the type of advice the Criminal Division may provide the FBI on foreign counterintelligence investigations involving Foreign Intelligence Surveillance Act surveillance and searches without affecting possible judicial interpretations of the primary purpose of the surveillance or searches. To address these impediments, a coordination working group headed by the Principal Associate Deputy Attorney General developed a decision memorandum in late 2000. The memorandum, which required the Attorney General's approval, recommended revisions to the 1995 procedures and detailed several options, including a preferred option,

⁶The Attorney General's procedures, in addition to establishing a requirement and criteria for notification, set out guidelines for coordination. The notification requirement is to be the first step in achieving coordination.

to address the differing interpretations on the advice issue. However, as of the completion of our review, no decision had been made on the memorandum. Consequently, these issues continue to be impediments to coordination. According to working group officials, among those issues discussed in the decision memorandum were (1) the type of advice the Criminal Division should be permitted to provide the FBI and (2) varying interpretations as to whether certain criminal violations are considered “significant violations” and, thus, trigger the Attorney General’s 1995 coordination procedures. Beyond the decision memorandum, an additional impediment, according to Criminal Division officials, relates to the adequacy and timeliness of foreign counterintelligence case summary memorandums that the FBI provides to the Criminal Division.

Criminal Division officials, while recognizing some improvement in coordination due to the January 2000 procedures, continue to question whether the Attorney General’s 1995 procedures were always being followed for notifying the Criminal Division about relevant investigations. Office of Deputy Attorney General and FBI officials acknowledged that historically no mechanisms had been specifically created to help ensure compliance with the Attorney General’s 1995 procedures. Other than its routine managerial oversight of investigations, the FBI has not had in place an oversight mechanism specifically targeted at ensuring compliance with the Attorney General’s 1995 procedures. Recently, however, two mechanisms have been developed to help improve coordination with the Criminal Division. First, in mid-2000, the Office of Intelligence Policy and Review implemented a practice to notify both the FBI and the Criminal Division of FBI Foreign Intelligence Surveillance Act cases that Office attorneys believed met the requirements of the Attorney General’s procedures. Second, with the reestablishment of the core group in April 2001, a new high-level mechanism has been created to oversee coordination issues. The reconstituted core group’s principal role will be to decide whether particular FBI investigations meet the requirements of the Attorney General’s procedures for notification and to identify for the Attorney General’s attention any extraordinary situations where compliance with the guidelines needs to be considered. However, these efforts have not been institutionalized in management directives or written administrative policies or procedures.

This report contains recommendations to the Attorney General that (1) address the identification and proper coordination of those FBI intelligence investigations that detect, potential or actual, criminal violations meeting the requirements established in the Attorney General’s

1995 procedures and (2) would establish mechanisms to help ensure compliance with the those procedures.

In its June 21, 2001, written comments on a draft of this report, DOJ said that it has taken steps to implement two of our recommendations and that our remaining recommendations are under review.

Background

The main purpose of a foreign counterintelligence investigation is to protect the U.S. government from the clandestine efforts of foreign powers and their agents to compromise or to adversely affect U.S. military and diplomatic secrets or the integrity of U.S. government processes. At the same time, however, many of the foreign powers' clandestine efforts may involve a violation of U.S. criminal law, usually espionage or international terrorism, which falls within the federal law enforcement community's mandate to investigate and prosecute. As a result, foreign counterintelligence investigations often overlap with law enforcement interests.

To provide a statutory framework for electronic surveillance conducted within the United States for foreign intelligence purposes, the Congress, in 1978, enacted the Foreign Intelligence Surveillance Act (FISA). The legislative effort emerged, in part, from the turmoil that surrounded government intelligence agencies' efforts to apply national security tools to domestic organizations during the 1970s. For example, congressional hearings identified surveillance abuses within the United States by intelligence agencies that were carried out in the name of national security.⁷ FISA was designed to strike a balance between the government's need for intelligence information to protect the national security and the protection of individual privacy rights.⁸ In 1994, the Congress amended the 1978 act to include physical searches for foreign intelligence purposes under the FISA warrant procedures.⁹

⁷See, S. Rep. No. 95-604, at 15 (1977).

⁸*Id.* The Senate committee report provided that the basis for this legislation was the understanding that even if the President had an "inherent" constitutional power to authorize warrantless surveillance for foreign intelligence purposes, the Congress had the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance.

⁹Intelligence Authorization Act for Fiscal Year 1995, P.L. 103-359, 108 Stat. 3423 (1994).

Within DOJ, various components have responsibilities related to the investigation and prosecution of foreign intelligence, espionage, and terrorism crimes. The Criminal Division has responsibility for developing, enforcing, and supervising the application of all federal criminal laws, except those specifically assigned to other divisions. Within the Criminal Division, the Internal Security Section and the Terrorism and Violent Crime Section have responsibility for supervising the investigation and prosecution of crimes involving national security. Among such crimes are espionage, sabotage, and terrorism.

The Office of Intelligence Policy and Review (OIPR) is, among other things, to assist the Attorney General by providing legal advice and recommendations regarding national security matters and is to approve the seeking of certain intelligence-gathering activities. OIPR represents the United States before the Foreign Intelligence Surveillance Court (hereinafter, the FISA Court). OIPR prepares applications to the FISA Court for orders authorizing surveillance and physical searches by U.S. intelligence agencies, including the FBI, for foreign intelligence purposes in investigations involving espionage and international terrorism and presents them for FISA Court review. When evidence obtained under FISA is proposed for use in criminal proceedings, OIPR is to obtain the FISA-required advance authorization from the Attorney General. In addition, in coordination with the Criminal Division and U.S. Attorneys, OIPR has the responsibility of preparing motions and briefs required in U.S. district courts when surveillance authorized under FISA is challenged.

The FBI is DOJ's principal investigative arm with jurisdiction over violations of more than 200 categories of federal crimes, including espionage, sabotage, assassination, and terrorism. To carry out its mission, the FBI has over 11,000 agents located primarily in 56 field offices and its headquarters in Washington, D.C. Among its many responsibilities, within the United States, the FBI is the lead federal agency for protecting the United States from foreign intelligence, espionage, and terrorist threats. The FBI's National Security and Counterterrorism Divisions are the units responsible for countering these threats. To accomplish their task, the National Security and Counterterrorism Divisions engage in foreign intelligence and foreign counterintelligence investigations.

Within the Judicial Branch, FISA established a special court (the FISA Court). The FISA Court, as noted previously, has jurisdiction to hear applications for and grant orders approving FISA surveillance and searches. The FISA Court is comprised of seven district court judges from seven different districts who are appointed by the Chief Justice of the U.S.

Supreme Court to serve rotating terms of no longer than 7 years. The Chief Justice also designates three federal judges from the district or appeals courts to serve on a Foreign Intelligence Surveillance Review Court. The Foreign Intelligence Review Court was established to rule on the government's appeals of Foreign Intelligence Surveillance Court denials of government-requested surveillance and search orders.

As noted previously, foreign counterintelligence and law enforcement investigations often overlap, but at the same time different legal requirements apply to each type of investigation. For intelligence and counterintelligence purposes, electronic surveillance and physical searches against foreign powers and agents of foreign powers in the United States are governed by FISA,¹⁰ as amended. FISA, among other things, contains requirements and a process for seeking electronic surveillance and physical search authority in investigations seeking to obtain foreign intelligence and counterintelligence information within the United States. For example, FISA permits surveillance only when the purpose of the surveillance is to obtain foreign intelligence information. FISA also requires prior judicial approval by the FISA Court for surveillance and searches.¹¹ With respect to FBI foreign counterintelligence investigations, the FBI Director¹² must certify, among other things, to the FISA Court that the purpose of the surveillance is to obtain foreign intelligence information and that such information cannot reasonably be obtained by normal investigative techniques. However, FISA also contains provisions permitting intelligence agencies to share with law

¹⁰FISA surveillance and searches, under certain circumstances, may be conducted with respect to any persons, including U.S. persons (defined, in part, to include U.S. citizens and permanent resident aliens), who, among other things, knowingly or pursuant to the direction of an intelligence service or network, engage in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; or knowingly engages in sabotage or international terrorism, or in activities that are in preparation therefor; or knowingly aids or abets any person in the conduct of such activities.

¹¹In certain emergency situations, in general, FISA allows the Attorney General to authorize surveillance and searches for a limited period after which judicial approval is needed.

¹²By executive orders, in addition to the FBI Director, the following individuals have been designated to make the certifications required by FISA in support of applications to conduct electronic surveillance or physical searches: the Secretaries and Deputy Secretaries of State and Defense and the Director and Deputy Director of Central Intelligence. Moreover, none of the foregoing officials, nor anyone officially acting in that capacity, may make such certifications, unless that official has been appointed by the President, by and with the advice and consent of the Senate.

enforcement intelligence information that they have gathered that implicates federal criminal violations. For federal criminal investigations, the issuance and execution of search warrants, for example, is generally governed by the *Federal Rules of Criminal Procedure*.¹³ In addition, electronic surveillance or wiretapping in criminal investigations is, in general, governed by title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended.¹⁴

The differing standards and requirements applicable to criminal investigations and intelligence investigations are evident with respect to electronic surveillance of non-U.S. persons where the requisite probable cause standard under FISA differs from that required in a criminal investigation. In criminal investigations, the issuance of court orders authorizing electronic surveillance must, in general, be supported by a judicial finding of probable cause to believe that an individual has committed, is committing, or is about to commit a particular predicate offense.¹⁵ In contrast, FISA, in general, requires that a FISA Court judge find probable cause to believe that the suspect target is a foreign power or an agent of a foreign power, and that the places at which the surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power.

Scope and Methodology

To determine what key factors affected coordination between the FBI and the Criminal Division, we interviewed DOJ officials, including officials from the Office of the Deputy Attorney General, OIPR, the Criminal Division, the Division's Internal Security and Terrorism and Violent Crime Sections, the Office of Inspector General, and the FBI's National Security and Counterterrorism Divisions and Office of General Counsel. We also reviewed congressional committee reports and hearing transcripts regarding intelligence coordination issues and the DOJ Inspector General's July 1999 unclassified report on intelligence coordination problems related to DOJ's campaign finance investigation. In addition, we reviewed the classified report of the Attorney General's Review Team on the FBI's handling of its investigation at the Los Alamos National Laboratory.

¹³Federal Rules of Criminal Procedure, Rule 41, Search and Seizure (2000).

¹⁴P.L. 90-351, 82 Stat. 197 (1968).

¹⁵See title III of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, as amended.

To determine what policies, procedures, and processes are in place for coordinating foreign counterintelligence investigations that indicate possible criminal violations within appropriate DOJ units, we reviewed applicable laws, Executive Orders 12139 on Foreign Intelligence Electronic Surveillance and 12949 on Foreign Intelligence Physical Searches, and copies of existing guidance provided by DOJ and the FBI. We interviewed Criminal Division, OIPR, and FBI officials to determine the pertinent coordination policies, procedures, and processes in effect and their views on their effectiveness. In order to provide you with an unclassified report, we agreed with the Committee not to review specific cases to try to identify instances of compliance or noncompliance with the 1995 coordination procedures.

To determine what actions DOJ has taken to address identified coordination problems and what concerns and impediments, if any, remain, we reviewed certain legal requirements pertaining to disseminating and safeguarding information from foreign counterintelligence investigations and criminal investigations. For foreign counterintelligence investigations, we reviewed FISA, as amended; relevant federal court cases; Executive Order 12333 on United States Intelligence Activities; and Congressional Research Service reports. For criminal investigations, we reviewed sections of the *United States Code* and *Federal Rules of Criminal Procedure*; federal court cases; and news articles related to espionage prosecutions. In addition, we obtained and reviewed congressional committee reports and hearing transcripts regarding intelligence coordination issues. We also reviewed internal DOJ reports, as mentioned earlier, the DOJ Inspector General's unclassified report on DOJ's campaign finance investigation and the Attorney General's Review Team's classified report concerning the FBI's Los Alamos National Laboratory investigation. Furthermore, we met with Criminal Division, OIPR, coordination working group, and FBI officials to discuss the proposed revisions to the July 1995 guidelines and any issues the working group was unable to resolve. During our review, decision memorandums containing recommendations concerning the coordination of FBI intelligence investigations with the Criminal Division, prepared by the coordination working group, remained draft internal documents. We were not provided and did not have the opportunity to review the working group's documents. As such, our findings and conclusions relating to DOJ's proposed actions and remaining impediments are based on testimonial evidence.

To determine what mechanisms have been put into place to ensure compliance with intelligence coordination policies and procedures, we

reviewed applicable OIPR and FBI internal policies and procedures. We also interviewed officials from the Office of Deputy Attorney General, including the then Principal Associate Deputy Attorney General in charge of the intelligence coordination working group, OIPR, and the Office of the Inspector General and FBI officials, including the the General Counsel and representatives of the FBI's Inspection Division.

We performed our work from May 2000 to May 2001 in accordance with generally accepted government auditing standards. In June 2001, we requested comments on a draft of this report from the Attorney General. On June 21, 2001, we received written comments from the Acting Assistant Attorney General for Administration. The comments are discussed on pages 32 and 33 and reprinted in appendix II. DOJ also provided technical comments, which we have incorporated where appropriate.

Concern Over Possible Adverse Consequences of Judicial Rulings Has Been a Key Factor Impeding Coordination

A key factor impeding coordination of foreign counterintelligence investigations involving the use or anticipated use of the FISA surveillance and search tools has been the FBI's and OIPR's concern about the possible consequences that could result should a federal court rule that the line between an intelligence and a criminal investigation had been crossed due to contacts and/or information shared between the FBI and the Criminal Division. Specifically, FBI and OIPR were concerned over the consequences should a court find that the primary purpose of the surveillance or search had shifted from intelligence gathering to collecting evidence for criminal prosecution. While these concerns inhibited coordination, Criminal Division officials questioned their reasonableness and believe that they had an adverse effect on the strength of subsequent prosecutions. A further concern of FBI intelligence investigators, not necessarily related to the question of the primary purpose of the surveillance or search, has been the potential revelation of its sources and methods during criminal proceedings.

Concerns Inhibited FBI and OIPR Coordination

The consequences about which the FBI and OIPR were concerned included the potential (1) rejection of the FISA application or the loss of a FISA renewal and/or (2) suppression of evidence gathered using FISA tools, which, in turn, might lead to loss of the criminal prosecution. According to OIPR officials, differences of opinion existed among OIPR, the Criminal Division, FBI, and other DOJ officials, regarding their perceptions of the likelihood that the FISA Court or another federal court might, upon review, find that the line between an intelligence and criminal surveillance or search had been crossed and, therefore, the primary

purpose had shifted from intelligence gathering to a criminal investigation. Complicating the resolution of these differences has been DOJ's disinclination to risk rejection of a FISA application or loss of a prosecution, for example, by requiring the FBI to more closely coordinate with the Criminal Division.

Concerns Regarding Loss of FISA Investigative Tools

The FBI has long recognized that the investigative tools FISA authorized were often the FBI's most effective means to secure intelligence information. However, since the mid-1990s, FBI investigators, cautioned by OIPR, became concerned that their interaction with the Criminal Division regarding an investigation might result in the FISA Court denying a FISA application, the renewal of an existing FISA, or limit the FBI's options to seek the use of the FISA tools at a later date should the FISA Court interpret these interactions as an indication that intelligence gathering was not, or no longer was, the primary purpose of the investigation. As a result, according to the Attorney General's Review Team—the team established to review the FBI's handling of the Los Alamos National Laboratory investigation—even in foreign counterintelligence investigations not involving FISA tools, the FBI and OIPR were reluctant to notify the Criminal Division of possible federal crimes as they feared such contacts could be detrimental should they decide to subsequently seek the use of FISA tools.

According to an Associate Deputy Attorney General, resolving these concerns is complicated because DOJ's interactions with the FISA Court take place during FISA proceedings before the court. Introducing new policies or procedures during an investigation for which the court was considering a FISA application or renewal (e.g., requiring greater coordination), might result in the FISA Court rejecting that FISA. The official also said that DOJ officials did not want to take such a risk.

Concerns Regarding Loss of Evidence in a Criminal Prosecution

Contacts between FBI intelligence investigators and the Criminal Division may also raise concerns with respect to the preservation of certain evidence in criminal prosecutions. As noted earlier, FISA provides that evidence of criminal violations gathered during an intelligence investigation may be shared with law enforcement and, for example, used in a criminal prosecution. Under the primary purpose test, most courts have held that information gathered using the FISA tools may be used in subsequent criminal prosecutions only so long as the primary purpose of the FISA surveillance or search was to obtain foreign intelligence information. According to Criminal Division officials, since FISA's

enactment, no court using the primary purpose test has upheld a challenge to the government's use of FISA-obtained intelligence information for criminal prosecution purposes. However, OIPR and FBI officials expressed concern that a federal court could determine that the primary purpose of the surveillance or search was for a criminal investigation, and, could potentially suppress any FISA evidence gathered subsequent to that time.

According to Criminal Division officials, the FBI's and OIPR's more restrictive interpretation of what could be shared with the Criminal Division stemmed from the application of the judicially created primary purpose test, articulated prior to the enactment of FISA.¹⁶ Most federal courts have adopted the primary purpose test in post-FISA cases.¹⁷ Under this test, most federal courts have held that foreign intelligence information gathered using FISA tools may be used in subsequent criminal proceedings so long as the primary purpose of the FISA surveillance or search was to obtain foreign intelligence information.

These officials suggested that the application of the primary purpose test had not raised potential coordination problems between the FBI and the Criminal Division until the Aldrich Ames case. In 1994, Aldrich H. Ames, a Central Intelligence Agency official, was arrested on espionage charges of spying for the former Soviet Union and subsequently Russian intelligence. The FISA Court authorized an electronic surveillance of the computer and software within the Ames' residence. In addition, the Attorney General had authorized a warrantless physical search of the residence. At that time, FISA did not apply to physical searches. DOJ obtained a guilty plea from Ames who was sentenced to life in prison without parole.

Criminal Division and FBI officials said that some in DOJ were concerned that, had the Ames case proceeded to trial, early and close coordination between the FBI and the Criminal Division might have raised a question as to whether the primary purpose of the surveillance and searches of Ames' residence had been a criminal investigation and not intelligence gathering. According to these officials, had this question been raised, a court might have ruled that information gathered using the FISA surveillance and/or the warrantless search be suppressed, thereby possibly jeopardizing Ames'

¹⁶See, e.g., *United States v. Truong Dinh Hung*, 629 F.2d 908 (1980), *cert. denied*, 454 U.S. 1144 (1984). The facts in this case occurred prior to FISA's enactment in 1978.

¹⁷See, e.g., *United States v. Duggan*, 743 F.2d 49 (1984).

prosecution. To date, this issue remains a matter of concern to the FBI and OIPR. OIPR officials indicated that while such a loss had not occurred because Ames had pleaded guilty, the fear of such a loss, nonetheless, was real.

**Criminal Division Believes
OIPR and FBI Concerns Are
Overly Cautious**

Criminal Division officials consider OIPR's and FBI's concern in the Ames case to be overly cautious. In their opinion, the coordination that occurred during the investigation had been carried out properly and, had the case been tried, any challenges to the evidence gathered would have been denied and the prosecution would have been successful.

Moreover, with regard to FBI and OIPR concerns, Criminal Division officials said that they stemmed from an unduly strict interpretation of the primary purpose test. As noted earlier, the primary purpose test was articulated prior to FISA. Division officials cited the opinion of the Attorney General's Review Team, which stated, in general, that FISA was not a codification of the primary purpose test and that FISA, itself, with all its attendant procedures and safeguards, was to be the measure by which such surveillance and searches were to be judged. While recognizing that the FBI's and OIPR's concerns were well-intentioned, Criminal Division officials said that as a result of these concerns the primary purpose test had been, in effect, interpreted by the FBI and OIPR to mean "exclusive" purpose.

OIPR officials did not dispute this characterization of OIPR's historical concerns relative to primary purpose. However, these officials said that OIPR's current position regarding FBI and Criminal Division coordination was based on their understanding of the FISA Court's position on the primary purpose issue relating to such coordination. As a result, Division officials contend that they have been unable to provide advice that could have helped the FBI preserve and enhance the criminal prosecution option. For example, the Division could advise the FBI on ways to preserve its intelligence sources against compromise during a subsequent criminal trial. Division officials further contend that their involvement in the investigation can help to ensure that the case the government presents for prosecution is the strongest it can produce.

**Concerns Regarding
Revelation of Intelligence
Sources and Methods**

According to OIPR, whenever the government decides to pursue both national security and law enforcement investigations simultaneously, it may have to decide, in some instances, whether, or at what point, one of the investigations must be ended to preserve the integrity of the other.

OIPR officials said that the possibility of intelligence sources and methods being exposed, if evidence gathered during an intelligence investigation is later used and challenged in a criminal prosecution, remains a concern of FBI investigators.¹⁸ If the intelligence source or method is deemed to be of great value, DOJ may have to decide whether protection of the source or method outweighs the seriousness of the crime and, accordingly, decline prosecution.

As discussed previously, the primary legislation governing intelligence investigations of foreign powers and their agents in the United States is FISA. FISA also provides, however, that intelligence information implicating criminal violations may be shared with law enforcement. FISA further contains provisions to help maintain the secrecy of lawful counterintelligence sources and methods where such information is used in a criminal proceeding. Specifically, the act provided that where FISA information is used, introduced, or disclosed in a trial and the Attorney General asserts that disclosure of such information in an adversary hearing would harm the national security of the United States, the Attorney General may seek court review, without the presence of defense counsel, as to whether the surveillance or search was lawfully authorized and conducted. OIPR officials emphasized that while the act may provide for such a review, a judge may decide that the presence of defense counsel was necessary. Furthermore, officials asserted that, as a result, the presence of the defendant's attorney raised the risk that classified information reviewed during the proceeding could be subsequently revealed, despite these proceedings being subject to security procedures and protective orders. Consequently, they added that intelligence investigators might be reluctant to share with the Criminal Division evidence of a possible federal crime that had been gathered during an intelligence investigation.

¹⁸According to OIPR officials, the Classified Information Procedures Act, as amended (P.L. 96-456, 94 Stat. 2025 (1980)), mitigates against, but does not eliminate, the risk that prosecution would involve public disclosure of classified information not covered by the specific statutory protections afforded FISA applications and related materials.

Procedures Established to Ensure Proper Coordination Led to Problems

Stemming, in part, from concerns raised over the timing and extent of coordination on the Aldrich Ames case, the Attorney General in July 1995 established policies and procedures for coordinating FBI foreign counterintelligence investigations with the Criminal Division.¹⁹ One purpose of the 1995 procedures was to ensure that DOJ's criminal and counterintelligence functions were properly coordinated. However, according to Criminal Division officials and conclusions by the Attorney General's Review Team, rather than ensuring proper coordination, problems arose soon after the Attorney General's 1995 procedures were promulgated. As discussed, those problems stemmed from the FBI's and OIPR's concerns about the possible consequences that could damage an investigation or prosecution should a court make an adverse ruling on the primary purpose issue.

In January 2000, the Attorney General promulgated coordination procedures, which were in addition to the 1995 procedures.²⁰ These procedures were promulgated to address problems identified by the Attorney General's Review Team during its review of the FBI's investigation of the Los Alamos National Laboratory. Criminal Division officials believed that the 2000 procedures had helped to improve coordination, especially for certain types of foreign counterintelligence investigations.

The Attorney General's 1995 Guidelines Were Promulgated to Try to Ensure Proper Coordination

According to DOJ officials, following the conviction of Aldrich Ames, OIPR believed that the close relationship between the FBI and the Criminal Division had been near to crossing the line between intelligence and criminal investigations, thereby risking a decision against the government if a court had applied the primary purpose test. To address the concerns raised, in part, by the FBI's contacts with the Criminal Division in the Ames case, the Attorney General promulgated coordination procedures on July 19, 1995.

¹⁹Attorney General memorandum dated July 19, 1995, "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations."

²⁰Memorandum for the Attorney General, dated January 18, 2000, "To Recommend that the Attorney General Authorize Certain Measures Regarding Intelligence Matters in Response to the Interim Recommendations Provided by Special Litigation Counsel Randy Bellows."

The purposes of the 1995 procedures were to establish a process to properly coordinate DOJ's criminal and counterintelligence functions and to ensure that intelligence investigations were conducted lawfully. To accomplish its coordination purpose, the 1995 procedures, among other things, established criteria for when and how contacts between the FBI and the Criminal Division were to occur on foreign counterintelligence investigations. The procedures identify the circumstances under which the FBI was to notify the Criminal Division and set forth procedures to govern subsequent coordination that arises from the initial contact. In investigations involving FISA, the notification procedures established criteria that "If in the course of an...[foreign counterintelligence] investigation utilizing electronic surveillance or physical searches under the Foreign Intelligence Surveillance Act...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." Following the Criminal Division's notification, the procedures require the FBI to provide the Criminal Division with the facts and circumstances, developed during its investigation that indicated significant criminal activity.²¹ After the initial notification, the FBI and the Criminal Division could engage in certain substantive consultations.

The procedures allowed the Criminal Division to provide the FBI guidance to preserve the criminal prosecution option; however, the procedures also established limitations on consultations between the FBI and the Criminal Division. To protect the intelligence purpose of the investigation, the procedures limited the type of advice the Criminal Division could provide the FBI in cases employing FISA surveillance or searches. Specifically, the procedures prohibited the Division from instructing the FBI on the operation, continuation, or expansion of FISA surveillance or searches. Additionally, the FBI and the Criminal Division were to ensure that the Division's advice did not inadvertently result in either the fact or appearance of the Division directing the foreign counterintelligence investigation toward, or controlling it for, law enforcement purposes.

Criminal Division officials indicated that they believed the procedures permitted the Division to advise the FBI on ways to preserve or enhance

²¹The procedures also place limitations on the FBI's contacts with U.S. Attorneys' Offices. Except for exigent circumstances, the procedures in investigations involving FISA require both OIPR's and the Criminal Division's approval prior to any contact.

evidence for subsequent criminal prosecutions. The officials said that the Criminal Division might be able to advise the FBI on ways to preserve its intelligence sources, for example, by utilizing other sources to develop the information needed in a prosecution without risking the revelation of its more valuable sources. Moreover, the Criminal Division may also be able to advise the FBI on ways to enhance the evidence needed for prosecution, for example, by developing information that is needed to prove the elements of a criminal offense.

FBI and OIPR Concerns Affected Implementation of the 1995 Procedures

To implement the new procedures, the FBI Director, in August 1995, sent a memorandum with the Attorney General's notification procedures attached to all Special Agents In Charge of FBI field offices. The Director's memorandum provided guidance on the parameters of the Attorney General's notification procedures and methods intended to ensure compliance with them. Among the instructions implementing the Attorney General's procedures was an instruction that when investigations met the Attorney General's criteria for notification, FBI headquarters, not field offices, ordinarily would be responsible for notifying the Criminal Division.²² Moreover, when those investigations employed FISA techniques, FBI headquarters was to notify OIPR before notifying the Criminal Division. The purpose of notifying OIPR before the Criminal Division was so that OIPR could ensure that in subsequent contacts between the FBI and the Division, the primary purpose of the subject foreign counterintelligence FISA surveillance or search would continue to be intelligence gathering. Emphasizing the importance of FBI headquarters in the notification process, the FBI Director cautioned in his August 1995 memorandum as follows:

"It is critical that the value of the FBI's most sensitive and productive investigative techniques not be affected by their use for purposes for which they were not principally intended. Careful coordination in these matters by [FBI headquarters] is essential in order to avoid the inappropriate characterization or management of intelligence investigations as criminal investigations, the potential devaluation of intelligence techniques, or the loss of prosecutive opportunities."

²²The implementing procedures only permit FBI field offices to contact the Criminal Division or a U.S. Attorney's Office directly when exigent circumstances involving potential danger to life or property are present.

According to information provided by FBI officials, after issuance of the procedures, agents received training on them. The FBI's Office of General Counsel developed presentations, which according to FBI officials, were provided to both new agent trainees at the FBI's Quantico, VA, training facility and to experienced special agents. Additional training on the procedures continued in subsequent years and, on occasion, agents were sent reminders on the importance of reporting evidence of significant federal crimes to FBI headquarters so that it could properly coordinate them with the Criminal Division.

According to the Attorney General's Review Team's report, almost immediately following the implementation of the Attorney General's 1995 procedures, coordination problems arose. Rather than ensuring that DOJ's criminal and counterintelligence functions were properly coordinated, as intended, the implementation and interpretation of the procedures triggered coordination problems. Those problems stemmed from concerns FBI and OIPR officials had over the possible legal consequences, discussed above, should the FISA Court or another federal court rule that the primary purpose of the surveillance or search was for criminal investigation purposes rather than intelligence gathering. According to Criminal Division officials, coordination of foreign counterintelligence investigations dropped off significantly following the implementation of the 1995 procedures. The Attorney General's Review Team reported and Criminal Division officials confirmed that when the FBI did notify the Criminal Division about its foreign counterintelligence investigations, the notifications tended to occur near the end of the investigation. As a result, during the investigations the Division would have been playing little or no role in decisions that could have affected the success of potential subsequent criminal prosecutions.

An FBI official acknowledged that soon after the implementation of the Attorney General's 1995 procedures, coordination concerns surfaced. According to the official, after the FBI contacted OIPR about an investigation that needed to be coordinated with the Criminal Division, OIPR would determine whether and when such coordination should occur. Moreover, according to OIPR and FBI officials, when OIPR did permit coordination to take place, it participated in the meetings to help ensure that the contacts between the agents and the prosecutors did not jeopardize the primary intelligence purpose of the FISA's search and surveillance tools. Thus, OIPR became the gatekeeper for complying with the 1995 procedures. While the 1995 procedures allowed OIPR to participate in consultations between the FBI and the Criminal Division, the procedures did not set out a gatekeeper role for OIPR. Moreover, the

procedures permitted the Criminal Division to provide the FBI guidance aimed at preserving its criminal prosecution option.

Subsequently, DOJ established working groups in 1996 and again in 1997 to address coordination problems and the issues underlying FBI, OIPR, and Criminal Division concerns. But, they were unsuccessful in resolving the concerns. Remedial actions to address the coordination issues were not taken until, as discussed below, (1) another working group was established in August 1999, specifically to address the coordination of intelligence information among the FBI, OIPR, and the Criminal Division and (2) the Attorney General's Review Team submitted interim recommendations to the Attorney General in October 1999.

DOJ Promulgated Additional Procedures to Address Some Coordination Problems

In January 2000, based on the Attorney General's Review Team's interim recommendations, the coordination working group recommended to the Attorney General additional procedures to address the FBI/Criminal Division coordination issues. These procedures were designed to stimulate increased communication between the FBI and the Criminal Division for investigations that met the notification criteria contained in the 1995 procedures. In January 2000, the Attorney General approved these procedures. These procedures, in part, required the FBI to provide the Criminal Division copies of certain types of foreign counterintelligence case summary memorandums involving U.S. persons. In addition, the procedures established a briefing protocol whereby, monthly, FBI National Security Division and Counterterrorism Division officials judgmentally were to select cases that they believed to be their most critical and brief the Principal Associate Deputy Attorney General and the OIPR Counsel on them. These officials together formed what DOJ officials termed a "core group." During these "core group critical-case briefings," Criminal Division officials were to be briefed on those cases that the core group agreed met the criteria established in the 1995 procedures for Criminal Division notification. According to FBI officials, one criterion used to decide which cases to include in the critical-case briefings was whether a suspected felony violation was involved.²³ The briefing protocol also established procedures for subsequent briefings of pertinent Criminal Division section chiefs and allowed for the Criminal Division to follow up with the FBI in those critical cases that the Division believed it needed

²³According to DOJ officials, because of the large volume of foreign counterintelligence investigations, not all investigations implicating a criminal violation were presented.

more information. According to OIPR and Criminal Division officials, OIPR maintained its gatekeeper role at these briefings. However, in October 2000, core group meetings and the briefing protocol were discontinued. According to DOJ officials, the briefings were discontinued because some participants believed that these briefings somewhat duplicated sensitive-case briefings that the FBI provided quarterly to the Attorney General and Deputy Attorney General. Appendix I provides a chronology of key events related to the coordination issue.

DOJ Has Taken Additional Action to Address Coordination, but Some Impediments Remain

Subsequent to its 1999 interim recommendations, the Attorney General's Review Team, in May 2000, issued its final report to the Attorney General. In its report, the Review Team raised additional coordination issues and provided recommendations to resolve them. To address these issues and recommendations, the coordination working group developed a decision memorandum in October 2000, for the Attorney General's approval. According to working group officials, the memorandum recommended revisions to the 1995 procedures and included decision options for consideration for the issues on which the working group could not reach agreement, including an option advocated by the Office of the Deputy Attorney General. The primary issue on which the coordination working group could not agree reflects differences of opinion among the Criminal Division, OIPR, and the FBI as to what advice the Division may provide the FBI without jeopardizing either the intelligence investigation or any resulting criminal prosecution. This issue reflects the same underlying concern—judicially acceptable contacts and information sharing between the FBI and the Criminal Division—that affected proper implementation of the 1995 procedures and earlier disagreements over coordination in foreign counterintelligence FISA investigations. As of the completion of our review, no decision on the memorandum had been made. Thus, issues addressed in the memorandum remain. These include the advice issue and varying interpretations of whether certain criminal violations are considered “significant violations” that would trigger the Attorney General's coordination procedures, as well as other issues. Another issue identified that could impede coordination, but was not addressed in the memorandum, is the adequacy and timeliness of the FBI's case summary memorandums.

Working Group Continued Efforts to Address Foreign Counterintelligence Coordination Issues

In May 2000, the Attorney General's Review Team sent to the Attorney General its final report on and recommendations to address problems identified during its review of the FBI's investigation of possible espionage at the Los Alamos National Laboratory. To address those problems dealing with coordination between the FBI and the Criminal Division, the established coordination working group, which was led by the Principal Associate Deputy Attorney General and included representatives from FBI, OIPR, and the Criminal Division, was given responsibility to review the report and the Review Team's recommendations. In addition to the Review Team's report, the coordination working group considered intelligence coordination issues raised in the DOJ Office of Inspector General's report on DOJ's campaign finance investigation. On the basis of its deliberations, the coordination working group developed a decision memorandum and sent it to the Attorney General for approval in October 2000. According to working group officials, the group was able to reach consensus on most issues. For example, these officials said that the group had agreed to recommend that for clarity the reference to the phrase "significant federal crime" in the 1995 procedures be changed to "federal felony," since they believed that the term "significant" was too ambiguous and that the term "felony" would be open to less interpretation as the particular elements comprising any particular felony violation are set out in statute.

The working group officials told us that on issues on which the group could not reach consensus, the memorandum presented options, including an option advocated by the Office of the Deputy Attorney General. Specifically, working group officials indicated that the group could not reach a consensus regarding the permissible advice the Criminal Division should be allowed to provide to intelligence investigators. Although the working group agreed that the Criminal Division should play an active role in foreign counterintelligence investigations employing FISA tools, it could not agree on the type of advice the Criminal Division should be allowed to provide. For example, OIPR officials indicated that they believed that the FISA Court held a restrictive view on the issue of notification and advice and that this view would affect the FISA Court's decisions to authorize a FISA surveillance or search.²⁴ In contrast, a working group official said that the Criminal Division and Attorney General's Review Team held less restrictive views on the notification and advice issues. Criminal Division

²⁴OIPR officials believe that the direction of the FISA Court may be gleaned from the orders that it issues when it grants a FISA surveillance or search.

officials said that FISA did not prohibit contact between investigators and prosecutors. They said that it was inconceivable that the Division should be left in the dark in these cases, which they characterized as being of extraordinary importance. They argued that in these cases effective coordination was important to develop the best case possible to bring to prosecution. In its report, the Attorney General's Review Team asserted that there should be little restriction on the advice the Criminal Division should be allowed to provide. The working group left the matter for the Attorney General to decide.

After the Attorney General took no action on the memorandum between October and December 2000, the working group again reviewed their positions for possible areas of consensus and made minor changes to the memorandum, which they resubmitted to the Attorney General in December. Since the basic positions of the working group participants did not change materially, the outstanding issues remained areas of disagreement. The Attorney General did not make a decision on the recommendations before leaving office on January 20, 2001.

In March 2001, the decision memorandum was sent to the Acting Deputy Attorney General for the Attorney General's decision. On the basis of the Acting Deputy Attorney General's review, a new core group process was implemented. As of the completion of our review, no other action had been taken on the memorandum or the recommendations therein.

Some Impediments to Coordination Remain

Despite reported improvements in coordination between intelligence investigators and criminal prosecutors, in part, as a result of the implementation of the January 2000 procedures, several of the same coordination impediments remain. Some of these impediments stemmed from the longstanding differences of opinion regarding possible adverse judicial interpretations of what might be acceptable contacts and information sharing between the FBI and the Criminal Division. Also, Criminal Division officials expressed some concerns regarding the case summary memorandums provided by the FBI.

Differing Opinions on the Requirements and Prohibitions of the Attorney General's Coordination Procedures Persist

Despite the efforts of the coordination working group, differences of opinion remained regarding the possible consequences of potential adverse judicial interpretation of the notification of the Criminal Division and the type of advice it may provide without crossing the line between an intelligence investigation and a criminal investigation. Furthermore, since the Attorney General had not approved the memorandum, the working group's recommendation to clarify language in the 1995 procedures that

trigger the Criminal Division's notification was not implemented and, therefore, that issue remains.

OIPR, FBI, and Criminal Division officials have continued to strongly differ in their interpretation as to when the Criminal Division should be notified of FBI intelligence investigations involving suspected significant federal crimes, and what type of advice the Criminal Division is permitted to provide FBI intelligence investigators without compromising the primary purpose of the intelligence surveillance or search (i.e., risk losing a FISA application or renewal, or future FISA request). Specifically, the issue revolved around the officials' different perceptions of how restrictively the FISA Court might interpret Criminal Division notification or any subsequent advice the Division may provide. Working group officials indicated that the pertinent parties continued to disagree on procedural issues, such as the type of the advice that the Criminal Division should be allowed to give. For example, a working group official suggested that numerous categories of the types of advice the Criminal Division can provide could be created. However, such distinctions made it difficult to determine what advice under which circumstances could be provided without risking the loss of FISA authority. According to working group officials, these differences were left unresolved in the December 2000 decision memorandum.

In addition, the language indicating when the Criminal Division is to be notified remained an issue. Although the working group's December 2000 memorandum recommended clarifying the language in the 1995 memorandum which triggered the Criminal Division's notification by changing the term "significant federal crime" to "federal felony," the significant federal crime language remains in effect without the Attorney General's approval. OIPR officials said that the coordination working-group members had agreed to the proposed change in language in order to make it clearer when the Criminal Division was to be notified. Although the working group members agreed, our interviews with some FBI officials, responsible for recommending that the Criminal Division be notified, indicated that they continued to use the significant threshold and that there were still disagreements as to its meaning. For example, FBI Counterterrorism Division officials told us that there still were disagreements over what constituted significant, and, therefore, differences of opinion as to when the Criminal Division should be notified. The officials said that these differences might have to be resolved at the highest levels of DOJ and the FBI. These FBI officials remained cautious regarding contacts between FBI intelligence investigators and the Criminal Division, preferring a higher threshold. Although addressed in the working

group's memorandum, this issue remains pending action by the Attorney General.

The Criminal Division Has Concerns About the Adequacy and Timeliness of the Case Summary Memorandums

According to Criminal Division officials, while the 2000 procedures had increased intelligence coordination, questions and concerns remained regarding the adequacy of FBI case summary memorandums for the Criminal Division's purposes and the timeliness of the memorandums.

Criminal Division officials said that they had questions as to whether some FBI case summary memorandums were sufficiently comprehensive to indicate criminal violations. They said that while it is relatively easy to discern from some FBI case summary memorandums whether criminal violations have been committed, in others it is not. OIPR officials also noted that FBI case summary memorandums were not always clear from the way they were written as to whether intelligence investigators had reason to believe that the criteria established by the Attorney General's 1995 guidelines for notification had been triggered. According to the Criminal Division and OIPR officials, the case summary memorandum format does not require agents to address whether or not a possible criminal violation was implicated or contain a specific section for doing so.

Criminal Division officials also asserted that for their purposes the case summary memorandums were not always timely. Criminal Division officials indicated that there could be a significant time lag between the time when a significant criminal violation was revealed or investigative actions in a case occurred and when the memorandums were provided to the Division. They added that the timeliness of the memorandums could be a problem, because events can often overtake an investigation. For example, the officials said that should an investigative target be planning to go overseas, the Criminal Division would like to have information in a timely manner so that it can assess its prosecutorial equities against the risk that the target may flee the country. Division officials said that the Division only receives the initial memorandums within 90 days after the investigation had been opened and, subsequently, annually thereafter. Thus, the memorandums the Criminal Division receives may not be timely enough to protect its prosecutorial equities in a case.

No matter what impediments remain, the question exists as to how and how often has the lack of timely coordination adversely affected DOJ prosecutions. In its report on the FBI's handling of the Los Alamos National Laboratory investigation, the Attorney General's Review Team

found that, by not coordinating with the Criminal Division at an earlier point, the FBI's intelligence investigation might have been harmed and that had the Criminal Division been allowed to provide advice it could have helped the FBI to better develop its case. Since the 1995 guidelines were implemented, for those intelligence investigations of which they were aware, Criminal Division officials were able to identify one other case in which the prosecution may have been impaired by poor and untimely coordination.

Regardless of the number of prosecutions that may have been adversely affected by poor or untimely coordination, Division officials argued that due to the significance of these types of cases, it was important that the strongest cases be developed and brought forward for prosecution. The officials said that the practical effect of not being involved during an investigation is that the Criminal Division was not aware of interviews conducted or approaches made, such as certain types of undercover operations, that could have helped make sure the prosecutorial equities were preserved or enhanced. Moreover, commenting on the adverse effects of being informed about investigations at the last minute, the officials said that it takes time to prepare cases for prosecution. They indicated that being informed of an investigation at the last minute could be problematic because it takes more than 2 or 3 days to prepare search warrants or obtain orders to freeze assets.

Mechanisms Created to Ensure Compliance With the Procedures Have Not Been Institutionalized

In addition to the impediments noted above, Criminal Division officials continued to question whether all investigations that met the criteria of the 1995 procedures were being coordinated. Such concerns indicate that an oversight mechanism to help ensure compliance with the Attorney General's 1995 coordination procedures was lacking. Office of the Deputy Attorney General and FBI officials acknowledged that, historically, no mechanisms had been created to specifically ensure compliance with the Attorney General's 1995 procedures. Recently, two mechanisms have been created to help ensure Criminal Division notification. However, both mechanisms lacked written policies or procedures to institutionalize them and help ensure their perpetuation.

Criminal Division's Concerns Indicate That an Oversight Mechanism Was Lacking

Criminal Division officials said that while they knew which investigations were being coordinated, they did not know whether any existed about which they were not being notified. Furthermore, Division officials said they were still concerned that the FBI and OIPR might not notify the Division or provide the Division with the information in sufficient time for

it to provide appropriate advice to the investigation or protect its prosecutorial equities in the case. Division officials also questioned whether foreign counterintelligence investigations involving possible federal criminal violations were being closed without the Criminal Division being notified and, thereby, potentially affecting the Division's ability to exercise its prosecutorial equities in those cases. These concerns indicate that an oversight mechanism to ensure compliance with the Attorney General's coordination procedures was lacking.

DOJ Lacked Oversight Mechanisms to Ensure Compliance With Notification Requirement

Historically, DOJ had not developed oversight mechanisms specifically targeted at ensuring compliance with the 1995 requirements for notification. DOJ officials noted that ordinarily, DOJ expects components to comply with the Attorney General's directives. According to the former Principal Associate Deputy Attorney General, no mechanism existed to provide systematic oversight of compliance with the notification procedures.

Other than its normal oversight of investigations, such as periodic supervisory case reviews and reviews of FISA applications, the FBI did not have a specific or independent oversight mechanism that routinely checked whether FBI investigations complied with the 1995 procedures. FBI Inspection Division officials said that every 3 years the Inspection Division is to review the administration and operation of FBI headquarters and field offices, including whether or not policies and guidelines were being followed. The officials said that in the course of field offices inspections, certain aspects of investigations employing FISA surveillance or searches are reviewed, including whether the applications were properly prepared and accurately supported and whether there were appropriate field office administrative checks of the process. However, the Inspection officials said that, where such investigations had detected possible criminal violations, compliance with the Attorney General's coordination procedures was not an issue that Inspection reviewed. Thus, the FBI had no assurance that foreign counterintelligence investigations that met the criteria for notification established by the 1995 procedures were being coordinated with the Criminal Division.

Recently Created Mechanisms Should Help Better Ensure Notification

Since mid-2000, two new mechanisms have been created to help better ensure that FBI foreign counterintelligence investigations meeting the Attorney General's requirements for notification are coordinated with the Criminal Division. First, in mid-2000, OIPR implemented a practice aimed at identifying from FBI submitted investigation summaries those

investigations that met the notification criteria established in the 1995 procedures. Then, in April 2001, DOJ reconstituted the core group and gave it a broader role in overseeing coordination issues and in better ensuring Criminal Division notification. However, these mechanisms have not been institutionalized in writing and, thus, their perpetuation is not ensured. Federal internal control standards require that internal controls be documented.²⁵

OIPR's Practice Identified FBI Investigations Meeting the Attorney General's Notification Requirements

OIPR officials said that, based in part on the Attorney General's Review Team's findings and to ensure greater compliance with the 1995 procedures, OIPR managers began emphasizing at weekly meetings with OIPR attorneys, and in a February 2001 e-mail reminder to them, the importance of coordinating relevant intelligence investigations with the Criminal Division. According to OIPR officials, OIPR attorneys were instructed that when they reviewed FBI FISA applications, case summary memorandums, or other FBI communications, they were to be mindful of OIPR's obligation to identify and report to the Criminal Division FBI investigations involving appropriate potential violations. When the OIPR attorneys identify FBI investigations in which there is evidence of violations that meet the criteria established in the 1995 guidelines, they are to notify OIPR management. Management then is to contact both the FBI and the Criminal Division to alert them that in OIPR's opinion, the notification requirement had been triggered. Then, whenever the FBI and the Criminal Division meet to coordinate the intelligence investigation, OIPR attends to help ensure that the primary purpose of the surveillance or search is not violated.

OIPR officials believed that its practice has been working well. In commenting on improved coordination, both the Criminal Division Deputy Assistant Attorney General responsible for intelligence matters and the Chief of the FBI's International Terrorism Section noted instances where OIPR had contacted them to alert them to investigations that met the criteria established by the Attorney General's coordination procedures. As of April 2001, the Criminal Division Deputy Assistant Attorney General estimated that since OIPR had initiated its practice, it had contacted the Division about approximately a dozen FBI investigations that OIPR believed met the Attorney General's requirements for notification.

²⁵*Standards for Internal Control in the Federal Government* (GAO/AIMD-00-21.3.1, Nov. 1999).

Reconstituted Core Group to Provide Broader Oversight to Coordination Issues

In April 2001, the acting Deputy Attorney General decided to reconstitute the core group and to give it a broader role for overseeing coordination issues. The core group, similar to the prior core group, is comprised of several officials from the Office of Deputy Attorney General, an official representing the Office of Intelligence Policy and Review, and the Assistant Directors of the FBI's National Security and Counterterrorism Divisions. Whereas the previous core group's role was to decide which of the FBI's most critical cases met the requirements of the Attorney General's coordination procedures and needed to be coordinated with the Criminal Division, the new core group's role is broader. According to an Associate Deputy Attorney General and core group member, the new group is to be responsible for deciding whether particular FBI investigations meet the requirements of the coordination procedures and to identify for the Attorney General's attention any cases involving extraordinary situations where compliance with the guidelines requires the Attorney General's consideration.

According to the Associate Deputy Attorney General, the FBI is to bring to the core group's attention any investigation in which it is not clear that the Attorney General's procedures have been triggered. For example, during an FBI investigation should it not be clear whether a criminal violation should be considered a significant federal crime, as indicated in the procedures, the FBI is to bring the matter to the core group for resolution. Thus, this is a much broader scope of responsibility than the prior core group's which only considered the need for coordination in those critical cases that were judgmentally selected by the FBI. Furthermore, the core group also is to be responsible for identifying for the Attorney General's attention those extraordinary situations where the FBI believes there may be good reason not to notify the Criminal Division. For extraordinary situations, the Associate Deputy Attorney General opined that it was expected that the number of such questions brought to the core group would be extremely few.

Mechanisms Have Not Been Institutionalized

While both mechanisms, if implemented properly, should help to ensure notification of the Criminal Division, neither mechanism has been written into policies or procedures. OIPR's Counsel pointed out that while OIPR would try to ensure better coordination by employing this practice, it was not a part of OIPR's mission. OIPR's priority was to make sure that the FBI had what it needed to protect national security. She added that ensuring coordination could not be a priority for OIPR without additional attorney resources. OIPR's Counsel further said that OIPR frequently has had its hands full trying to process requests for FISA surveillance and searches

without having to worry about the criminal implications of those cases. She noted that over the last few years, the FBI has received a significant number of additional agent resources and had increased its efforts to combat terrorism, espionage, and foreign intelligence gathering. As a result, FISA requests had increased significantly, while OIPR resources needed to process those requests had not kept pace.²⁶

While the practice may be working well to date, the practice has not been put into writing and, thus, has not been institutionalized. On the basis of our conversations with OIPR, the Criminal Division, and FBI officials, the extent to which OIPR has allowed coordination and advice to occur, currently and in the past, has varied depending upon the views and convictions of the Counsel responsible for OIPR at the time. As OIPR's coordination practices have varied over the years, the perpetuation of the current practice could depend on future Counsels' views on the coordination issue and, more importantly, how restrictively they believe the FISA Court views coordination with the Criminal Division.

Likewise, the core group has not been institutionalized. Although at the time of our review it had met on two occasions since its creation, according to the Associate Deputy Attorney General there has been no written documentation establishing the core group or defining its role and responsibilities. Federal internal control standards require that internal controls need to be clearly documented. Furthermore, these standards require that such documentation appear in management directives, administrative policies, or operating manuals.

Conclusions

Differing interpretations within DOJ of adverse consequences that might result from following the Attorney General's 1995 coordination procedures for counterintelligence investigations involving FISA surveillance and searches have inhibited the achievement of one of the procedures' intended purpose—to ensure that DOJ's criminal and counterintelligence functions were properly coordinated. These interpretations resulted in less coordination. Additional procedures implemented in January 2000,

²⁶The Conference Report related to DOJ's appropriation for fiscal year 2001, includes additional resources for OIPR with respect to FISA applications (H.R. Conf. Rep. 106-1005, at 195 (2000)). According to OIPR officials, these resources were, in part, for additional attorneys; however, as of April 1, 2001, those resources had not as yet come on board. According to OIPR officials, as a result, its attorney resources should double by the end of the year.

requiring the sharing of certain FBI investigative case summaries, creating a core group, and instituting the core group critical-case briefing protocol helped to improve the situation by making the Criminal Division aware of more intelligence investigations with possible criminal implications. Subsequently, the core group and the critical-case briefing protocol were discontinued. However, in April 2001, a revised core group was created with a broader coordination role. It is too early to tell how effective a mechanism the new core group process will be for overseeing the requirement for notification. Nevertheless, other impediments remain.

The differing interpretations comprise the main impediment to coordination. Intelligence investigators fear that the FISA Court or another federal court could find that the Criminal Division's advice to the investigators altered the primary intelligence purpose of the FISA surveillance or search. Such a finding could lead to adverse consequences for the intelligence investigation or the criminal prosecution. As such cases involve highly sensitive national security issues, this is no small matter and caution is warranted. However, this longstanding issue has been reviewed at high-levels within DOJ on multiple occasions and Criminal Division officials believe the concerns, while well intentioned, are overly cautious given the procedural safeguards FISA provides. While the problems underlying the lack of coordination have been identified, the solutions to these problems are complex and involve risk. These solutions require balancing legitimate but competing national security and law enforcement interests. On the one hand, some risk and uncertainty will likely remain regarding how the FISA Court or another federal court might upon review interpret the primary purpose of a particular surveillance or search in light of notification of the Criminal Division and the subsequent advice it provided. On the other hand, by not ensuring timely coordination on these cases, DOJ may place at risk the government's ability to bring the strongest possible criminal prosecution. Therefore, a decision is needed to balance and resolve these conflicting national security and law enforcement positions.

Beyond resolving these differences, DOJ and the FBI can take several actions to better ensure that possible criminal violations are identified and reported and that mechanisms to ensure compliance with the notification requirements of Attorney General's 1995 procedures are institutionalized. Such actions could facilitate the coordination of DOJ's counterintelligence and prosecutorial functions.

Recommendations for Executive Action

To facilitate better coordination of FBI foreign counterintelligence investigations meeting the Attorney General's coordination criteria, we recommend the Attorney General establish a policy and guidance clarifying his expectations regarding the FBI's notification of the Criminal Division and types of advice that the Division should be allowed to provide the FBI in foreign counterintelligence investigations in which FISA tools are being used or their use anticipated.

Further, to improve coordination between the FBI and the Criminal Division by ensuring that investigations that indicate a criminal violation are clearly identified and by institutionalizing mechanisms to ensure greater coordination, we recommend that the Attorney General take the following actions:

1. Direct that all FBI memorandums sent to OIPR summarizing investigations or seeking FISA renewals contain a section devoted explicitly to identifying any possible federal criminal violation meeting the Attorney General's coordination criteria, and that those memorandums of investigations meeting the criteria for Criminal Division notification be timely coordinated with the Division.
2. Direct the FBI Inspection Division, during its periodic inspections of foreign counterintelligence investigations at field offices, to review compliance with the requirement for case summary memorandums sent OIPR to specifically address the identification of possible criminal violations. Moreover, where field office case summary memorandums identified reportable instances of possible federal crimes, the Inspection Division should assess whether the appropriate headquarters unit properly coordinated with the Criminal Division those foreign counterintelligence investigations.
3. Issue written policies and procedures establishing the roles and responsibilities of OIPR and the core group as mechanisms for ensuring compliance with the Attorney General's coordination procedures.

Agency Comments and Our Evaluation

In written comments on a draft of this report, the Acting Assistant Attorney General for Administration responding for Justice responded that on two of our recommendations, the Department has taken full or partial action. Concerning our recommendation to institutionalize OIPR's role and responsibilities for ensuring compliance with the Attorney General's coordination procedures, the Acting Counsel for Intelligence Policy on

June 12, 2001, issued a memorandum to all OIPR staff. That memorandum formally articulated OIPR's policy of notifying the FBI and the Criminal Division whenever OIPR attorneys identify foreign counterintelligence investigations that meet the requirements established by the Attorney General for coordination. We believe this policy should help perpetuate OIPR's mechanism for ensuring compliance with the 1995 coordination procedures beyond any changes in OIPR management. Moreover, establishing a written policy places the Department in compliance with the documentation standard delineated in our "Standards for Internal Control in the Federal Government."

Concerning our recommendation regarding the FBI's Inspection Division, the Deputy Attorney General directed the FBI to expand the scope of its periodic inspections in accord with our recommendation or explain why it is not practical to do so and, if not, to suggest alternatives. While this is a step in the right direction, full implementation of the recommendation will depend on whether the FBI can expand the scope of its inspections, or develop acceptable alternatives, to address coordination of foreign intelligence investigations where federal criminal violations are implicated. This, in turn, will depend on the extent to which the FBI case summary memorandums seeking FISA renewals, or whatever medium is subsequently used to accomplish that purpose, contains a separate section indicating possible federal criminal violations.

Concerning our recommendation that the Attorney General establish a policy and guidance clarifying his expectations regarding the FBI's notification of the Criminal Division and the types of advice the Division should be allowed to provide, DOJ, citing the sensitivity and difficulty of the issue, said that the Attorney General continues to review the possibility of amending the July 1995 coordination procedures. Our report recognizes the complexity of the issue and DOJ's concerns about the uncertainties that any change in the procedures will create on how the courts may view such changes in their rulings. Nevertheless, as we pointed out, this issue has been longstanding and the concerns that it has generated by some officials has inhibited the achievement of one of the intended purposes of the procedures, that is, to ensure that DOJ's criminal and counterintelligence functions were properly coordinated. Because such coordination can be critical to the successful achievement of both counterintelligence investigations and criminal prosecutions, the issue needs to be resolved as soon as possible. We remain concerned that delays in resolving these issues could have serious adverse effects on critical cases involving national security issues.

Concerning our two remaining recommendations—(1) that all FBI memorandums sent to OIPR summarizing investigations seeking FISA renewals contain a section specifically devoted to identifying federal criminal violations and (2) that the Attorney General institutionalize the role of the Core Group—DOJ said that they were being reviewed, but offered no timeframe for their resolution.

With respect to other points raised in Justice’s comments, we have incorporated in our report, where appropriate, the Department’s technical comments concerning our discussion of the primary purpose test and the courts’ views on it. Regarding the Department’s point that it is probably more accurate to divide the concept of coordination into an information-sharing component and an advice-giving component, we believe our report adequately differentiates between the two concepts and that we accurately report that the issue concerning the type of advice the Criminal Division can provide has been the primary stumbling block to better coordination. Thus, we made no change regarding this matter. Moreover, while the Department wrote that all relevant Department components agree that information sharing is usually appropriate for all felonies, we found and our report notes that the timing of the information sharing has been an issue. Furthermore, notifications tended to occur near the end of the investigation, with the Criminal Division playing little or no role in decisions that could effect the success of potential subsequent prosecutions. Even with the later procedural changes to coordination, the Criminal Division still had concerns about the timeliness issue. In this regard, the actions DOJ said it has taken in response to our report and our recommendation concerning FBI case summary memorandums, if implemented, should help improve coordination timeliness.

As agreed with your office, unless you publicly release its contents earlier, we plan no further distribution of this report until 30 days from its issue date. At that time, we will provide copies of this report to the Chairman of the Committee on Governmental Affairs; the Chairmen and Ranking Minority Members of the Committee on the Judiciary and the Select Committee on Intelligence, United States Senate; the Chairmen and Ranking Minority Members of the Committee on Government Reform, the Committee on the Judiciary, and the Permanent Select Committee on Intelligence, House of Representatives; the Attorney General; the Acting Director of the Federal Bureau of Investigation; and the Director of the Office of Management and Budget. We will also make copies available to others on request.

If you should have any questions about this report, please call Daniel C. Harris or me on (202) 512-8777. Key contributors to this report were Robert P. Glick, Barbara A. Stolz, Jose M. Pena III, and Geoffrey R. Hamilton.

Sincerely yours,

A handwritten signature in cursive script that reads "Richard M. Stana".

Richard M. Stana
Director, Justice Issues

Appendix I: Chronology of Key Events Relating to FBI/DOJ Coordination

The following table shows key events relating to coordination of FBI foreign counterintelligence investigations with the Criminal Division.

Table 1: Key Events Relating to FBI/DOJ Coordination

Date	Event
1978	Foreign Intelligence Surveillance Act (FISA) is enacted.
1980	U.S. Court of Appeals for the 4th Circuit sustains the application of the “primary purpose” test in U.S. vs. Truong Dinh Hung. Facts in the case were developed prior to FISA’s enactment.
1994	FISA is amended to include physical search authority.
July 1995	Attorney General’s coordination procedures are promulgated.
1996	DOJ working group created to address coordination issues and concerns. The working group was unable to resolve the issues and concerns.
1997	Second working group created to address continuing coordination issues and concerns. The group also was unable to resolve them.
1999	Third coordination working group is established.
January 2000	Attorney General issues additional coordination procedures, which establish a “core group” and critical-case briefing protocol and require the sharing of certain case summary memorandums.
Mid-2000	Office of Intelligence Policy and Review implements a mechanism intended to help ensure that the FBI notifies the Criminal Division of cases meeting the criteria for notification.
October 2000	Coordination working group drafts memorandum recommending to the Attorney General revisions to the July 1995 coordination procedures. The memorandum, with minimal revisions, was resubmitted in December 2000.
October 2000	The core group and critical-case briefing protocol are discontinued.
April 2001	The core group is reconstituted with expanded responsibilities.

Source: GAO analysis based on legal documents and DOJ documents and interviews.

Appendix II: Comments From the Department of Justice

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



U. S. Department of Justice

JUN 21 2001

Washington, D.C. 20530

Mr. Richard M. Stana
Director, Justice Issues
General Accounting Office
Washington, DC 20548

Dear Mr. Stana:

The Deputy Attorney General has asked me to convey the Department of Justice's (Department) comments concerning your draft report on coordination within the Department of FBI counterintelligence investigations involving potential criminal violations. We appreciate the opportunity to comment, and look forward to working with you to resolve any outstanding questions you may have.

I. Comments on the "Recommendations for Executive Action" Section of the Report.

At the outset, the Department would like to address the report's "Recommendations for Executive Action" section, which appears at pages 32-33. In addition to suggesting that the Attorney General establish new intelligence sharing guidelines, the report contains certain specific recommendations. As of today, the Department has taken concrete steps with respect to two of those recommendations. First, on June 12, 2001, the Acting Counsel for Intelligence Policy issued a memorandum to all Office of Intelligence Policy Review (OIPR) staff formally articulating the policy discussed in your report. The memo provides that "it is OIPR policy that when you conclude that notice to the Criminal Division is appropriate in a particular matter in accordance with the Attorney General's July 19, 1995, memorandum, you must immediately notify the Deputy Counsel for Intelligence Operations and prepare [an attached] standard memorandum for the signature of the Counsel for Intelligence Policy or Acting Counsel and transmission to the FBI and Criminal Division."

Second, the Deputy Attorney General issued a memorandum yesterday directing that within 30 days the FBI expand the scope of its periodic inspections in accord with your recommendations or explain why it is not practical to do so and suggest alternatives.

See comment 1.

See comment 1.

Mr. Richard M. Stana

2

Your specific recommendations concerning two other matters--FBI memoranda sent to OIPR, and the role of the Core Group--are currently under review within the Department.

Finally, the Attorney General continues to review the possibility of amending the July 1995 Guidelines. As explained in your report, and as further discussed below, changing the July 1995 Guidelines raises sensitive and difficult issues.

II. Comments on Other Sections of the Report.

The Department has several comments on other sections of the draft report, focused on the primary purpose standard and the degree of coordination within the Department. Based on our concerns, we present specific proposed changes to particular sentences and phrases, and also offer two paragraphs for inclusion in the "Results in Brief" section of the report (pages 3-5).

A. Primary Purpose.

The report states on page 3, lines 7-13, that the primary purpose test has been adopted by "some" courts, and that under the test "some" courts have allowed the use of Foreign Intelligence Surveillance Act (FISA) information in a criminal prosecution. See also page 12, lines 29-33; page 13, lines 4-9. While those statements are literally true, as far as we are aware no court has rejected the primary purpose standard. While the Ninth Circuit has reserved judgment on the question, *United States v. Sarkissian*, 841 F.2d 959, 964 (9th Cir. 1988), the remaining courts of appeals that have considered the issue have adhered to the primary purpose standard, either because they have construed FISA as incorporating that standard or because they consider it to be constitutionally required. See, e.g., *United States v. Duggan*, 743 F.2d 59, 77 (2d Cir. 1984); *United States v. Johnson*, 952 F.2d 565, 572 (1st Cir. 1991), cert. denied, 506 U.S. 816 (1992); *United States v. Pelton*, 835 F.2d 1067, 1075-1076 (4th Cir. 1987), cert. denied, 486 U.S. 1010 (1988); *United States v. Badia*, 827 F.2d 1458, 1464 (11th Cir. 1987). Similarly, all courts to consider the issue have held that FISA information may be used in a criminal prosecution as long as the primary purpose standard was met.¹

¹ A district court in the Eastern District of New York appears to have concluded that a lesser standard would apply under FISA, *United States v. Falvey*, 540 F. Supp. 1306, 1313-1314 (E.D.N.Y. 1982), but that decision is superseded by the Second

See comment 1.

See comment 1.

Mr. Richard M. Stana

3

See comment 1.

The report also refers to the primary purpose standard as a "judicially established" test. See page 3, lines 7-13; see also page 3, lines 24-29. In that regard, we believe the report should note that FISA permits surveillance only when "the purpose" of the surveillance is to obtain foreign intelligence information. 50 U.S.C. 1804(a)(7)(B). Accordingly, it may be appropriate to include in the report the following sentence or its equivalent: "While a few courts have reserved the question of whether the primary purpose standard is the standard imposed by FISA, courts generally have applied the primary purpose test to searches and surveillances conducted under FISA." As to the Department's position, all components believe that it is appropriate for the Department to operate under the primary purpose standard. The report should make clear that statements from the Department concerning the FISA Court's views are merely our assessment of the Court's views.

See comment 1.

Finally, we have two technical concerns with respect to the report's discussion of primary purpose. First, on page 3, lines 10-13, and at various other places (e.g., page 12, lines 29-33; page 13, lines 5-9), the report suggests that FISA activity passes the primary purpose test if ordinary, domestic law-enforcement "was not the primary purpose of the surveillance or search." This may be a minor point, but, despite possible suggestions to the contrary in at least one decision, *Johnson*, 952 F.2d at 972, we believe it is more accurate to state the matter affirmatively rather than negatively--i.e., to say that the primary purpose test requires that foreign intelligence collection be the primary purpose of a search or surveillance. Second, on page 3, lines 19-22, and in the second-to-last sentence on page 12, the report states that "no court using the primary purpose test" has upheld a challenge to the government's use of intelligence information in a criminal case. In light of the decision in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), we believe it is more accurate to say that no court has upheld such a challenge when the information was obtained under FISA.

B. Coordination.

On page 3, lines 25-26, and at various other places (e.g., page 24, lines 5-7), the report suggests that there is significant disagreement within the Department over "coordination" as a general matter. It is probably more accurate to divide the concept of coordination into its two major

Circuit's decision in *Duggan*.

Mr. Richard M. Stana

4

component parts: information-sharing and advice-giving. All relevant components--the Criminal Division, OIPR, and the FBI--agree that information-sharing (from the intelligence side to the criminal side of the Department) is usually appropriate for all felonies, even though there is disagreement on the permitted categories of advice that may be given from the criminal side to the intelligence side.

On page 4, lines 21-28 and line 35, the report states that the "disagree[ment]" among the various DOJ components is an "impediment to coordination." Similarly, on page 31, lines 1-7, the report states that "[d]iffering interpretations within DOJ" have "inhibited" coordination, and that "[t]hese [differing] interpretations resulted in less coordination." See also page 31, lines 17-18. In advancing that argument, we believe the report should distinguish between the questions of whether the 1995 Guidelines are being applied correctly, and whether and how the Guidelines ought to be changed. In our view, the principal (but not exclusive) area of disagreement concerns the latter question, not the former. The last word on page 17 of the report, "enhance," illustrates the importance of the distinction. The Criminal Division is of the view that the 1995 Guidelines should be amended expressly to permit enhancing advice, and it is also of the view that the line between enhancing and preserving advice is often murky. As written, however, the 1995 Guidelines provide only that, where FISA activity is underway, the "Criminal Division may give guidance to the FBI aimed at preserving the option of a criminal prosecution" (emphasis added). As you are aware, one of the central recommendations made by the Attorney General's Review Team was to modify the 1995 Guidelines expressly to permit "enhancing" advice.

Finally, we do not believe the report acknowledges sufficiently the difficulty inherent in resolving the questions of how much advice, and what kinds of advice, the Criminal Division may provide to intelligence investigators who are using FISA. To be sure, the report's conclusion (page 31, lines 23-29) does state that "such cases involve highly sensitive national security issues" and that "caution is warranted;" it also acknowledges that "the solutions to these problems are complex and involve risk." But we believe additional emphasis of these points in the "Results in Brief" and other sections of the report would be appropriate. For example, on page 11, third line from the bottom, we believe the report should explain that the "disinclination" referred to is justified, at least in part, by the high stakes involved. Similarly, on page 12, lines 36-37 (third and fourth lines from the bottom of the page), we think it would be appropriate to add a phrase after "However, OIPR and

Now on p. 30.

See comment 2.

See comment 3.

See comment 4.

Mr. Richard M. Stana

5

FBI officials expressed concern that" and before "a federal court could determine..." The phrase we propose adding is: "the reason for this is the caution that has been exercised, and that absent such caution". As amended, the sentence would read as follows: "However, OIPR and FBI officials expressed concern that the reason for this is the caution that has been exercised, and that absent such caution a federal court could determine that the primary purpose of the surveillance or search was for a criminal investigation, and, could potentially suppress any FISA evidence gathered subsequent to that time."²

C. Proposed Addition to the Report.

To address the foregoing concerns, we suggest adding the following paragraphs to the "Results in Brief" section of the report:

Ordinarily, and for obvious reasons, the Department encourages coordination among its components to the maximum extent possible. In the realm of FISA, however, the primary purpose standard imposes a legal limit on the permissible extent of such coordination. The principal question the Department has been grappling with is how the primary purpose standard applies in practice, and depending on the answer to that question, whether the 1995 Guidelines can be revised to permit more advice without creating an undue risk of violating the primary purpose standard in particular cases.

The answer to that question is made difficult by several related factors, including the legal issues discussed in this report, the widely varying facts of foreign intelligence and counterintelligence investigations (especially as we move to an era of

²We have one additional factual correction. On page 4, lines 28-33, the report refers to "a" decision memorandum submitted "in late 2000." In fact, there were two decision memoranda submitted to Attorney General Reno, the first on October 6, 2000, and the second on December 7, 2000. We believe it is important to note as well that the "options" presented in the decision memoranda were for specific replacements for the 1995 Guidelines. In other words, several complete versions of new intelligence sharing guidelines were proposed. See also page 24, lines 20-21 (referring to differences of opinion "left unresolved" in the decision memos).

See comment 4.

See comment 5.

Mr. Richard M. Stana

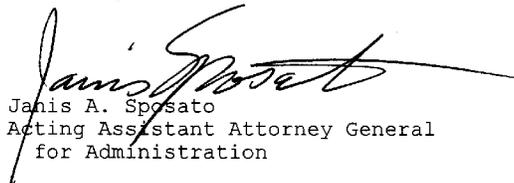
6

expanded extraterritorial criminal jurisdiction), and the difficulty of assessing possible judicial reactions to increased advice-giving. In this last regard, it is important to note that whatever general standards the Department adopts internally, their application in particular cases will be subject to the scrutiny of the FISA Court, which makes the statutorily-required findings regarding the Government's certification of the purpose of each surveillance or search. The Department is therefore proceeding with understandable caution in deciding whether and how to address this extremely complex and sensitive matter.

Adding these paragraphs will, in our view, help make clear the extent and the difficulty of the issues facing the Department in this area.

Again, thank you very much for the opportunity to comment on the draft report. If you have any questions about our comments, please feel free to contact me.

Sincerely,



Janis A. Sposato
Acting Assistant Attorney General
for Administration

The following are GAO's comments on the Department of Justice's letter dated June 21, 2001.

GAO Comments

1. See "Agency Comments and Our Evaluation" section.
2. DOJ suggested in its comments that we address the question of whether or not the 1995 coordination procedures were being applied correctly. As we noted in the scope and methodology section of this report, as agreed with the requester of the report, we did not review specific cases to try to identify instances of compliance or noncompliance with the coordination procedures.
3. DOJ also suggested in its comments that we address whether and how the coordination procedures ought to be changed. Given that since 1995, this issue has been studied by three high-level DOJ working groups and the Attorney General's Review Team and because of the concerns expressed by some DOJ officials in our report, we believe that DOJ is in the best position to address any changes to its procedures.
4. The Department suggested that we emphasize to a greater extent throughout our report the sensitivity and complexity of the issues. In addition, it provided additional language for the report to reflect the issues' sensitivity and complexity. We agree that the issues discussed are sensitive and complex, however, we believe the report adequately conveys these points and, thus, we did not revise our report to address the Department's suggestion.
5. DOJ suggested a factual correction to recognize that two decision memorandums were submitted to the Attorney General; one in October 2000, and a second in December 2000. On pages 22 and 23 of our report, we discuss the submission of both memorandums. Concerning DOJ's suggestion that we note the options that these memorandums presented, we did not adopt this suggestion as DOJ had opted not to provide us with the details of its options when we met to discuss the memorandums.

Ordering Information

The first copy of each GAO report is free. Additional copies of reports are \$2 each. A check or money order should be made out to the Superintendent of Documents. VISA and MasterCard credit cards are also accepted.

Orders for 100 or more copies to be mailed to a single address are discounted 25 percent.

Orders by mail:

U.S. General Accounting Office
P.O. Box 37050
Washington, DC 20013

Orders by visiting:

Room 1100
700 4th St., NW (corner of 4th and G Sts. NW)
Washington, DC 20013

Orders by phone:

(202) 512-6000
fax: (202) 512-6061
TDD (202) 512-2537

Each day, GAO issues a list of newly available reports and testimony. To receive facsimile copies of the daily list or any list from the past 30 days, please call (202) 512-6000 using a touchtone phone. A recorded menu will provide information on how to obtain these lists.

Orders by Internet

For information on how to access GAO reports on the Internet, send an e-mail message with "info" in the body to:

Info@www.gao.gov

or visit GAO's World Wide Web home page at:

<http://www.gao.gov>

To Report Fraud, Waste, and Abuse in Federal Programs

Contact one:

- Web site: <http://www.gao.gov/fraudnet/fraudnet.htm>
- E-mail: fraudnet@gao.gov
- 1-800-424-5454 (automated answering system)