CHAPTER FOUR
THE FBI'S INVESTIGATION OF ZACARIAS MOUSSAOUI

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

A. Moussaoui's background

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

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

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

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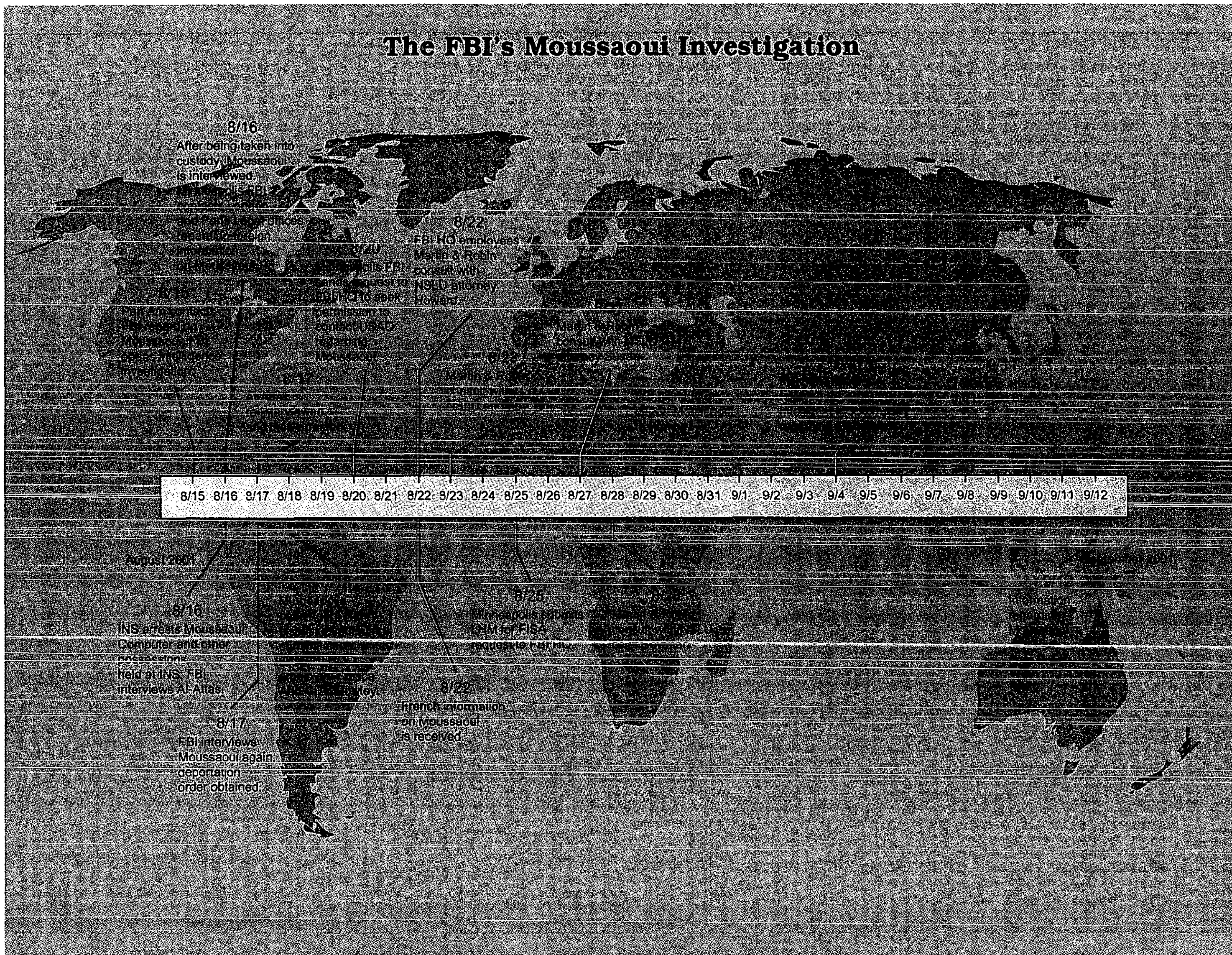
[93] For a description of the Visa Waiver Program, see the OIG report entitled "Follow-up Report on the Visa Waiver Program" (December 2001).


The FBI's Moussaoui Investigation
8/16
After being taken into
custody, Moussaoui
is interviewed
8/22
FBI HQ employees
Martin & Robin
consult with
NSLU attorney
Howard
8/15 8/16 8/17 8/18 8/19 8/20 8/21 8/22 8/23 8/24 8/25 8/26 8/27 8/28 8/29 8/30 8/31 9/1 9/2 9/3 9/4 9/5 9/6 9/7 9/8 9/9 9/10 9/11 9/12
August 2001
8/16
INS arrests Moussaoui
Computer and other
held at INS. FBI
interviews Al-Attas.
8/17
FBI interviews
Moussaoui again;
deportation
order obtained.
8/25
Minneapolis submits
LHM for FISA
request to FBI HQ
8/22
French information
on Moussaoui
is received

B. The FBI receives information about Moussaoui

Moussaoui had completed two days of classroom instruction and one flight simulator training session to fly a 747-400 airplane (out of a scheduled four or five sessions) when a manager at the Minneapolis Pan Am flight school contacted the FBI about him. On August 15, 2001, the Pan Am manager called the FBI's Minneapolis Field Office to report that he and his co-workers were training a student, Moussaoui, who they considered suspicious.

According to the Pan Am manager, they considered it odd that Moussaoui said that all he wanted to learn was how to take off and land the plane, giving the reason that it was "an ego boosting thing."[94] In addition, the FBI learned that Moussaoui had no background in aviation and did not have a private pilot's license.[95] It was also unusual that Moussaoui had paid $8,000 – $9,000 in cash for the course. The Pan Am manager reported that Moussaoui appeared to be of Middle Eastern descent and that he had said he grew up in France. The manager said that Moussaoui had completed two days of classroom instruction and was scheduled for four or five sessions in the flight simulator.

The FBI agent who took the telephone call was assigned to the Minneapolis FBI's international and domestic terrorism squad. Immediately following the telephone call, the agent discussed the call with the Acting Supervisory Special Agent (SSA) on the Minneapolis FBI's international and domestic terrorism squad, who we call "Gary," and another agent on the squad who handled international terrorism investigations. We call this agent "Henry."

Gary had become the Acting SSA of the terrorism squad in late July 2001. Prior to being named the acting supervisor, during his five years as an FBI special agent Gary had worked for two years on bank robberies and other

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[94] Media reports later incorrectly reported that Moussaoui had stated that he did *not* want to learn to take off or land a plane. In fact, according to the FBI, the Pan Am manager reported that Moussaoui *only* wanted to learn to take off and land the plane.

[95] Although Pan Am's typical students were commercial pilots receiving initial or refresher training, this was not a prerequisite to taking the training course.

violent crime investigations, two years in the unit responsible for investigating fugitives, and one year as the coordinator of the FBI's Joint Terrorism Task Force (JTTF) for the Minneapolis Field Office.[96] Gary also had served as the relief supervisor for the international and domestic terrorism squad. However, he had no field experience in terrorism matters and no experience in working with FISA.

Henry had joined the FBI as a special agent in January 1999 and had been assigned to work on international terrorism matters since his arrival at the Minneapolis office in the spring of 1999. In August 2001, Henry and two other agents on the squad handled international terrorism and foreign counterintelligence investigations. By virtue of his assignment on the counterterrorism squad, Henry also worked on the local JTTF. Prior to joining the FBI, Henry served as a naval intelligence officer for almost ten years. In the Navy, he specialized in aviation-related intelligence issues, including a detail to the Canadian Navy and Air Force, and he was also an intelligence officer on staff at the navy fighter weapon school commonly referred to as "Top Gun." Henry said that he had a private pilot's license and that he flew for the FBI as a collateral duty. Henry described himself as having a "working knowledge" of aviation.

When Gary was named the Acting SSA of the squad in late July 2001, he was assigned to report to one of two ASACs in the Minneapolis Field Office who we call "Roy." On August 3, 2001, Roy was named the Acting SAC of the office and remained in that position until December 2001. Roy had no previous experience in terrorism matters. Gary continued to report directly to Roy even after he was named Acting SAC.

In July 2001, an SSA who we call "Charles" became an ASAC in the Minneapolis FBI office. For three years, he had been the supervisor of the Minneapolis international and domestic terrorism squad. Prior to becoming the supervisor, Charles had been an SSA at FBI Headquarters in the domestic terrorism section, and he had worked both foreign counterintelligence and

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[96] JTTFs combine investigators from the FBI and various federal, state, and local agencies in FBI field offices throughout the country to combat terrorism.

international terrorism matters in the Los Angeles Field Office for six years before his assignment to FBI Headquarters.

When Charles became an ASAC in Minneapolis in July 2001, he was no longer assigned to oversee the counterterrorism programs; that responsibility was given to Roy. According to Charles, this was done so that Charles would be seen as an ASAC rather than as the supervisor of the office's terrorism programs. When Roy became the Acting SAC, he maintained responsibility for the counterterrorism and foreign counterintelligence programs. In August 2001, when the Moussaoui matter was reported to the Minneapolis office, Charles was at a management training class at the FBI Academy in Quantico, Virginia.

C. The Minneapolis FBI's investigation

1. The Minneapolis FBI opens an intelligence investigation

Henry told the OIG that within a half hour of receiving the telephone call from the Pan Am manager, the Minneapolis FBI filled out the paperwork to open a full field intelligence investigation of Moussaoui. According to Henry, the case was opened as an intelligence matter and not a criminal matter because, based on the telephone call, the FBI did not have information indicating criminal predication, which Henry said in this case would have been "something in furtherance of terrorism." Henry said that, as an initial matter, the case was a "classic" intelligence investigation.

Gary assigned the case to Henry and not the agent who had taken the call from Pan Am, because Henry had international terrorism experience and the other agent did not. Henry told the OIG that based on his own knowledge of aviation, he was concerned about Moussaoui. He said he questioned whether it was normal for a person with no previous experience in aviation to be training to fly a 747-400 commercial airplane. In addition, Moussaoui's lack of aviation experience made Henry suspicious, because Henry knew that the 747-400 airplane had become very automated since the 1970s, could be flown by as little as two people, and had user-friendly computer screens rather than the many dials and gauges that were in the earlier versions of the airplane. Henry said that because of these suspicions, he asked the agent who had initially taken the call to call the Pan Am manager back and ask some follow-up questions, such as how automated a 747-400 airplane was.

2. Initial checks for information

Henry also ran name searches in ACS and learned that the name "Moussaoui" was predominantly Lebanese. Henry did not find any information in ACS about Zacarias Moussaoui. Henry learned that the last name "Moussaoui," which did appear in ACS records in several places, was most often attached to individuals from Lebanon and the terrorist organization Hizbollah.

Henry contacted an SSA in FBI Headquarters who he knew and who we call "Jack." He worked in the unit in ITOS that handled cases dealing with Hizbollah. In addition, Gary notified Jack that the Minneapolis FBI had opened a full field intelligence investigation on Moussaoui.

Henry obtained from Pan Am Moussaoui's passport information and learned that Moussaoui had entered the U.S. on a French passport from London, England. Henry sent an e-mail on August 15 to the FBI's Paris Legat requesting any available information on Moussaoui from the French authorities. Henry also requested similar information from the FBI's London Legat.

Also on August 15, at the request of the FBI an INS agent assigned to the Minneapolis JTTF ascertained from INS records that Moussaoui had stayed beyond the 90-day time limit allowed by his entry into the United States under the Visa Waiver Program. The INS agent reported to Henry that Moussaoui therefore was subject to arrest on immigration charges for overstaying his permitted time of entry.

3. The investigation continues

On August 16, Henry and two INS agents who worked on the JTTF began conducting interviews and collecting information about Moussaoui. The FBI interviewed Moussaoui's flight instructor at Pan Am, an experienced pilot and flight instructor for several years. He characterized Moussaoui as unlike any other student with whom he had ever worked. He told the agents that Moussaoui seemed to have a genuine interest in aviation but Moussaoui had no background in any type of sophisticated aircraft systems and had only approximately 50 hours of flight training in light civil aircraft that did not resemble a 747-400 plane. The agents also learned that Moussaoui had stated that he was attending flight school to go on a "joy ride" and that he claimed

that he would "love" to fly a simulated flight from London's Heathrow Airport to New York's John F. Kennedy Airport in one of his scheduled simulator sessions.

According to the flight instructor, Moussaoui also showed a particular interest in the "mode control panel" of the flight simulator, which is the machinery that enables computerized flying. Moussaoui had demonstrated that he already knew how to use the mode control panel during the one simulator session that he had completed. Henry told the OIG that he found this information ominous because of Moussaoui's statement that he was attending flight school to go on a "joy ride." This concerned Henry because, based on his experience as a pilot, he knew that a joy ride consists of actually flying the plane, not allowing the computer to do the flying.

The flight instructor also reported that although he had initially raised the subject, Moussaoui had seemed extremely interested in the aircraft doors and their operation and that Moussaoui seemed surprised to learn that the doors could not be opened during flight because of the air pressurization in the cabin.

The flight instructor described Moussaoui as amiable but also "extremely reticent" to discuss his background. The flight instructor said that in a conversation in which he told Moussaoui about a well-known aviation accident involving a group of Muslims, the flight instructor asked Moussaoui whether he was Muslim. After reacting with surprise and caution, Moussaoui stated that he was not.

The flight instructor provided the agents with the name of the hotel where Moussaoui was staying. The flight instructor said that he had seen Moussaoui in the company of another Middle Eastern male and gave a description of their vehicle.

4. The decision to arrest Moussaoui

On August 16, the agents learned that Moussaoui's next scheduled training session was that evening. Henry asked the INS agents to arrest Moussaoui in order to prevent him from receiving any further training. Henry said that he was concerned that if Moussaoui completed the training and was later arrested and deported, he would be able to use his training in the future. Henry said that he wanted to arrest Moussaoui because "there were enough indications that [Moussaoui's behavior] was sinister." Henry also noted that

Moussaoui had paid for his training in cash, which Henry described as "unusual," since most of the students are pilots whose training is paid for by the airline which employs them. In addition, Henry said that the fact that Moussaoui was not a typical student, since he was not a new or experienced pilot and did not even have a pilot's license, was another factor that made Henry suspicious of him. These characteristics were inconsistent with students the Pan Am representatives had dealt with before.

Henry spoke on the telephone with SSA Jack in FBI Headquarters about the decision to arrest Moussaoui. According to Henry, Jack suggested that it would be better to conduct surveillance of Moussaoui and his companion rather than to immediately arrest Moussaoui. This surveillance would allow Henry to collect more information about Moussaoui's connections to others and his intentions. Henry told Jack, however, that the decision already had been made to arrest Moussaoui because the Minneapolis FBI was concerned about him receiving any more flight training.

Jack told the OIG that, in most cases, conducting surveillance and asking the CIA to check its records on information already collected, such as the hotel records, is advisable because it results in obtaining additional information about the subject. However, Jack said that he also understood the Minneapolis FBI's position that it wanted to arrest Moussaoui immediately to prevent him from receiving additional training.

After discussing the issue with Jack, Henry called his supervisor, Gary, to discuss Jack's position that Moussaoui should be put under surveillance. Gary told the OIG that he also believed that it was necessary to arrest Moussaoui to prevent him from receiving further training. In addition, Gary believed that it was appropriate for the field office to decide to make an arrest, even if FBI Headquarters disagreed, and he advised Henry to go ahead with the arrest.[97]

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[97] We recognize that there were good arguments to be made for either arresting Moussaoui or for conducting additional surveillance on him. For example, if the agents had waited to arrest Moussaoui and conducted surveillance, they may have uncovered more information about his associates and his plans. On the other hand, there are serious risks involved in trying to surveil an individual – especially a transient one like Moussaoui – who could slip away and be lost altogether. Further, as Henry noted, if Moussaoui were allowed (continued)

5. Moussaoui's arrest

At approximately 5:00 p.m. on August 16, Henry and three other agents, two of who were INS agents, went to Moussaoui's hotel to arrest him. They stopped Moussaoui and another man as they were getting into a car outside of their hotel. Henry and one of the INS agents questioned Moussaoui about his immigration status. Moussaoui claimed that he was in the country legally and that he had a paper in his hotel room that would prove this.

In response to questions about his immigration status, Moussaoui presented his passport case to the agents. The passport case contained a bank statement indicating that Moussaoui had deposited $32,000 in cash upon arriving in the United States. The passport contained a Pakistani visa indicating that Moussaoui had been in Pakistan for two months – December 9, 2000, to February 7, 2001.

The agents accompanied Moussaoui into his hotel room where Moussaoui produced an INS document. The document indicated that Moussaoui had filed with the INS an application for an extension of stay, but there was no evidence that any extension had been granted.[98]

Moussaoui's hotel room was scattered with papers. Henry asked if the agents could search the room to see if they could find additional documents that would indicate Moussaoui was in the country legally. Moussaoui refused this request and refused to allow the agents to search the room or his possessions.

Because it was clear at that point that Moussaoui was in the country illegally, the INS agents arrested him. Incident to the arrest, they searched Moussaoui and the bag he had been carrying. They found a knife in his pocket, cash in his money belt, and flight-training materials from Pan Am in the bag.

(continued)
to continue his training and later was deported without any criminal charges, he would have achieved his goal of obtaining flight training that could be used at a later time.

[98] In certain circumstances non-immigrant visitors are permitted an extension to stay beyond the initial period allowed by the INS upon entry into the country. Pursuant to the requirements of the Visa Waiver Program, however, Moussaoui would not have been eligible for such an extension.

The other man with Moussaoui at the time of his arrest was Hussein Ali Hassan Al-Attas (Al-Attas), the owner of the car. The agents detained Al-Attas, who consented to a search of his car. The agents found in the car another knife, which Moussaoui admitted was his.

Henry and one of the INS agents remained at the hotel to conduct an interview of Al-Attas in the hotel room. The other two agents took Moussaoui into custody and transported him to the INS District Office for processing.

6. Search of hotel room and Al-Attas' possessions

According to FBI documents, prior to interviewing Al-Attas the agents asked for and received his permission to search some bags that were within his reach in the hotel room. To check for weapons, the agents opened several bags that Al-Attas told them belonged to Moussaoui. The agents noticed in the bags a laptop computer, spiral notebooks, numerous aviation study materials, a cellular telephone, and a small "walkie-talkie" radio. The agents did not search these items further.

With the assistance of Al-Attas, the agents collected Moussaoui's belongings, including his bags and papers, from the hotel. Moussaoui subsequently gave verbal permission for the FBI to store his belongings at the INS District Office, but he refused to allow his belongings to be searched.

At the hotel, Al-Attas gave the agents permission to search the room and Al-Attas' belongings in the room. From the search of Al Attas' belongings, the agents obtained telephone numbers, personal address books, credit card and bank records, and numerous personal documents. The agents found several sheets of paper written in Arabic, which Al-Attas identified as his will, and a pamphlet advising how to prepare a will.[99] In addition, the agents found a partially completed application for a Pakistani visa, padded gloves, shin guards, binoculars, hiking boots, Power Point 2002 computer software, and a document indicating that Moussaoui intended to purchase a handheld Global Positioning System receiver and rent a camcorder.

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[99] The sheets of paper identified by Al-Attas as his will were in a mailing envelope.

7. Interview of Al-Attas

Henry and an INS agent interviewed Al-Attas at the hotel. During the interview, Al-Attas – a 21-year-old Yemeni citizen whose family was living in Saudi Arabia – stated that he was in the United States on a student visa and had been an undergraduate student at the University of Oklahoma for several years. He provided documentation to the agents indicating that he had a valid student visa that had first been issued in 1995 and that he met the requirements for residing in the United States with the student visa.

Al-Attas stated that approximately one month earlier, he had moved into an apartment near the University of Oklahoma, in Norman, Oklahoma, with an acquaintance. Unbeknownst to Al-Attas, Moussaoui had just before that moved into the apartment with the same acquaintance.[100] Al-Attas said that he had known Moussaoui for six months and had met him through the mosque in Norman that Al-Attas attended regularly. He said that Moussaoui was studying aviation in Norman at the time that they first met.

Al-Attas said that he had accompanied Moussaoui to Minnesota as a friend and was not enrolled in any flight school. Al-Attas also stated that he knew Moussaoui only by the name of "Shaqil." and that Moussaoui did not reveal his last name.

Al-Attas described Moussaoui as an extremely religious Muslim who had gained a reputation at the mosque for being too hard-line and outspoken. According to the EC prepared by Henry about the interview, Al-Attas was asked if he had ever heard Moussaoui "make a plan to kill those who harm Muslims and in so doing become a martyr." Al-Attas responded that he "may have heard him do so, but that because it is not in his [Al-Attas'] own heart to carry out acts of this nature, he claimed that he kept himself from actually hearing and understanding."

The Minneapolis agents determined that Moussaoui had traveled to Pakistan, as well as to Morocco, Saudi Arabia, and Europe. They also obtained the first and last names of one associate of Moussaoui's in Oklahoma and the

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[100] The acquaintance was an Indian Muslim. The FBI ran a name check in its computer records for Ali but found no information on him.

first name of another of Moussaoui's associates in Oklahoma.[101] When Al-Attas was asked to explain why he and Moussaoui had padded gloves and shin guards, he responded that Moussaoui had purchased a set of each for them so that they could train to protect themselves against crime in the United States. Al-Attas also stated that Moussaoui advocated that "true Muslims must prepare themselves to fight," and that, at Moussaoui's urging Al-Attas had begun martial arts training.

Henry asked Al-Attas if he would be willing to go on jihad, which Henry told the OIG he defined for Al-Attas as "holy war." Al-Attas said he knew what it meant, and he would be willing to fight, but currently he was studying.

Al-Attas also stated that Moussaoui believed it is the highest duty of Muslims to know of the suffering of Muslims in the lands where they are oppressed, and because the United States is full of unbelievers Muslims should not reside in the United States.

In response to questions about his will, Al-Attas said that it was common for Muslims to write their wills and that he had written his a long time ago. Al-Attas also was asked why he was in possession of a partially completed visa application to travel to Pakistan. He responded that he had been asked by his family to go there to research treatments for liver cancer to assist an uncle living in Saudi Arabia.

Al-Attas said that he and Moussaoui planned to travel around the United States for two weeks after Moussaoui's training was completed. According to Henry's EC, Al-Attas could not explain how he would be able to start his college classes at the end of the month if he was planning to travel with Moussaoui.

Al-Attas was not detained but was asked to come to the INS District Office the next day for further questioning, which he agreed to do.

Henry told the OIG that after the Al-Attas interview, he was unequivocally "convinced . . . a hundred percent that Moussaoui was a bad actor, was probably a professional Mujahedin and this wasn't a joyride, that he

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[101] FBI records show that these two names were later checked in ACS, but no information was found on them.

was completely bent on use of this aircraft for destructive purposes." Henry also stated that he believed that Al-Attas was "telling us as much as he could culturally" that Moussaoui was involved in a "plot."

8. Interview of Moussaoui

After interviewing Al-Attas on August 16, Henry and an INS agent interviewed Moussaoui that same evening in detention in the INS offices near Minneapolis. Henry told the OIG he believed that Moussaoui was "combative" and "deceptive" throughout the interview.

According to Henry's later 26-page EC documenting the Minneapolis FBI's investigation of Moussaoui (which we discuss in detail in Section E below), Moussaoui stated he had come to the United States to be a pilot and had been a student at the Airman Flight School in Norman, Oklahoma. He said that he had taken the Federal Aviation Administration (FAA) written exam to become a pilot but had failed it. Moussaoui said the instructors in Oklahoma told him that he was not cut out to be a pilot. He said that he was determined to "follow his dream" of flying a "big airplane," and for pure enjoyment he had enrolled in the flight simulator training course at Pan Am in Minneapolis. He said that once he completed the simulator course, he planned to return to his efforts to obtain a pilot's license. Moussaoui stated several times during the interview that it was very important for him to return to finish the flight simulator training.

Henry reported that Moussaoui could not identify his source of income. Moussaoui claimed to have worked as a freelance marketing researcher and at various other business ventures, one of which involved an Indonesian telephone card company. According to Henry, however, Moussaoui could not provide a convincing explanation for the $32,000 in his checking account, and he was unable to provide an approximate income for the previous year.

Moussaoui said that he had traveled to Malaysia, Indonesia, and Pakistan in connection with an Indonesian business, as well as to Morocco, Saudi Arabia, and all over Europe. When asked why his passport did not reflect entry or exit stamps for Indonesia or Malaysia, Moussaoui stated that the passport had been issued recently to replace one that had been ruined in the washing machine. Moussaoui refused to answer whether he went anywhere else outside of Pakistan while he was in Pakistan and, according to Henry, became upset

that he was being asked about his travels to Pakistan.[102] Moussaoui denied that he had ever had any weapons training, but Henry believed he was deceptive in this response.

Moussaoui was questioned about his religious beliefs. He stated that he considered himself a religious Muslim and that he followed the Islamic practice of praying five times per day and helping his fellow Muslim brothers. When asked about his feelings about the treatment of Palestinians in Israel, Moussaoui said that it made him sad but denied that it made him angry. When asked whether he had spoken openly about hurting people in retaliation for what was happening in Israel, he stated that he needed to think about the question, and ultimately he refused to answer it.

When asked what his immediate plans had been after his flight simulator training, Moussaoui stated that he and Al-Attas had planned to travel to New York to see the sights and to Denver, Colorado, to do some unspecified business with United Airlines. He said he then planned to go to Oklahoma and then return to the United Kingdom.

9. Minneapolis FBI's consultation with Minneapolis United States Attorney's Office

During the evening of August 16, after Moussaoui's arrest, Gary paged the "duty attorney" at the Minneapolis United States Attorney's Office (USAO), who that evening was an Assistant United States Attorney (AUSA) who we call "Wesley." Gary left a message for Wesley stating that he needed to discuss a criminal search warrant. According to Wesley, when he called Gary back around 8:00 p.m., Gary told him that the FBI no longer needed a search warrant immediately because the FBI was holding onto his belongings while he was being detained. Gary told him that he would get back in touch the next day to discuss the issue further. Wesley told Gary that when he called back the next day he should talk to the supervisor who was the coordinator for terrorism matters, an AUSA who we call "Megan."

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[102] Henry said he knew that persons interested in attending terrorist training camps in Afghanistan were known to enter Pakistan first and cross the border into Afghanistan, with no indication on their passports of having traveled to Afghanistan. (U)

Gary told the OIG that he had called the USAO because he was unsure whether a criminal search warrant could be obtained, since Moussaoui was arrested by the INS on an immigration violation. According to Gary, he provided Wesley with a hypothetical with little information, because Gary was not sure how much information he was permitted to share with the USAO in light of the fact that the investigation was opened as an intelligence investigation and not a criminal investigation. Gary said that he asked Wesley if they were "close" to getting a criminal search warrant, and Wesley told him that it "sounds close" but that Gary should "freeze the scene" and call Megan the next day, since Wesley was not familiar with that type of case.

Wesley told the OIG that, based on what he was told at the time, he had believed that there was sufficient probable cause to obtain a criminal search warrant. He added that if the Minneapolis FBI had wanted to obtain the search warrant that evening, he would have sought the warrant and would not have needed supervisory approval to do so.

Following his conversation with Gary, Wesley called Megan on her cell phone and left her a message about the case. The next day, Wesley drafted a memorandum to Megan summarizing his conversation with Gary, in which he wrote, "The FBI would like to search the computer, and likely the other property. The suspect is being held, and questioned, by INS. [Gary] said that he will be off today, and that [another Minneapolis FBI agent] or [Henry] will stop by today to talk with you about the case."

Megan told the OIG that Wesley conveyed to her in his message on the evening of August 16 that the Minneapolis FBI had arrested Moussaoui and was interested in obtaining a search warrant, but not that night. When the USAO did not hear back from the Minneapolis FBI, Megan called Henry the next day, August 17, and left a message for him. According to Megan, Henry did not return her call until August 20. He told her that according to the Attorney General Guidelines he could not discuss the case with her without FBI Headquarters and DOJ approval, since the case had been opened as an intelligence matter.

Megan told the OIG that she did not know if probable cause existed before September 11 to obtain a criminal search warrant in the Moussaoui case. However, she stated her belief that if the FBI had indicated that it was ready to

pursue the search warrant, it would have been the "normal course" for the USAO to try to obtain the warrant.

10. Al-Attas' arrest

On August 17, the day after Moussaoui's arrest and Al-Attas' interview at the hotel, Al-Attas came to the INS District Office, as requested by the FBI, and was interviewed again by FBI and INS agents. During this second interview, Al-Attas stated that Moussaoui had associated with two Pakistani flight instructors and two flight students in Oklahoma, one from Saudi Arabia and one from Bahrain. In addition, Al-Attas said that Moussaoui followed the teachings of a sheikh, whose identity Moussaoui had not revealed to Al-Attas because Moussaoui believed that Al-Attas would not approve of this sheikh's views.[103] When asked if the person was Usama Bin Laden, Al-Attas stated that he did not believe so, and that the only reference Moussaoui had made to Bin Laden was to comment on his appearance on television. Al-Attas also gave the agents the first and last names of one associate of Moussaoui's in Oklahoma and the first name of another of Moussaoui's associates in Oklahoma.[104]

During this interview, Al-Attas admitted that he had worked while he was going to school at the University of Oklahoma. Because this was a violation of his student visa, the INS arrested Al-Attas and took him into custody.

Also on August 17, Henry and other agents interviewed Moussaoui again, and documented the results of the interview.

11. Second interview of Moussaoui

On August 17, Henry and other agents interviewed Moussaoui again. According to Henry's 26-page EC, which included information about both interviews, Moussaoui attempted to appear cooperative at the start of the August 17 interview but became "increasingly angry" as the questions focused on his source of financial support, his reasons for flight training, and his

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[103] A sheikh is "a venerable old man, a chief" or "the head of an Arab family, or of a clan or tribe; also, the chief magistrate of an Arab village."

[104] FBI records show that these two names were later checked in ACS, but no information was found on them.

religious beliefs. He was asked again to explain the source of his income, and he offered for the first time that he had received money from friends in the United Kingdom and from a friend in Germany for whom he could only recall a first name. Henry wrote that questions about materials in Moussaoui's laptop "provoked an extremely strong emotional reaction" in Moussaoui.

The agents told Moussaoui that they believed that he was an extremist, "intent on using his past and future aviation training in furtherance of a terrorist goal." He was asked to provide the name of his group, the religious scholars whom they followed, and to describe his plan in detail. Henry reported that Moussaoui was "visibly surprised" at the question about his membership in a group and that the FBI was aware of his fundamentalist beliefs. Moussaoui repeated he was in the United States to enjoy using a simulator for a big plane. According to Henry's 26-page EC, Moussaoui then requested an immigration lawyer, and the questioning was therefore halted.

D. Expedited deportation order

After the INS arrested Moussaoui on August 16, it initiated the process for deporting him. Because he had entered the country under the terms of the Visa Waiver Program, he was subject to the "expedited removal" process. As a condition of entering the United States under this program, Moussaoui waived any right to contest the deportation. For this reason, the deportation process consisted of paperwork prepared by an INS official, with no hearing before an immigration judge.

The deportation order for Moussaoui was signed on August 17, 2001. Henry told the OIG that he had been informed by the INS agent who had conducted the interviews with him that persons who had entered the country under the Visa Waiver Program and overstayed were not entitled to an appeal and would therefore be deported very quickly. Henry's supervisor, Gary, said that he also had been told by INS officials that Moussaoui could only be held for seven to ten days before he would be deported. As a result, the Minneapolis FBI believed that Moussaoui's deportation was imminent.

E. Discussion regarding search warrant

1. Henry's 26-page EC

After Moussaoui's arrest, Henry prepared a 26-page EC that provided a lengthy description of the facts of the case. The EC set forth the information obtained from the flight school, the information from the two interviews of Moussaoui and the two interviews of Al-Attas, and the information obtained from the items in Moussaoui and Al-Attas' possession when they were arrested.

The EC, which was uploaded into ACS on August 20, included some of Henry's assessments of Moussaoui's and Al-Attas' behavior. It described Moussaoui as "extremely evasive" and extremely agitated" when asked about his religious beliefs, overseas travel and associates, and the source of his financial support. Henry also wrote that believed, based on Moussaoui's demeanor, Moussaoui was being deceptive when he denied any weapons training. Henry also wrote that Al-Attas was being "deceptive in trying to minimize both his understanding of and involvement in whatever Moussaoui was planning to do."

Henry concluded the EC by stating, "Minneapolis believes that Moussaoui is an Islamic extremist preparing for some future act in furtherance of radical fundamentalist goals." In support of this conclusion, Henry wrote:

> The numerous inconsistencies in his story, his two month long trip to Pakistan which ended less than three weeks before his coming to the U.S., and his inability to explain his source of financial support all give cause to believe he is conspiring to commit a terrorist act, especially when this information is combined with his extremist views as described by Al-Attas in his sworn statement.
>
> As Moussaoui was in the process of gathering the most knowledge and skill possible in order to learn to fly the Boeing 747-400, Minneapolis believes that his plan involved an aircraft of this type. This is especially compelling when considering that the 400 series of this aircraft has a smaller flight crew and is more automated than other versions, lending itself to simpler operation by relative novices. His request of Pan Am that he be

> permitted to fly a simulated flight from London's Heathrow Airport to New York's JFK Airport is suggestive and gives Minneapolis reason to believe that he may have been attempting to simulate a flight under the conditions which he would operate while putting his plan into motion in the future.

Henry wrote that the Minneapolis FBI believed "Moussaoui, Al-Attas and others yet unknown [were] conspiring to commit violations of [federal anti-terrorism statutes]." Quoting from one of the statutes, Henry wrote that Moussaoui and Al-Attas were "attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States." See 18 U.S.C. § 2332b. In addition, Henry wrote that the Minneapolis FBI believed Moussaoui was engaging in flight training for the purpose of conspiring to use an airplane in the commission of a terrorist act. In support of this, Henry noted Moussaoui's possession of knives and his preparation through physical training for violent confrontation. Henry wrote that Moussaoui's "plan is believed to involve the performance of violence or incapacitation of individuals on aircraft." The EC further stated that Minneapolis considered the matter to be urgent.

At the conclusion of the EC, Henry wrote, "Minneapolis believes that the preponderance of information to be gained from future investigation will concern the specific criminal acts set forth above. However, as there is reason to believe that Moussaoui and Al-Attas are part of a larger international radical fundamentalist group, [the intelligence investigation] will remain open and a [criminal investigation] will be opened."

Through the EC, Henry also sent out several leads, including leads to FBI Headquarters, the Paris and London Legats, and the Oklahoma City Field Office. In the leads to the London and Paris Legats, Henry requested that they provide the EC to the British and French governments and report to Minneapolis any information developed on Moussaoui or any of his associates "yet unknown." The lead to the Oklahoma City FBI asked it to fully identify all of the individuals from that area who had surfaced in the investigation, including a request to further investigate Al-Attas.

With respect to the lead to FBI Headquarters, Henry requested that FBI Headquarters "expeditiously" obtain permission from OIPR for the Minneapolis FBI to contact the Minneapolis USAO to discuss the merits of

prosecution; to seek a criminal search warrant for Moussaoui's belongings, residences, and vehicles; and to obtain subpoenas for his telephone and financial records.[105]

Henry also sent an e-mail to the SSA who we call Jack in FBI Headquarters on Sunday, August 19, providing an update on the case.

Henry wrote that both Moussaoui and Al-Attas were in custody on INS violations. Henry reported that the Minneapolis FBI was planning to open a criminal investigation on Moussaoui and was seeking permission to contact the USAO. Henry explained his desire to obtain a criminal search warrant to search Moussaoui's possessions from the hotel room, including his laptop computer, cellular telephone, and other documentary material, and also Moussaoui's property in his residence in Norman, Oklahoma.[106] Henry wrote that he thought that a search of Moussaoui's things could "reveal detailed information regarding his plans and associates worldwide. He's obviously well-funded and highly motivated."

Henry also e-mailed the 26-page EC to Jack the next day, Monday, August 20. In the e-mail accompanying the EC, Henry again requested that FBI Headquarters obtain permission to allow Minneapolis to contact the Minneapolis USAO for a search warrant "as soon as possible." In the e-mail, Henry reported that Al-Attas was being released on bail and was returning to Oklahoma, where he could potentially "destroy incriminating evidence." Henry concluded the e-mail by writing, "[p]lease let me know as soon as [the Department] gives the go-ahead. We're all counting on you!"[107]

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[105] As discussed in Chapter Two, the 1995 Procedures provided that when an intelligence investigation was open and no FISA techniques had yet been employed, an FBI field office had to obtain permission through FBI Headquarters from the Criminal Division, not from OIPR, to contact the local USAO.

[106] According to Henry, the Minneapolis FBI was aware of the requirement that to open a criminal investigation Minneapolis had to establish a "wall" between the criminal investigation and the intelligence investigation. He said that the Minneapolis FBI had planned for Henry to remain the agent for the intelligence investigation and for a different agent to handle the criminal investigation.

[107] In addition, in an e-mail dated August 21 to FBI Headquarters, Gary, and another Minneapolis FBI agent, Henry wrote, "It's imperative that the [United States Secret Service] (continued)

2. Assignment of Moussaoui investigation at FBI Headquarters

According to Jack, he reviewed Henry's EC on August 20 and noticed that Hizbollah was not mentioned. This indicated to Jack that the case did not belong in his unit. Rather, because of the lack of information about any particular terrorist group and the extremist view described to Moussaoui in the EC, Jack believed that the case belonged in the ITOS' Radical Fundamentalist Unit (RFU). Cases that could not be linked to a specific group or substantive unit and involved radical extremist allegations are assigned to the RFU.

That same day Jack discussed the EC with his Unit Chief, who instructed him to give the matter to the RFU and walk the EC over to that unit. Jack therefore gave the 26-page EC to the RFU Unit Chief who we call "Don."[108] Don told the OIG that at the time there were four SSAs in the RFU. Don assigned the matter to one of them, an SSA who we call "Martin," based on the availability and workload of the staff at the time. An IOS assigned to work with Martin, who we call "Robin," also was assigned to the Moussaoui case. Henry was informed that the investigation had been reassigned to Martin in the RFU.

Martin had joined the FBI in 1988 as a special agent and spent his first three and a half years conducting bank fraud and embezzlement investigations

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be apprised of this threat potential indicated by the evidence contained in the EC. If [Moussaoui] seizes an aircraft flying from Heathrow to NYC, it will have the fuel on board to reach DC." Henry told the OIG that he believed that the Secret Service, in its role of protecting the President, needed to be advised of Moussaoui because he posed a threat to the White House. Henry knew that Moussaoui had received training to fly a 747-400 and if Moussaoui hijacked an airplane and flew from Heathrow to New York, the airplane would have enough fuel to be diverted to Washington. According to Henry, he never got a response to this e-mail.

[108] As discussed in Chapter Three, Don had been the Unit Chief of the RFU since May 2001. He became an FBI agent in 1987 and spent eight years in the Newark Division. Between 1990 and 1995, he worked international terrorism matters on the Newark counterterrorism squad. In 1995, he was promoted to an SSA position in a unit other than the RFU in ITOS in FBI Headquarters. In 1998, he became the supervisor of a counterterrorism squad in the Miami Division and remained there until his promotion to the Unit Chief of RFU in 2001.

in Colorado. In February 1992, he entered a language program at the Defense Language Institute in Monterey, California, to study Arabic for more than two years. After completing the language course, in September 1994 he became an agent on the counterterrorism squad of the Washington Field Office, where he worked exclusively on international terrorism matters, including the bombing of the Khobar Towers in Saudi Arabia in 1996. In November 1999, Martin was promoted to be a Supervisory Special Agent in the RFU.

IOS Robin began working for the FBI in 1976 in a clerical position. In 1980, she was promoted to a paralegal specialist position, where she handled Freedom of Information Act requests. In 1993, she was promoted to the IOS position and assigned to a substantive unit in ITOS. In approximately 1994, the RFU was formed, and Robin was assigned to that newly created unit. In 2001, Robin had responsibility for terrorism matters with a connection to two African countries.

3. Prior relationship between the Minneapolis FBI and RFU

The Moussaoui matter was not the first time that the Minneapolis FBI and the RFU worked together. Unfortunately, the earlier matters resulted in disputes and significant friction between the two offices. We believe this past history, which we discuss briefly here, affected how the two offices interacted on the Moussaoui case.

Several FBI employees told the OIG that the Minneapolis FBI's counterterrorism squad had conflicts with the RFU that preceded Martin and continued after Martin came to the RFU. The RFU Unit Chief who preceded Don, who we call "Dan," told the OIG that the SSA who had been the supervisor of the Minneapolis counterterrorism squad until the first week of August 2001 – who we call "Charles," had conflicts with the RFU SSA who had preceded Martin and that Dan had helped Charles in dealing with those conflicts. Dan added that the Minneapolis FBI counterterrorism squad had a reputation for saying "the sky is falling."

By contrast, Charles told the OIG that the RFU "raised the bar" for what was needed for the Minneapolis FBI to accomplish what it wanted. For example, Charles said that Martin had not supported the Minneapolis FBI's recommendation that the FBI seek the designation of a particular organization as a terrorist organization by the State Department. Charles said that Martin

had forwarded to Don an e-mail exchange between Charles and Martin that arose out of this conflict, and that Don e-mailed Charles to say that he wanted to discuss the problem. Charles said he spoke to Don about a week after the e-mail and that Don told him that he did not have a full complement of SSAs in the unit and that Charles had to deal with the personnel that were in the unit.

Charles also told the OIG that Martin treated Henry like he was a new employee. Charles said that, while Henry only had two years of FBI experience, he had a significant intelligence background based on his work with the Navy. According to Charles, Martin had "a track history of not giving [Henry] much respect."

Don told the OIG that soon after his arrival as unit chief in June 2001, he had a telephone conversation with Charles about the prior conflicts between the Minneapolis FBI and the RFU, including conflicts with the SSA who preceded Martin, the former unit chief, and Martin. Don stated that Charles told him that there had been "personality conflicts" and that he did not believe that the RFU had supported the Minneapolis FBI sufficiently. In particular, Don said Charles discussed Martin's lack of support for Minneapolis' recommendation that the FBI attempt to have a particular organization designated as a foreign terrorist organization by the State Department. Don told the OIG that he advised Charles that he wanted the disputes between the two offices to end and that if Charles had a problem with the RFU, he should address it with Don.

Martin told the OIG that he was aware that there had been prior conflicts between Minneapolis and others in the RFU. He said that his understanding was that Minneapolis had made some errors in their handling of matters with other SSAs, such as initiating electronic surveillance before the FISA order had actually been signed. Martin stated that his problems in his dealings with the Minneapolis office began when the conflict with Charles arose over the designation of an organization as a terrorist organization by the State Department. Martin told the OIG that he did not believe that it was appropriate to pursue the designation, based on information that he had obtained from the FBI's IOS who had responsibility for the particular organization for the FBI and from the CIA program manager who handled the particular organization for the CIA. Martin said that Charles believed that Martin was attempting to undermine his efforts. Martin believed that Charles also had "tak[en] offense" when he pointed out mistakes that were made by Minneapolis, such as failing to "minimize" a conversation recorded pursuant to a FISA warrant.

Henry told the OIG that he was "unhappy" that the Moussaoui matter had been assigned to Martin because of how matters "had gone in the past." Henry said that Martin acted with an "abundance of caution" and cited examples in which he believed that Martin had not acted aggressively enough. For example, Henry said that Martin refused to allow Minneapolis to pursue a criminal investigation in an intelligence investigation in which electronic surveillance under FISA was being conducted. According to Henry, without the criminal part of the case, the intelligence case could not proceed, and Minneapolis wanted to continue both the criminal investigative activity and the electronic surveillance. Henry told the OIG that Martin would not allow it. According to Henry, Minneapolis was forced to close its investigation, and another field office later picked up the criminal case.

With respect to the specific case cited by Henry, Martin stated that during the FISA renewal process he informed OIPR and the FISA Court of the criminal direction the case was taking. According to Martin, the Court did not have a problem with the case at that point. However, OIPR requested a meeting with ITOS Section Chief Martin Rolince to discuss whether there was a "primary purpose" problem, and they collectively decided to shut down the FISA surveillance. This was conveyed to the Minneapolis FBI, which in turn discontinued surveillance on the target. Martin told the OIG that at no time did he instruct Minneapolis that the criminal case could not be pursued.

Robin told the OIG that she believed that part of the problem between Martin and the Minneapolis FBI was a difference in style. According to Robin, Minneapolis, and field offices in general, usually wanted things done immediately. She said, however, that Martin was very "laid back" and that "he doesn't get all riled up and stirred up about things. He just – he's not a spin-through-the-roof kind of guy. But he gets everything done and it's not that he doesn't do them timely. He just doesn't get excited about stuff."

Former RFU Unit Chief Dan also described the differences between the Minneapolis FBI and Martin as a "clash of personalities." He described Martin as "low key" but "professional," and said that Charles was "more animated." Another IOS in the RFU who worked with the Minneapolis agents and Martin also described the problems as a "personality conflict." He described Martin as "methodical" and said that he had an "even keel" approach. He described the Minneapolis agents as "aggressive" and said that with every request to FBI

Headquarters, their approach was "if this doesn't happen, the world is going to end."

4. Gary seeks advice from ASAC Charles

Gary told the OIG that on August 21 he called ASAC Charles, who was in training at Quantico, for guidance on how to proceed, and that Charles told him that he should seek a criminal warrant. Charles said that he gave Gary this advice since he did not believe the Minneapolis FBI would be able to get a FISA warrant, not because of the facts in the Moussaoui case but because of his past experience with the difficulty and significant delays in obtaining FISA warrants. Charles stated that, in his experience, OIPR only wanted "slam dunks."

Charles told the OIG that, as part of the training he was attending at Quantico at the time, Deputy Attorney General Larry Thompson had just recently presented at the training conference a memorandum on the issue of intelligence sharing dated August 6 and addressed to the Criminal Division, the FBI, and OIPR. As discussed in Chapter Two, this memorandum reiterated the requirement of the 1995 Procedures that the Criminal Division be notified when there was a "reasonable indication" of a "significant federal crime" and that this notification was "mandatory."[109] The memorandum also stated that

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[109] As discussed in Chapter Two, the report of the OIG's Campaign Finance Report and the report of the Attorney General's Review Team investigating the Wen Ho Lee matter concluded that the FBI was not complying with the notification requirement primarily because of a fear that any contact with the Criminal Division would negatively affect an existing FISA order or the FBI's ability to obtain one in the future. In January 2000, Attorney General Reno established the "Core Group," which consisted of the FBI's Assistant Directors for counterterrorism and counterintelligence, the Principal Deputy Attorney General, and the Counsel for OIPR. The FBI Assistant Directors were supposed to provide "critical case briefings" to the Core Group, and they were to decide if the facts of the case warranted notification to the Criminal Division as provided for in the 1995 Procedures. The Core Group was disbanded in October 2000 and reconstituted in April 2001, but the problem of lack of notification to the Criminal Division remained. In July 2001, the GAO issued its report recommending, among other things, that the Attorney General establish a policy and guidance clarifying the expectations regarding the FBI's notification of the Criminal Division about potential criminal violations arising in intelligence investigations.

the standard for reasonable indication was "substantially lower" than probable cause, but that it required more than "a mere hunch." Charles told the OIG that he explained the new guidelines to Gary and recommended that he bring them to the attention of FBI Headquarters. Charles told the OIG he believed that by doing this, FBI Headquarters would be forced to contact the Criminal Division, and that once this occurred, the Criminal Division would on its own direct the Minneapolis FBI to contact the USAO about a search warrant. Gary told the OIG that Charles faxed the memorandum to him and that he discussed notifying the Criminal Division about Moussaoui with Martin on August 22, which we discuss below in Section F.

Gary also said that Charles told him that if he had any problems in dealing with Martin that he should ask Acting SAC Roy to "go up the chain of command" in FBI Headquarters, and Charles provided Gary with the names of upper management, including Assistant Section Chief Steve Jennings, Section Chief Rolince, and Deputy Assistant Director James Caruso. According to Gary, Charles suggested that Gary pass these names to Roy because Charles did not believe that Roy knew who they were. Gary told the OIG that he provided these names to Roy.

Charles also recommended that the Minneapolis FBI contact an FBI employee detailed to the CIA, who we call "Craig," to request any information that the CIA had on Moussaoui.

5. Henry discusses with Don pursuing criminal warrant

According to Henry, on approximately August 21, he called RFU Unit Chief Don to discuss pursuing a criminal investigation of Moussaoui. Henry told the OIG that Gary had already filled out the paperwork for opening a criminal terrorism investigation, and Henry was calling Don to let him know that the paperwork would soon be submitted to FBI Headquarters.

Henry told the OIG that Don instructed him that he could not pursue the criminal investigation. Henry stated that Don said to him, "You will not open it, you will not open a criminal case." Henry stated that Don asserted that if the Minneapolis FBI attempted some kind of criminal process from the USAO, such as a search warrant, and failed, it would not thereafter be able to pursue a FISA warrant. According to Henry, Don also asserted that probable cause for a criminal search warrant was "shaky."

Although Henry believed there was probable cause for a criminal warrant, he said that as an entry-level agent he was not in a position to argue with Don, a unit chief at FBI Headquarters, who was in a better position to judge how the FISA Court would respond to a FISA request that followed a failed attempt to obtain a criminal search warrant. Henry said that although his supervisor, Gary, had previously prepared paperwork for opening the criminal investigation, Henry wrote, "Not opened per instructions of [Unit Chief Don]" on it after this conversation with Don.

Don's recollection of the conversation with Henry about pursuing a criminal investigation of Moussaoui differed from Henry's. Don told the OIG that his recollection was that he talked to the Acting Minneapolis ASAC, Charles, and that he did not speak to Henry. Charles told the OIG, however, that he did not speak to Don before September 11. We believe that Don likely spoke to Henry, not Charles.

Don told the OIG that, based on his knowledge of the case, he did not believe there was criminal predication for a criminal search warrant. Don stated that, in his opinion, Minneapolis had a "belief" that there was the potential for a criminal charge of conspiracy to hijack, but this was not supported by sufficient evidence. Don also asserted that since Moussaoui had been arrested and detained on immigration charges, he could not be involved in a crime that was about to be committed.

According to Don, he voiced his opinion to the Minneapolis FBI about the lack of criminal predication and advised that if obtaining the criminal warrant failed, the FBI would not be able to pursue the FISA warrant. Don told the OIG he expressed in the conversation that he did not want Minneapolis to follow the criminal road prematurely. However, Don asserted that at no time did he tell the Minneapolis FBI that it could not pursue the matter criminally.

Don also stated to the OIG that he advised the Minneapolis FBI to consult with the Minneapolis CDC about whether probable cause for a criminal search warrant was present. According to Don, he stated, "You guys need to go back to your CDC, you need to discuss it with your CDC, and get back to me and tell me your position." Don told the OIG that, in his opinion, giving this kind of advice – whether there was criminal probable cause – was the role

of the CDC. He said he wanted the Minneapolis CDC to weigh in before the Minneapolis FBI made its decision about which way to proceed.

Henry confirmed to the OIG that Don advised him that he should consult with his CDC on the matter. After his conversation with Don, Henry met with Rowley to discuss whether Minneapolis should pursue the criminal investigation.

Martin told the OIG that his understanding was that Don explained to the Minneapolis FBI the problems that could arise when a criminal investigation is pursued at the same time that a FISA warrant has been issued or is being sought. Martin said he thought that Don had told the Minneapolis FBI, "You guys need to be careful. You need to run it through your division counsel if you want to do a criminal investigation on this guy, because if you do that and you get turned down by a magistrate or even if you try to get the okay from a U.S. Attorney's Office, we have to document that in our request to the FISA court, and we risk making it look like to the judge that we really want to get a criminal case, want to prosecute the guy but we didn't have enough probable cause to get a criminal search warrant." Martin told the OIG that it was his understanding that Minneapolis "listened to [Don] and agreed."

6. CDC Rowley's recommendation

According to Rowley, Henry came to her office some time after his conversation with FBI Headquarters and conferred with her about whether to seek a criminal search warrant in the Moussaoui case. Rowley said this occurred on or about August 22. Rowley told the OIG that, until this point, she had not been actively involved in the Moussaoui investigation, although she had had a brief discussion with Gary on the night of Moussaoui's arrest.

As discussed above, Rowley was the CDC for the Minneapolis FBI. She had graduated from law school in May 1980 and joined the FBI as a special agent in January 1981. After working in several FBI offices on, among other cases, white-collar crime, drug investigations, and applicant background investigations, Rowley transferred to the Minneapolis FBI office in July 1990. Rowley said that as the CDC for the Minneapolis FBI, she spent very little of her time on intelligence matters. She stated that she had attended FBI training on counterterrorism issues, including FISA, but that she usually was not involved in the FISA process. She said that agents typically dealt with FBI

Headquarters on these matters and that she had only reviewed a couple of FISA requests.

Rowley told the OIG that when Henry came to her office around August 22, he asked her what she thought about the FISA issue in the Moussaoui case. He related that he had spoken to either Martin or Don (Rowley did not recall which one), who had suggested that the Minneapolis FBI would have a better chance of obtaining a warrant if it sought a FISA as opposed to a criminal search warrant. She said she thought Henry may have mentioned something about the "smell test." She said that, after discussing the matter with Henry, like the RFU she recommended going the FISA route because of the "smell test." Rowley explained that she knew that if a FISA warrant was sought after an unsuccessful attempt to obtain a criminal warrant, it would give the appearance – or "smell" – that the true purpose for seeking the FISA was for criminal prosecution and the FISA warrant would be denied. According to Rowley, Henry's position was that the Minneapolis FBI should proceed with the criminal search warrant and not worry about the smell test. Rowley, however, stated that the smell test was a reality and advised that it had to be factored into the decision.

Additionally, Rowley said that while she thought that there was probable cause for a criminal search warrant, she also believed that the USAO in Minneapolis required a higher standard than probable cause to seek a search warrant.[110] Because of the smell test and concerns whether the USAO would

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[110] In her May 21, 2002, letter to the FBI Director, Rowley stated that she had advised Henry to seek the FISA warrant instead of the criminal warrant because the Minneapolis USAO "regularly requir[ed] much more than probable cause" and "requir[ed] an excessively high standard of probable cause." In the letter, Rowley gave as an example of this the Minneapolis FBI's investigation of mailbox pipe bombings during which, she wrote, an AUSA declined permission to seek a search warrant despite "significant evidence" supporting the search warrant. We interviewed several attorneys in the Minneapolis USAO, including the United States Attorney, Thomas Heffelfinger. All the attorneys denied that the Minneapolis USAO required more than probable cause before seeking search warrants. They also stated that in cases in which the USAO determined that there was insufficient evidence to support a search warrant, their practice was to specify the FBI's options, including what additional information was needed to support probable cause. With respect to the mailbox pipe bombings case, Heffelfinger acknowledged that there had been a disagreement between the USAO and the FBI over whether sufficient evidence existed to (continued)

agree to a criminal search warrant, Rowley said that she recommended the avenue with the best chance of success, which she believed was seeking a FISA warrant instead of a criminal warrant.

Rowley told the OIG that at the time of her discussion with Henry she had not discussed the Moussaoui matter with any attorneys in the National Security Law Unit (NSLU) or anyone else in FBI Headquarters.[111] She also said that she had not reviewed the FISA statute or any other training materials about FISA warrants. She said her advice was based on her knowledge of the problems with the smell test, the problems with the Minneapolis USAO, and "optimizing" the chances of getting a warrant by pursuing the FISA process first.

Henry confirmed to us that Rowley recommended that pursuing the FISA warrant would be the safest route. When we asked Rowley about the nature of the discussion that she had with Henry about seeking the criminal warrant, Rowley told the OIG that she was "helping make his decision." When we asked Rowley whose decision it was to not seek the criminal warrant – the field office or Headquarters – she stated:

> I thought it was kind of, I don't know, kind of a joint thing. I thought Headquarters, somebody at Headquarters had also recommended we try FISA first, too. But I think maybe ultimately it was [Henry]'s decision to try FISA first or our field division's.

F. The FISA request

As a result, the Minneapolis FBI began seeking a FISA warrant, instead of a criminal warrant, to search Moussaoui's belongings that were being held by the INS.

(continued)
obtain a search warrant, but he stated that the FBI declined to pursue the additional investigative steps suggested by the USAO.

[111] Rowley's only contact with anyone at FBI Headquarters about the Moussaoui matter was in a brief e-mail exchange with an NSLU attorney, which we discuss in Section F, 4, d below.

1. Minneapolis seeks to expedite the FISA process

When Gary first discussed seeking a FISA search warrant for Moussaoui's belongings with Martin on August 22, Gary indicated that Minneapolis wanted to expedite the process. As noted above, Gary told the OIG that the Minneapolis FBI had been informed by INS officials that the INS could only hold Moussaoui for seven to ten days before deporting him. Gary said that he was aware that FISA requests normally took a long time and that the Minneapolis FBI was concerned about expediting the process to ensure that the FISA warrant was obtained and executed before Moussaoui's deportation. Gary said that he explained to Martin that the INS said it could only hold Moussaoui for seven to ten days.

Martin told the OIG that he recalled that the Minneapolis FBI was very concerned about obtaining the FISA warrant quickly before the INS deported Moussaoui. Martin said he explained to Gary that a way to expedite the process would be to seek an emergency FISA. He also explained the process at FBI Headquarters for obtaining an emergency FISA, including the requirement for ITOS Section Chief approval.[112]

Gary and Henry began preparing a FISA request while they continued the investigation of Moussaoui.

2. The RFU's assessment of the Minneapolis FBI's FISA request

At FBI Headquarters, Martin and Robin began looking into the merits of the Minneapolis FBI's FISA request, based on the information about Moussaoui that the Minneapolis FBI had provided, primarily in the 26-page EC Henry had sent to FBI Headquarters about the Moussaoui investigation.

Martin told the OIG that his reaction upon reading the 26-page EC with respect to obtaining a FISA warrant was that while he believed Moussaoui was "a dirty bird" and was probably "up to something," there was no evidence

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[112] As discussed in Chapter Two, although the term "emergency FISA" was used, it referred to obtaining an expedited FISA warrant and not the statutory emergency FISA that involves a warrantless search approved by the Attorney General without prior approval of the FISA Court.

linking Moussaoui to a foreign power of any kind. Martin said that based upon what was in the EC, his opinion was that "there was no way" that a FISA warrant could be obtained because of the lack of evidence linking Moussaoui to a foreign power.

Robin told the OIG that Martin informed her that Minneapolis was seeking a FISA search warrant and Martin provided her with a copy of the 26-page EC to read. She said that after reading the EC, she also believed that Moussaoui was "up to something." However, she said that after reading the EC she asked Martin, "Where's the foreign power?" In her view there was no evidence of a terrorist organization's involvement with Moussaoui. According to Robin, Martin agreed with her assessment that the FISA request lacked a connection to a foreign power.

3. Additional information related to Moussaoui

The Minneapolis FBI continued to collect additional information about persons associated with Al-Attas in connection with the posting of his bond for release from the INS detention facility. In an EC written by Henry and dated August 22, the Minneapolis FBI reported to FBI Headquarters that Al-Attas had been bonded out of custody on August 20. While he was still in custody, he made 13 calls to a telephone number registered to a man who had been identified in an earlier interview by Al-Attas as the imam – or leader, spokesman, and advisor – of the mosque attended by Al-Attas in Norman, Oklahoma. We will call this person "Ahmed." Al-Attas told the Minneapolis agents that he had called Ahmed to request assistance in raising bond money.

The Minneapolis FBI conducted name checks for Ahmed in FBI databases and learned that a person with the same name was the suspect in several bank robbery investigations in Memphis, Tennessee, but that he had not been in contact with the FBI since 1999. The Minneapolis FBI sought to determine if the Ahmed who talked to Al-Attas was the same person as the bank robbery suspect. The Oklahoma City Field Office informed the Minneapolis FBI on September 6 that it had determined that the Ahmed who was the assistant iman of the Norman mosque was not the same Ahmed who was the bank robbery suspect in Memphis.

The Minneapolis FBI also determined that two other men were involved in attempting to post Al-Attas' bond. The first was a man who we will call

"James Smith," who had gone to the INS offices in Oklahoma City to inquire about Al-Attas' bond. Smith was the imam of a local mosque. The Minneapolis FBI reported that he was the subject of an Oklahoma intelligence investigation, but it did not state the date, status, or findings of the investigation on Smith.[113]

In addition to Smith, the Minneapolis FBI learned that an individual, who we call "Mohammed Mohald," had gone to the INS District Office near Minneapolis and paid Al-Attas' bond on August 20.[114] According to documents prepared in the case, Mohald had reported to INS officials that he was and had been Al-Attas' roommate for some time, and that he knew Attas' traveling companion – whom he called "Shaqir" – because they attended the same mosque in Norman, Oklahoma, where they all lived. Mohald advised that he had been a Muslim since 1970 and had traveled to a Middle Eastern country in the late 1980s as part of a missionary group.[115] The EC stated that a search in ACS revealed that Mohald had an extensive criminal history and was the subject of a New York criminal terrorism-related investigation. The EC did not state the date, status, or findings of the investigation.

In the EC, Henry reported suspicions about Mohald and stated that he believed that Mohald was involved in Moussaoui's plan to commit a terrorist act along with Al-Attas. Henry's suspicions were based on inconsistencies such as Mohald stating that he was Al-Attas' roommate, when the Minneapolis FBI had confirmed that Al-Attas had been living for approximately one month with Moussaoui and someone else at an address other than the one provided by

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[113] The Oklahoma City Field Office reported in an EC dated August 24 that Al-Attas had spoken not only to Smith but also to an individual who we will call "Nabu Khalid," who was the assistant imam to Smith. The Oklahoma City FBI reported that Smith and Khalid were the subjects of preliminary inquiries for their suspected involvement in a terrorist cell. This terrorist cell was not linked to Al Qaeda.

[114] This individual was American-born but had adopted a Muslim name.

[115] This particular missionary group is a worldwide Islamic missionary organization which was founded several decades ago. As discussed below, some members of this missionary group used the organization as a means and as a cover to recruit individuals to conduct acts of terrorism and to send them to Middle Eastern countries under the guise of "religious training."

Mohald. In addition, while Mohald admitted to traveling to a Middle Eastern country in the late 1980s, ACS records showed that he was issued a visa for that country in April 1990 under his American name, which suggested that Mohald withheld information from the FBI about later trips to this Middle Eastern country. Henry also found Mohald's explanation that he had flown to Minneapolis to post Al-Attas' bond so that Al-Attas could return to teach children at the mosque in Oklahoma to be "farfetched."[116]

Around the same time, Henry sent an e-mail to other FBI agents involved in the investigation asking whether he should consider getting assistance from an FBI psychological profiler. He wrote, "They probably have a psych profile for an Islamic Martyr and could tell us if our 747 guys fit." According to Henry, he contacted an FBI field profiler in Tampa, Florida, whom Henry had met at a training session. Henry told the OIG that he contacted this agent because he knew him and because this agent was an experienced international terrorism investigator.

Henry told us that this agent provided good re-interview techniques and highlighted potential issues based on the information Henry gave him. For example, the agent called attention to the fact that while Al-Attas was in jail, "the one call [Al-Attas] made was back to the mosque" and not to any family member. Henry said that while Al-Attas' parents lived in Saudi Arabia, Al-Attas had at least one cousin and possibly two in the United States but did not call these relatives.

4. Consultations with NSLU attorney Howard

Also on August 22, at FBI Headquarters SSAs Jack and Martin each independently consulted with an NSLU attorney who we call "Howard" about the Moussaoui matter. Martin also consulted with three other NSLU attorneys. We summarize first the role of NSLU attorneys, specifically with respect to FISA requests, before discussing the consultations between Jack and Howard, and between Martin and Howard.

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[116] Henry provided the names of Ahmed, Smith, and Mohald and their available identifying information to the CIA for checks against CIA records. The CIA did not report any information about these individuals to the FBI.

a. Role of NSLU attorneys

The NSLU is part of the FBI's Office of General Counsel in FBI Headquarters. The NSLU provided advice to FBI Headquarters and field offices on counterterrorism and counterintelligence matters. At the time of the Moussaoui case, two NSLU attorneys – who we call "Susan" and "Tim" – were assigned to work with ITOS substantive units. Other NSLU attorneys, including Howard, were consulted by ITOS employees when Susan and Tim were not available.[117] Marion "Spike" Bowman was the FBI's Deputy General Counsel for National Security Affairs and the head of the NSLU.

As discussed in Chapter Two, attorneys in the NSLU described their role as giving legal advice to their "client," the substantive unit in ITOS that was seeking the advice, but they said it was up to the substantive unit to decide how to proceed. NSLU attorneys spent a large amount of time handling questions related to FISA, including requests for warrants, execution of FISA orders, and dissemination of the information collected pursuant to FISA.

NSLU attorneys usually were consulted when a question arose whether there was sufficient information to support the FISA request. However, NSLU attorneys were not "assigned" to work on a particular FISA request or to work with specific SSAs. The consultations with NSLU attorneys typically consisted of oral briefings by the SSA and the IOS who were handling the particular FISA request. In connection with these consultations, NSLU attorneys did not normally receive and review the documents prepared by the field office or initial drafts of the LHM prepared by the SSA and IOS. Tim told the OIG that SSAs would sometimes come back to the NSLU attorney with documents to read after an oral briefing when the SSA "was really serious about something."

After questioning the SSA and IOS, and based on the information provided by the SSA and the IOS, the NSLU attorney typically would provide verbal guidance about what was needed to support the FISA request. Howard told the OIG that his role was "steering [the FBI] through the land mines and

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[117] Howard told the OIG that he primarily worked counterintelligence matters but also handled counterterrorism matters as needed. According to Howard, it was not uncommon for him to be consulted when Tim and Susan were unavailable.

helping them enhance their cases." Field offices did not normally participate in these consultations with the NSLU attorneys.

Both NSLU attorneys and SSAs described the volume of their work as overwhelming. Tim stressed that the NSLU attorneys relied on the SSAs and IOSs for their substantive knowledge about the available intelligence on the FBI's targets and terrorist organizations, and that given limited staffing NLSU attorneys normally were unable to conduct independent research on the substantive issues.

b. Jack's consultation with Howard

As noted above, the Minneapolis FBI's first contact with FBI Headquarters was with SSA Jack. On August 21, Jack made an appointment with NSLU attorney Howard to discuss the Moussaoui matter the following morning. Jack said that even though the case was in the process of being reassigned to Martin in the RFU, Jack kept his appointment with Howard because he was "curious" and wanted to discuss the Minneapolis FBI's options for obtaining authority to search Moussaoui's laptop and other belongings.

During the meeting on August 22, Jack orally briefed Howard on the facts, as reported in Henry's EC. Jack did not provide Howard with a copy of the EC. According to Howard's notes from the meeting, they discussed whether there was sufficient information to obtain either a criminal search warrant or a FISA search warrant. With respect to the FISA warrant, Howard told the OIG that he advised Jack that he did not believe that there was sufficient information to obtain a FISA warrant, primarily because Minneapolis lacked the necessary information to articulate a foreign power. Howard's notes indicate that he advised Jack that obtaining the FISA warrant also would be difficult because Moussaoui was already in custody. Howard told the OIG that at the time, OIPR viewed anyone in custody as a target of criminal investigation by the FBI, even if the person was being held on administrative charges, and therefore OIPR would question whether the FBI's "primary purpose" was to collect intelligence information.

With respect to approaching the USAO to obtain a criminal warrant, Howard's notes reflect that he did not believe that there was sufficient information to obtain a criminal search warrant. His notes state that he advised Jack that a decision needed to be made quickly and that if the Minneapolis FBI

decided to pursue the criminal case, then it would be difficult to later pursue the FISA warrant. Howard told the OIG, however, that whether to pursue the FISA warrant or the criminal warrant was a "judgment call" for Minneapolis to make and that he considered the matter to be a "work in progress."

Jack confirmed that he received this advice from Howard. He told the OIG that Howard advised him that he did not see evidence of a foreign power and that Howard concurred that there was no evidence of a criminal act. Jack told the OIG that he and Howard were "brainstorming" about the possible ways to proceed. Howard's notes indicate that he told Jack that it looked as if Minneapolis had several "good leads" and that Minneapolis needed to follow up on those leads.

c. Martin's meeting with Howard

As noted above, on August 20 the Moussaoui case was transferred from Joseph to the RFU and assigned to Martin and Robin. On approximately August 22, Martin and Robin consulted with Howard for legal advice on Minneapolis' chances for obtaining a FISA warrant.[118]

Martin said that when he began explaining to Howard the facts of the Moussaoui matter, Howard said that he was aware of the matter already because he had recently been consulted by Jack. According to Martin, Howard pulled out notes from his conversation with Jack and began reading them back to him and Robin.

Howard said he remembered having a "brief conversation" with Martin. Howard said that he recalled that he was on his way to a meeting and did not have time to discuss the issue in detail at that time. He said that he asked Martin if the Minneapolis FBI had followed up on specific items, and Martin indicated that he did not believe so. Howard reiterated the same advice to Martin as he told Jack – that he did not believe that there was sufficient evidence to tie Moussaoui to a foreign power and therefore a FISA warrant was not possible absent further investigation by Minneapolis.

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[118] Martin told the OIG that Tim and Susan, the two NSLU attorneys who usually worked on ITOS matters full time, must have been unavailable at the time.

Martin told the OIG that he recalled Howard advising him that there was not sufficient evidence to support a link to a foreign power. Like Jack, Martin did not provide Howard with a copy of the 26-page EC, although Martin had the document with him.

d. Howard's e-mail exchange with Rowley

After his meeting with Martin and Robin, Howard sent an e-mail dated August 22 to Minneapolis CDC Rowley. In the e-mail, he asked whether she had been asked for her "assessment of [Minneapolis'] chances of getting a [criminal] warrant" for Moussaoui's computer. Howard told the OIG that he did this because he wanted to make sure that the CDC was "engaged in the thought process." He stated that the decision on which type of warrant to seek was the field office's decision, and he wanted to make sure that the CDC was "part of the process."

In an e-mail response later the same day, Rowley wrote, "Although I think there's a decent chance of being able to get a judge to sign a criminal search warrant, our USAO seems to have an even higher standard much of the time, so rather than risk it, I advised that they should try the other route." Rowley told the OIG that in retrospect she wished that she had made it clear in her e-mail that she believed that, in fact, there was sufficient evidence to support probable cause for a criminal warrant.

Howard told the OIG that he recalled having the following reaction to Rowley's e-mail: "Good Lord, Coleen, we don't use FISA because we don't have probable cause for a criminal warrant. That plays right into the hands of those people who think FISA is subterfuge." Howard did not respond to the e-mail, nor did he and Rowley discuss the matter on the telephone.

5. French information about Moussaoui

Around the same time that Martin consulted with Howard, the Minneapolis FBI obtained additional information about Moussaoui from the French government. As noted above, because Moussaoui had entered the United States with a French passport, Henry had sent a lead to the FBI's Paris Legat to obtain any relevant information on Moussaoui from the French authorities. On August 22, the FBI's Paris Legat reported to the Minneapolis FBI and FBI Headquarters that the French government had reported that

Moussaoui was purportedly associated with a man who was born in France and died in 2000 in Chechnya fighting with "the Mujahideen." We call this person "Amnay."[119] The Legat's EC stated that while in Chechnya, Amnay worked for Emir Al-Khattab Ibn (Ibn Khattab), the leader of a group of Chechen rebels.[120] According to the EC, the French authorities, after Amnay's death, had interviewed a person who we call "Tufitri" who had known Amnay.[121] That person stated that Amnay was recruited to go to Chechnya by Moussaoui and that Moussaoui was "the dangerous one."

6. Martin advises Minneapolis FBI that French information is not sufficient to connect Moussaoui to a foreign power

After Martin received and reviewed the French information, he still did not believe there was sufficient information to identify a foreign power in the Minneapolis FISA request. Martin discussed the French information with Gary and stated that it provided little help to Minneapolis in connecting Moussaoui to a foreign power. Martin explained that Ibn Khattab and the Chechen rebel group he led were not an identified terrorist organization. Gary's notes of the conversation indicate that Martin explained that Minneapolis needed evidence linking Moussaoui to a "recognized" foreign power.

Martin told the OIG that by "recognized" he meant a foreign power that previously had been pled before the FISA Court. Martin told the OIG that he believed that the Chechen rebels had never previously been pled to the FISA

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[119] We do not use Amnay's real name because the FBI considers that information to be classified.

[120] As discussed in Chapter Three, after the collapse of the Soviet Union in 1991, Chechen separatists – both Islamic and non-Islamic – have sought independence for Chechnya from Russia. The Russian army has fought two guerilla wars in Chechnya to prevent its independence, resulting in tens of thousands of Chechens and Russians killed or wounded. In many Islamic countries, support for the Chechen cause is widespread. Ibn Khattab was a Jordanian-born Islamic extremist and leader of a large group of Chechen rebels that had many successes in clashes with Russian forces. He was killed in April 2002.

[121] We do not use Tufitri's real name because the FBI considers that information to be classified.

Court as a foreign power.[122] Rather, Martin described the situation in Chechnya as dissidents engaged in a "civil war." He acknowledged, however, that it may have been possible to develop the intelligence to support the position that Khattab's Chechen rebels were a terrorist group. But he said that he was not aware of any insurgency/rebel group ever being pled as a foreign power.[123]

In addition, Martin stated that even if the Intelligence Community had developed the intelligence that Khattab's Chechen rebels were a terrorist organization and could therefore constitute a foreign power under FISA, this could not be completed in a short time, which was what the FBI believed at the time was necessary in the Moussaoui case. Martin said he therefore advised the Minneapolis FBI that, to obtain a FISA warrant, it needed to develop information linking Moussaoui to a recognized or previously-pled, identifiable foreign power.[124]

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[122] We found that at the time FBI Headquarters was operating under a perception that OIPR was overly conservative in its approach to the FBI's FISA applications because OIPR's standard for probable cause was too high and because OIPR was not interested in pleading "new" foreign powers – foreign powers that had not previously been pled to the FISA Court. We discuss this perception of OIPR's conservatism and how it affected FBI Headquarters' handling of the Moussaoui investigation in the analysis section below.

[123] Martin suggested to the OIG that the reason that groups engaged in a civil war were not pled as terrorist organizations under FISA was because they were not "hostile" to the United States or working against U.S. interests. When asked whether it was a requirement under FISA for a terrorist organization to be hostile to U.S. interests to fulfill the foreign power requirement, Martin said that he did not know whether this was a legal requirement, but that he believed that it was assumed in the statute based on the terrorist organizations that had been pursued by the government.

[124] Martin told the OIG that at that time he had had only one other case in which he advised a field office that it was not going to be able to obtain a FISA warrant. He said that the field office wanted to pursue a FISA warrant targeted at an organization that it believed to be a terrorist organization that constituted a foreign power. As discussed above, a foreign power or an agent of a foreign power may be the target of a FISA warrant. Martin said that this potential target had never before been pled as a foreign power. He said that he consulted with an NSLU attorney, who informed him of the intelligence information that the field office would have to establish in order to successfully obtain a FISA warrant with the organization listed as a foreign power. Martin stated that he informed the field office of this (continued)

Robin also told the OIG that she did not believe that the French information was sufficient to connect Moussaoui to a foreign power. She said that she understood that the Chechen rebels had never been pled as a foreign power to the FISA Court and that the Intelligence Community had never developed sufficient intelligence that the conflict in Chechnya was more than a civil war. In one case she was familiar with, she understood that the FBI had previously attempted to obtain a FISA warrant using Khattab and the Chechen rebels as the foreign power but that it was "turned down" by OIPR.[125] She stated that "building a foreign power" was "not an overnight thing" and would have required months to collect the required intelligence information, as had been the case when one particular terrorist group was first put forth as a foreign power.

Gary told the OIG that during the conversation between him and Martin on August 22 about the French information, he raised with Martin the issue of the mandatory notification of the Criminal Division when there was a reasonable indication of a crime, as set forth in Deputy Attorney General Thompson's August 6 memorandum, which Charles had faxed to Gary. According to Gary, Martin said that he did not see any evidence of a federal felony, that the FISA route was easier, and that going the criminal route first would be relevant to whether they were able to obtain a FISA warrant. Gary's notes indicate that Martin stated, "Don't see federal crime." Gary told the OIG he deferred to Martin but faxed him a copy of the Thompson memorandum.

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advice, and the field office did not insist that the information it had was sufficient for a FISA warrant.

[125] Robin was mistaken about that FISA. The FISA request for that target was initially drafted by an FBI field office for a terrorist organization that was based in Northern Africa. The target was a well-known leader of a worldwide charitable organization that was known for providing financing to Muslim causes around the world, including but not limited to Ibn Khattab. The FISA request was given to an analyst in FBI Headquarters, who was asked to prepare the FISA request using a different foreign power than the terrorist organization based in Northern Africa. Several months later, after the field office developed information linking the target directly to a particular terrorist group leader, the analyst prepared a FISA request using his group as the foreign power.

Martin told the OIG that he did not remember a specific conversation with Gary about whether there was probable cause to obtain a search warrant. However, he said that he recalled a conversation in which he asked Gary, "What would the crime be?" Martin told the OIG he believed that the Minneapolis FBI did not have any evidence of a crime and only had "gut feelings."

7. Robin's research to link Moussaoui to recognized foreign power or terrorist organization

Robin conducted additional research on Moussaoui to try to bolster Moussaoui's connection to a recognized foreign power. Robin sought to find a direct link between Moussaoui or any of the other names or organizations that had surfaced in the investigation and foreign powers that she was aware had previously been pled to the FISA Court.

According to Robin, the Moussaoui FISA request was different from the typical FISA request because the Minneapolis FBI had not conducted a lengthy investigation on Moussaoui before he was arrested. As a result, Robin said, the FBI lacked information about Moussaoui that would have been gathered if the FBI had conducted physical surveillance and trash covers and obtained phone records and financial records, which was how intelligence investigations typically proceeded before a FISA warrant was requested.[126] Moreover, Minneapolis was seeking an emergency FISA warrant, which meant that there was little time to develop more information to support the FISA request.

Robin ran the names of Moussaoui, Al-Attas, and the individuals who had been identified as connected to Al-Attas in ACS and another computer system that contained intelligence reports from throughout the intelligence

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[126] Financial and telephone records could be obtained, prior to a FISA, through the use of a National Security Letter (NSL), which did not require approval of a court before issuance by the FBI. At the time of the Moussaoui investigation, the process for obtaining NSLs, which involved the signatures of several officials at FBI Headquarters and in the NSLU, took several months. Delay in obtaining NSLs has long been identified as a significant problem in counterintelligence and counterterrorism investigations. Under the Patriot Act, the FBI was given authority to delegate authority for obtaining NSLs to the field to speed up the process.

community. She said she did not find any evidence linking any of these individuals to a foreign power. She said she also researched the missionary group that Mohald had said that he had been a part of to determine whether that organization had any connections to terrorism or had formed the basis for the connection to a foreign power in any previous FISA application. According to Robin, it was not until several months after September 11 that individual members of this missionary group were pled as targets of a FISA application and were described as facilitators and recruiters for a particular terrorist organization.[127]

In addition, Robin researched the name Ibn Khattab, the Chechen rebel leader. Robin said she was not attempting to find information to support using Khattab and his rebel group as the foreign power because, according to Robin, there was insufficient intelligence to link his group to anything more than a civil war. She said that she was aware of a recent FISA application in which the subject had strong ties to Ibn Khattab, but that the Chechen rebels were not pled as the foreign power in that case. Robin told the OIG that she researched Ibn Khattab to determine whether he had close ties to other terrorist groups that had previously been pled as foreign powers before the FISA Court, but she did not find any. Robin said that she was aware that the FBI's Washington Field Office had an open investigation of Khattab but that it was not an active investigation.

One of the documents that Robin retrieved in her search using the name Ibn Khattab was the Phoenix EC, which we described in Chapter Three of this report. The author of the EC, Special Agent Kenneth Williams, mentioned Ibn Khattab when describing his interview of the subject of an FBI investigation who had a picture of Khattab and a picture of Usama Bin Laden on the wall of his apartment where the interview was conducted. Williams stated his belief that there were an "inordinate number" of persons of interest to the FBI who also were receiving training in aviation-related fields of study and that there

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[127] Even prior to the September 11 attacks, however, there was intelligence information showing that some members of this missionary group were using the organization as a means and as a cover to recruit individuals to conduct acts of terrorism and to send them to two Middle Eastern countries under the guise of "religious training."

was a possibility that Bin Laden was coordinating an effort to train people in the U.S. in order to conduct terrorist activity in the future.[128]

ACS records show that Robin printed the Phoenix EC on August 22. Robin told the OIG that her usual practice was to read the documents that she printed, but she said she did not have a recollection of reading the Phoenix EC at the time.

Robin did not provide the EC to anyone else or discuss its contents with anyone, including Martin or the Minneapolis FBI. Robin told the OIG that when she read the Phoenix EC after the Joint Intelligence Committee Inquiry staff informed her that ACS showed that she had printed the EC, she concluded that nothing in the EC would have bolstered Moussaoui's connection to a foreign power for FISA. She also asserted that the Phoenix EC's reporting of information about individuals who were of interest to the FBI – that they were Middle Eastern and were in flight school – was not significant at the time because there were thousands of Middle Eastern men in U.S. flight schools at the time.

8. Martin and Robin consult with NSLU attorney Tim

Around August 23, Don directed Martin and Robin to consult with another NSLU attorney, Tim, about the Moussaoui case. According to Martin, Don thought that Tim should be consulted because he handled counterterrorism matters full time and therefore may have had more expertise than Howard.

Martin orally briefed Tim on the facts of the Moussaoui case but did not provide him with any of the documentation. None of the participants in the meeting recalled specifically what facts were discussed. Tim took a few notes about the conversation in his calendar, and the notes reflect that Tim was told that Moussaoui was an Arab who was in flight school and who had encouraged a friend of his to fight for the Muslim cause in Chechnya. Tim said that he did not recall discussing with Martin and Robin the Chechen rebels as a possible foreign power. Tim added that it was the role of the SSA and IOS, not the

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[128] The Phoenix EC did not contain any references to Moussaoui, to any of the individuals who surfaced in the Moussaoui investigation, or to anyone associated with Oklahoma or Minnesota.

NSLU attorney, to identify the foreign power based on their analysis of the available intelligence. He also suggested that the reason that the Chechen rebels were not discussed as a foreign power was because, at the time, they were viewed as participants in a civil war, not as a terrorist organization. Tim told the OIG that while in theory the Chechen rebels could have been a foreign power, because "anything could be a foreign power," it was his understanding that this did not happen in practice before September 11, 2001. He added that even if the Chechen rebels were considered a foreign power under FISA, the FBI still would have had to show that Moussaoui was an agent of that foreign power.

Both Martin and Tim told the OIG that Tim's advice was that the Minneapolis FBI lacked sufficient evidence of a foreign power to obtain a FISA warrant. Tim advised Martin that Minneapolis would have to collect more information supporting Moussaoui's connection to a foreign power in order to obtain a FISA warrant.

Tim told the OIG that Martin's "attitude" in presenting the case was that "he didn't think [Minneapolis] should get the FISA" but that Minneapolis "wanted one." According to Tim, he was very busy with another matter at the time and advised Martin that if the project needed more attention, Martin would have to see another NSLU attorney.

Tim told the OIG that he did not read the Phoenix EC until some time after September 11. With regard to whether it would have had an impact on his legal advice, Tim stated, "I can't tell you it would have been enough for a FISA." He also stated that the Phoenix EC would not have provided sufficient information to connect Moussaoui to a foreign power. But Tim said that, if he had known about the Phoenix EC, he would have taken it to an attorney in OIPR to discuss the Moussaoui matter in person, which he said was consistent with how he had acted in the past. He said that while "all Middle Eastern pilots" trained in the United States, the Phoenix EC would have provided a theory to attempt to connect Moussaoui to a foreign power under FISA.[129]

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[129] We also asked Howard whether he had read the Phoenix EC since September 11 and if so, whether it would have made a difference to him in his analysis of whether the Minneapolis FBI had enough information to obtain a FISA warrant. Howard said that he only recently had read the Phoenix EC, but that if he had seen the Phoenix EC at the time, it (continued)

9. Martin tells Minneapolis its FISA request was not an emergency

On August 24, Martin and Gary discussed the options for the Minneapolis FBI in pursuing a FISA warrant for Moussaoui. Martin asserted that the Moussaoui situation did not qualify as an emergency, which required information that an "imminent act of terrorism" was about to take place, and he added the FISA request lacked sufficient evidence of a connection to a known foreign power.[130]

Gary's notes from the conversation indicate that Martin stated that Minneapolis could write a Letterhead Memorandum (LHM) for the FISA request, have its CDC approve it, and that Martin would try to push it "up [the] food chain" at FBI Headquarters. However, according to Gary's notes, Martin advised him that the FISA request could "take a few months" to complete, that there were "100s of these FISA requests," and that the FBI had to prioritize them.[131] The notes also indicate that Martin said that he had showed the FISA

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would have "made a difference in the pucker factor," and he would have called Rowley in Minneapolis and discussed the importance of tracking down the available leads to find out as much information about Moussaoui as possible. However, Howard said he believed that the Phoenix EC "would not have made a difference in the probable cause equation as it applie[d] to Moussaoui." He explained that the problem with the Moussaoui case was the lack of a connection to a foreign power and nothing he read in the Phoenix EC contributed to that issue.

[130] As discussed in Chapter Two, the SSAs and NSLU attorneys we interviewed told us that what rose to the level of an expedited FISA request depended on what the field office and ITOS management deemed to be an immediate priority, but the final decision would be made by the ITOS Section Chief, Michael Rolince. According to these witnesses, in the summer of 2001 expedited FISA requests normally involved reports of a suspected imminent attack or other imminent danger.

[131] Rolince and others told the OIG that there were always more FISA requests than ITOS resources and OIPR attorneys to complete all of them and have them heard before the FISA Court in the amount of time desired by the field office. Rolince stated that he instituted a policy that only the Section Chief was permitted to determine what constituted a priority and would be pushed to OIPR. He said that this arose out of the OIPR Counsel expressing to him that his attorneys were being called by SSAs and analysts making demands about what cases were priorities and had to be completed for presentation to the FISA Court. As a result of Rolince's policy, field office managers would call Rolince to (continued)

request to an NSLU attorney and that office was not supportive of the application.

Gary's notes also indicate that Martin told Gary that "1-1-1/2 years ago we could have rammed this through." Martin told the OIG that he did not remember making this statement but that he believes he was referring to the months after the bombing of the *U.S.S. Cole* in Yemen, which took place in October 2000. Martin said that after an act of terrorism or some other crisis situation, a significant amount of intelligence information is developed, which leads to more FISAs being obtained in a shorter amount of time. OIPR Counsel James Baker told the OIG that around the millennium in late 1999 and early 2000 the government had a heightened concern about terrorist attacks and was "aggressive" in its pursuit of FISA warrants, and the FISA Court "went along with them," approving a significant number of FISA warrants in less than a month.

Gary told the OIG that because he was new to counterterrorism matters, he relied on the advice that he received from Martin.

10. Martin seeks information from FAA

During this same time period, Martin initiated additional requests for information about Moussaoui. Martin advised the Federal Aviation Administration (FAA) representative at FBI Headquarters about the Moussaoui investigation and provided him with a copy of Henry's 26-page EC. The FAA employee checked FAA databases for information about Moussaoui and obtained records indicating that he had registered for a student pilot's certificate at the flight school in Norman, Oklahoma. The FAA employee e-mailed this information to the Minneapolis FBI and the RFU.

(continued)
assert their opinion that their case should be prioritized over others. Rolince explained that FISA renewals were generally of a higher priority than initiation of FISAs because with renewal requests the FBI was faced with the likelihood of not being able to renew the FISA if the previous FISA warrant order lapsed. He also stated that al Qaeda FISA requests were generally the priority, although there were times when another foreign power was the priority for a certain period of time because of a specific set of circumstances.

According to the FAA employee, he, Martin, and Robin met with Don when the Moussaoui matter first came to the RFU, and they discussed what the FBI could tell the FAA about Moussaoui. The FAA employee stated that they decided that since Moussaoui and Al-Attas were in custody and no other individuals were known to be working with them, the Minneapolis FBI would continue its investigation, but the FBI would not advise the FAA about the investigation at that point.

11. Minneapolis FBI seeks assistance from the CIA and London Legat

On August 24, after the Minneapolis FBI was told by Martin that the French information was not sufficient to link Moussaoui to a foreign power, the Minneapolis FBI sought assistance from other agencies to connect Moussaoui to al Qaeda or another foreign power.

Henry e-mailed an FBI manager detailed to the CIA to ask him to determine whether the CIA had any information linking Moussaoui to a foreign power. A CIA counterterrorism employee e-mailed the FBI manager detailed to the CIA, who forwarded the message to Henry, that Ibn Khattab was "a close buddy with Bin Laden from their earlier fighting days and that the CIA employee's interpretation of the French information was that Moussaoui was a "recruiter for Khattab." Henry responded by e-mail to the FBI detailee and asked him to forward the e-mail to the CIA employee. In this e-mail, Henry asked the CIA employee if she had any additional information connecting Ibn Khattab to al Qaeda "other than their past association." He also wrote, "We're trying to close the wiggle room for FBIHQ to claim that there's no connection to a foreign power." Henry did not receive any response from the CIA to his request for additional information linking Moussaoui to a foreign power. According to the CIA employee, the CIA had no further information on any links between Moussaoui and terrorists, and this information was communicated to the FBI.

Also on August 24, Henry e-mailed the FBI manager detailed to the CIA, who we call "Craig," with names, telephone numbers, and other information obtained from Al-Attas' address book. Henry requested that Craig ask the CIA to run traces on the information. Henry noted in the e-mail that he also was going to send copies of all of the documents found in Al-Attas' possession. Henry wrote that there were many more domestic telephone numbers in the

information obtained from Al-Attas, and Henry had included only the foreign information in the e-mail.

Also on August 24, the same day that Henry was exchanging e-mails with the CIA employee about obtaining information to connect Moussaoui to a foreign power, a CIA manager who was working in ITOS at FBI Headquarters as a "consultant" on intelligence issues e-mailed Don about the Moussaoui case. The CIA manager asked whether leads had been sent out to obtain additional biographical information, including any overseas numbers, and whether the FBI had obtained photographs and could provide them to the CIA. Martin responded to the e-mail and provided an update stating that requests for information and photographs already had been sent to the appropriate foreign intelligence agencies and to the CIA, and that the Minneapolis FBI had sent telephone numbers and addresses from Moussaoui's and Al-Attas' "pocket litter" to the CIA.[132] Martin concluded the e-mail by writing, "[p]lease bear in mind that there is no indication that either of these two had plans for nefarious activity as was apparently indicated in an earlier communication." (Emphasis in original.)

Also on August 24, Henry e-mailed the FBI's London ALAT, providing him with an update on the Moussaoui investigation and asking for assistance in establishing that Moussaoui was acting on behalf of a foreign power. Although the London ALAT contacted the British authorities twice in writing, made several telephone calls, and indicated the urgency of the Moussaoui matter, the British government did not provide the FBI any information about Moussaoui until September 12. We discuss the information and the ALAT's efforts to obtain this information from the British authorities in Section J below.

In addition to contacting the CIA and the London Legat directly, Henry contacted another FBI Headquarters employee who worked on intelligence matters and who we call "Carol." In an August 24 e-mail, Henry reported the CIA employee's statement that there was an association between Khattab and Bin Laden. Henry asked Carol for her assistance in establishing a connection between Moussaoui and a known terrorist organization, such as al Qaeda.

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[132] "Pocket litter" is a term used to describe the contents of the pockets of a person who is taken into custody and searched.

Henry wrote that the RFU had determined that Minneapolis did not have sufficient evidence of a criminal violation for a criminal search warrant and that Minneapolis also lacked sufficient evidence to obtain a FISA warrant. He noted that the RFU had advised Minneapolis that "because Ibn Khatab [sic] has not yet been established to be a member of a named group, that Moussaoui is not acting at the direction of a foreign power." He added, "I disagree, but that doesn't matter." He also e-mailed Carol a copy of his 26-page EC about the Moussaoui investigation. Henry told the OIG that he did not receive any information from Carol until September 10, when she sent him an e-mail inquiring whether he had been able to obtain a warrant.

12. Minneapolis prepares emergency FISA request

On the morning of Saturday, August 25, Henry completed the Minneapolis FBI's formal FISA request, which consisted of a 6-page LHM, and e-mailed it to FBI Headquarters. The LHM stated that the Minneapolis FBI was requesting a FISA search warrant on an emergency basis and that Minneapolis "wish[ed] to emphasize the urgency of this matter in reminding recipients that Moussaoui is in INS custody pending deportation."

The LHM summarized Henry's 26-page EC, including the statements received from the flight school representatives, that Moussaoui was arrested as an overstay on his visa and that deportation was pending and that he was in possession of two knives when he was arrested. The LHM also summarized Al-Attas' statements about Moussaoui's radical Islamic fundamentalist beliefs, including that Moussaoui believed that it was acceptable to kill civilians who harm Muslims. The LHM noted inconsistencies in Moussaoui's statements, such as his unconvincing explanation for the large sums of money in his possession while he was in the United States and his inability to convincingly explain the reasons for his recent trip to Pakistan. With respect to information linking Moussaoui to a foreign power, the LHM contained three paragraphs. The LHM included the information provided by French authorities. The LHM also included the statement from the CIA employee that Ibn Khattab was "known to be an associate of Usama Bin Laden from past shared involvement in combat."

Both Gary and Henry told the OIG that they believed that based on the information they provided in the LHM, the Minneapolis FBI could support that Moussaoui was connected to Ibn Khattab and that because Khattab was

connected to Usama Bin Laden, al Qaeda could be used as the foreign power in the FISA application.

Martin told the OIG, however, that he believed the information provided by the Minneapolis FBI to support a link between Ibn Khattab and Bin Laden was not sufficient to support a FISA request. According to Martin, it was "common knowledge" that there was a "purported" link between Khattab and Bin Laden. But he said that the most recent intelligence indicated that Khattab and Bin Laden were not connected.

Robin told the OIG that she believed that trying to link Moussaoui to al Qaeda by arguing that Moussaoui was linked to Khattab, and Khattab was linked to Bin Laden, was "too far removed" to obtain a FISA warrant. She stated that based on intelligence information, it was known that Khattab and Bin Laden were "contemporaries" but were not connected to each other. She said that Khattab was not working for Bin Laden.

13. Dispute between Minneapolis and Martin

Around this time, Gary and Henry were becoming increasingly frustrated with the advice from Martin that they lacked sufficient information linking Moussaoui to a foreign power. On Monday, August 27, in a telephone call between Martin and Gary, the tension surfaced.

According to Gary's notes of the conversation, Martin told them that "what you have done is couched it in such a way that people get spun up." Gary told the OIG that after Martin made this statement, Gary said "good" and then stated that Minneapolis was trying to keep Moussaoui from crashing an airplane into the World Trade Center. Gary's notes of the conversation indicate that Gary stated, "We want to make sure he doesn't get control of an airplane and crash it into the [World Trade Center] or something like that." According to Gary's notes, Martin responded by stating that Minneapolis did not have the evidence to support that Moussaoui was a terrorist. Gary's notes indicate that Martin also stated, "You have a guy interested in this type of aircraft. That is it."

Martin told the OIG that he did not recall making any statement about Minneapolis getting "spun up" about the Moussaoui investigation. When asked whether he spoke with Minneapolis about whether they were overreacting, Martin stated that he "could have." Martin told the OIG that he

never heard Gary make a statement that he thought that Moussaoui was going to hijack an airplane and crash it into the World Trade Center. He said that the first time that he heard that statement was in October 2001 at a meeting in FBI Headquarters involving several Minneapolis agents and FBI Headquarters employees to discuss the Moussaoui investigation. He said that during the meeting Gary made a reference to having made this statement to Martin some time in August 2001, but that Martin had never before heard Gary make the statement.

Gary's notes also indicate that the Minneapolis FBI asked Martin whether the FISA request, which had been e-mailed on Saturday, August 25, had been presented to Section Chief Rolince for approval as an emergency FISA. Martin stated that it had not been presented to Rolince.

Gary's frustration with Martin can be seen in an e-mail Gary sent to Martin on August 27 after their telephone conversation. In the e-mail, Gary advised Martin to contact the CIA employee for more information about Khattab and his connections to Bin Laden in order to support the foreign power portion of the FISA application. Martin responded in an e-mail on August 28 that FBI Headquarters had the latest information on Ibn Khattab and Chechnya, "as this program is administered by our unit," and that the matter had been discussed with the CIA employee. Martin also wrote, "I need to ask you guys to do me a favor. In the future, please contact and pass info to me and allow me to talk with [an FBI detailee to the CIA] and [the CIA]. Things work much better when our agencies are communicating HQ to HQ."[133]

Martin's e-mail was forwarded to Craig, the FBI detailee to the CIA with whom the Minneapolis FBI had been communicating. Craig responded with an e-mail to Gary, Martin, and Don, which stated that Craig definitely agreed that

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[133] Martin told the OIG that normally contacts with other agencies are made by the SSAs at FBI Headquarters. He stated that he was concerned about the Minneapolis FBI communicating directly with the CIA because it was "not conducive to good information flow" and that FBI Headquarters needed to be "apprised of what's going on." He also asserted that since FBI Headquarters was responsible for putting the FISA request together, it was necessary for FBI Headquarters to ensure that it had all of the available information from outside agencies, and that this was more likely to occur when the agencies were communicating at the Headquarters level.

it was critical for FBI field offices to deal directly with FBI Headquarters in order to ensure that FBI Headquarters was "in the loop up front." He added that in this instance he had been in touch with Don at the initiation of the case and that Don had asked the CIA to move quickly and without a formal request for information in the form of a teletype from FBI Headquarters. Craig wrote that it was for this reason that he had been dealing directly with the Minneapolis office but also coordinating with FBI Headquarters. Craig also wrote that the CIA had yet to receive a teletype from the FBI about the matter, which he described as "the only real, official communication between [the two agencies]." Craig also noted in a separate paragraph to Gary that FBI Headquarters "ha[d] a strong handle on the Chechen issue" and that the IOSs at FBI Headquarters were "well connected" to the CIA if they "require[d] anything new."

Henry told the OIG that he was frustrated with the advice that the Minneapolis FBI was receiving from FBI Headquarters and that he expressed this in a conversation with Martin. Henry said he told Martin that he disagreed with Don's arguments for not pursuing the criminal warrant. He told the OIG that he had said to Martin:

> ...if you're not going to advance this the FISA route, or if you don't believe we have enough for a FISA, I shudder to think – and that's all I got out. And [Martin] cut me off and said, you will not question the unit chief and you will not question me. We've been through a lot. We know what's going on. You will not question us. And that could be the mantra for FBI supervisors.

14. Minneapolis contacts RFU Unit Chief

Because of Gary's and Henry's frustrations in dealing with Martin, Gary told the OIG that he approached Roy, the Minneapolis Acting SAC, and asked Roy to call Don to "find out what [Martin]'s problem was."[134] On August 27,

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[134] As discussed above, Roy was named the Acting SAC on August 3, 2001, and remained in this position until December 2001. Prior to being named the Acting SAC, he was one of two Minneapolis ASACs.

Gary and Roy together placed a call to Don to discuss the Moussaoui FISA request.

According to Gary, Don was "immediately defensive" and asked Martin to join the call. Gary's notes of the conversation do not indicate that Martin's performance was discussed.

Gary told the OIG, and his notes reflect, that Martin and Don discussed the lack of a foreign power and stressed that more direct connections were needed to establish the required link. Gary told the OIG that he recalled asking "what is the mechanism" to address the Moussaoui situation. He said that he asked Martin and Don if "they won't let us go criminal" and if there was insufficient information for a FISA, "what can we do?"

Gary's notes indicate that he was advised that if Moussaoui could not be connected to a terrorist organization, there was "no mechanism to address on a case-by-case basis." Gary's notes also reflect that the question, "What is being done to address the loop-hole (if he isn't part of a known group)?" was asked. Gary told the OIG that he posed this question. The reply is noted in quotation marks as "That isn't something for you to worry about."[135] Gary told the OIG that he recalled that Don gave this reply. Don, however, told the OIG that he did not make this statement.

Gary's notes also indicate that either Don or Martin stated that another NSLU attorney – Susan – would review the matter and would give it a "good

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[135] Because FISA warrants are permitted only for foreign powers or agents of foreign powers, the "lone wolf" terrorist who is not acting on behalf of any foreign government or terrorist organization is not covered by the FISA statute. In 2002, a bill was introduced in the United States Senate to amend FISA's definition of "foreign power" to include "any person, other than a United States person, or group that is engaged in international terrorism or activities in preparation therefor." The intent of the amendment was to allow a FISA warrant to be issued after showing that a person is engaging in or preparing to engage in international terrorism, regardless of whether that person also is an agent of a foreign power. The bill was referred to the Judiciary Committee, and the Senate Intelligence Committee held a hearing on the bill on July 31, 2002. There was no written report, and the bill was not reported to the full Senate. On January 9, 2003, the bill was reintroduced and was approved by the Judiciary Committee on March 11, 2003. It was approved by the Senate in May 2003. A similar bill has been introduced in the House of Representatives.

faith review." Gary told the OIG that Don gave this assurance. According to Gary, Don also advised the Minneapolis FBI that it was necessary to attempt to confirm that the information received from the French related to the same Moussaoui the INS had in custody.

Roy told the OIG that he recalled having the telephone call but said he did not recall the substance of the conversation. He told the OIG, however, that he recalled that at some point he spoke to Don about Martin and expressed his belief that Martin was "hindering" the process or trying to "submarine" Minneapolis' case.

Don told the OIG that he recalled speaking on the telephone with Roy and Gary and discussing the foreign power issue. He said that his response to the disagreement was to have Susan – another NSLU attorney – weigh in on the merits of the FISA request. Don asserted that at no time did Roy or anyone else from Minneapolis raise any concerns to him about how Martin, Robin, or anyone else at FBI Headquarters was handling the case.

Martin also told the OIG that he did not recall the specifics of this telephone conversation. However, with respect to the issue of ensuring the identity of Moussaoui, he stated that his concern was that the Minneapolis FBI practice "due diligence" and ensure that the information that the FBI had received was for the same person. Martin told the OIG that he was aware that the name "Moussaoui" had resulted in multiple hits in the FBI's computer system when the Minneapolis FBI had first checked Moussaoui's name.

As a result of this concern, after the telephone conversation with Don and Martin, Gary directed an agent on the Minneapolis counterterrorism squad to contact the FBI's Paris ALAT to obtain information about the number of persons with the name Zacarias Moussaoui in France by checking the telephone books for the name Zacarias Moussaoui. In an e-mail later that day to the Paris ALAT, the Minneapolis agent wrote, "In an effort to demonstrate the probability, which we believe is low, can you determine just how many Zacarius [sic] Moussaoui's [sic] are listed in the white pages in France. [sic]" The ALAT replied by e-mail that he could check the white pages for Paris but he might not be able to check the white pages for all of France. He also wrote that he was meeting with the French authorities the next day and was expecting them to provide additional information that would "confirm Moussaoui's identity."

On August 30, the ALAT provided additional information obtained from the French authorities that confirmed Moussaoui's identity to Minneapolis and FBI Headquarters. This information is discussed in Section F, 20 below.

Henry told the OIG that he thought that Martin's suggestion that the Minneapolis FBI do more to confirm that Moussaoui was the same Moussaoui as reported by the French was "another arbitrary roadblock." He said that he believed that they should trust the professionalism of the French, although he also said that he was not aware of the specific information that the French authorities were relying on to assert that the Moussaoui in custody was the same Moussaoui as in their report.

Rolince told the OIG that some time in August 2001, Don stopped briefly at his office to give him a "heads up" on a case in the Minneapolis Field Office. Rolince said that the conversation lasted approximately 20 seconds. Rolince said he did not recall if Don mentioned the name Moussaoui or not. According to Rolince, Don indicated there was an issue with a FISA and Rolince might receive a call from FBI management in Minneapolis. Rolince said Don told him the subject of the investigation was in jail on an immigration charge and the logical leads had been sent out. Rolince told the OIG he did not receive any further details from Don about the issue in Minneapolis, but this type of heads up was not atypical. Rolince stated that he received this type of brief notification as often as 10-15 times a week from his subordinates about potential contacts from the field.

Rolince told the OIG that he never received a telephone call or other contact from the Minneapolis FBI about the Moussaoui matter. He said that he did not raise the limited information he received from Don about the Moussaoui investigation with anyone else in the FBI.

15. Martin and Robin's consultation with NSLU attorney Susan

After the call with Minneapolis on August 27, Martin and Robin met with NSLU attorney Susan to discuss the Moussaoui FISA request. Martin told the OIG that he orally briefed Susan about the facts of the case. He did not provide her with any of the documentation that had been generated, such as the 26-page EC or the 6-page LHM, although he had the documents with him at the meeting. Martin told the OIG that while he did not recall specifically what was discussed with Susan, he recalled that she did not believe that there was

sufficient evidence of a connection to a foreign power. Martin added that he recalled informing Susan of the facts that related to the issue of the foreign power, which was the information received from the French authorities.

According to Susan, the meeting lasted approximately 45 minutes. She said she was made aware of a handful of other facts, such as that Moussaoui was an Arab, was in flight school and had been asking some weird questions, and had paid cash for flight school.

Susan told the OIG that Martin and Robin downplayed the Khattab information to her. She stated, however, that she believed the evidence of a link between Moussaoui and Khattab was very "tangential" since it was based on the statement of Tufitri who had no direct knowledge of a connection between Moussaoui and Khattab. In addition, Susan told the OIG that based on her experiences in ITOS, the Chechen rebels would not have been accepted by OIPR as a foreign power. Susan told the OIG that based on the facts that she was presented, she told Martin and Robin that the FISA request lacked the necessary connection of Moussaoui to a foreign power.

Susan told the OIG that attempting to argue that Khattab was part of al Qaeda was not feasible, because at the time the FBI's position was that Khattab did not take direction from Bin Laden but rather was the leader of the rebels in Chechnya. She said that it was her understanding at the time that the CIA and the FBI did not agree about Khattab's role and relationship to Bin Laden.[136] Susan also stated that in her experience it would not have been feasible to get an emergency FISA through OIPR if a new foreign power that had never been pled before was presented.

Susan told the OIG that she asked Martin and Robin whether the FBI had any information indicating anyone was sending people to the United States for flight training, but that she was told no. She said that Robin did not mention the Phoenix EC to her. Martin told the OIG that he did not recall any such

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[136] The FBI IOSs we interviewed told the OIG that the CIA, not the FBI, collected intelligence information on the Chechen rebels and Khattab. According to the IOS who was responsible for targets in Chechnya, by the spring of 2001 both the CIA and the FBI took the position that Khattab did not take direction from Bin Laden.

question from Susan. Robin also told the OIG that Susan never brought up the issue of whether Middle Easterners were training in U.S. flight schools.

We asked Susan whether she had read the Phoenix EC since September 11 and whether it would have made a difference to her opinion about the Moussaoui FISA request. Susan said that she first read the Phoenix EC several months after September 11. She said that if she had read the Phoenix EC at the time, she would have been concerned enough about Moussaoui to bring the matter to an OIPR attorney's attention. According to Susan, she sometimes called OIPR attorneys "to bounce things off" them, rather than sending over a formal FISA request, and would ask them "where do you think we are?" Susan added that the Moussaoui case still would have had "the same foreign power issues" but that the Phoenix EC would have "influenced" her.

Susan also told the OIG that she had not been aware at the time of her meeting with Martin and Robin that the Minneapolis FBI had prepared a lengthy EC about the Moussaoui case. She stated that she thought that the case "was evolving" as she spoke to Martin and Robin and that she did not realize that documentation had been prepared. She said she believed that Martin had received oral briefings from Minneapolis. She said that she first became aware of Henry's EC in November 2001. However, she said that if she had read it before the meeting with Martin and Robin, it would not have changed her opinion about the Moussaoui FISA request. She said she recalled thinking that Martin had represented the facts as set forth in the EC. Susan stated that she probably received an oral briefing because Minneapolis was seeking an emergency FISA and needed an answer quickly. She said that there was nothing unusual about receiving an oral briefing in that situation. Susan told the OIG that she did not know at the time that Martin had already consulted with Howard and Tim about the same case.

After the consultation with Susan on August 27, Don instructed Martin to have the matter reviewed again by the head of NSLU, Spike Bowman, because of the level of concern raised by the Minneapolis FBI about Moussaoui and the FISA request. Martin arranged for a meeting with Bowman the next afternoon, August 28.

16. Martin's edits to Minneapolis' FISA request

Prior to the meeting with Bowman, Martin began reviewing and editing the Minneapolis FBI's 6-page LHM, in case the FISA request was approved by Bowman. Martin e-mailed an edited draft of the LHM to Gary and stated that he had made some refinements and wanted comments from Minneapolis. Martin noted that he had removed the paragraph reflecting that a CIA employee had stated that Khattab was an associate of Bin Laden, but that Martin would "add the foreign power info re Al-Khattab/UBL later, when we get an [attorney] to buy this argument."

Gary responded with a lengthy e-mail setting forth his concerns about Martin's edits. First, Gary expressed concern about the removal of the statement connecting Khattab to Bin Laden. Gary wrote, "It seems that we are setting this up for failure if we don't have the foreign power connection firmly established for the initial review." Gary also raised questions about the following made by Martin:

- Change from the statement about Moussaoui "preparing himself to fight" to a statement that Moussaoui and Al-Attas "train together in defensive tactics." Gary wrote, "During the interview neither Al-Attas nor [Moussaoui] used the term 'defensive tactics.' I think that softens our argument and misrepresents the statements of Al-Attas."
- Change to the statement "Al-Attas was also asked if he had ever heard Moussaoui make a plan to kill those who harm Muslims and in so doing become a martyr himself. Al-Attas admitted that he may have heard him do so, but that because it is not in his own heart to carry out acts of this nature, he claimed that he kept himself from actually hearing and understanding." Martin changed this section to read, "Al-Attas was also asked if Moussaoui has a plan to kill those who harm Muslims and or to martyr himself while conducting an act of terrorism. Al-Attas indicated that Moussaoui may have such a plan, but that he does not know for certain if this is the case." Gary acknowledged that Martin had changed the statement based on a previous telephone conversation with Gary, but Gary wrote "now that I see it in print,

I think we might be misstating Al-Attas' response" to the question.

- Change from the statement that "Moussaoui was unable to give a convincing explanation for his paying $8300 for 747-400 training" to "Moussaoui would [sic] give an explanation for his paying $8,300 in cash for 747-700 flight simulation training." After noting that Martin had left out the "not," Gary stated that he did not think that this statement was accurate because Moussaoui gave an explanation "but it was not convincing."

- Change from the statement that Moussaoui had no convincing explanation for the large sums of money known to have been in his possession during his time in the United States" to "Moussaoui would not explain the large sums of money known to have been in his possession during his time in the United States." Gary noted here again that Moussaoui had offered an explanation but that "his explanation fell short."

- Change from the statement that "Tufitri stated that Moussaoui was 'the dangerous one'" to Tufitri "described him as being dangerous." Gary pointed out that Tufitri "did not describe him as being dangerous in general terms, Tufitri specifically referred to him as 'the dangerous one.'" Gary added, "I think this is significant – and it accurately reflects the information as it was provided by [the French authorities].

Martin responded by e-mail to Gary the same day. With regard to Gary's concerns about the foreign power information, Martin explained that Robin would be pulling together the information required for the foreign power section of the FISA application and that it would be added to the LHM once it was ready to be sent to OIPR. Martin added, "Don't worry about this part."

Martin also wrote that he would make some of the changes requested by Gary. For example, with respect to the "would not give an explanation" comment, Martin changed the text to "did not give a logical explanation." With respect to Gary's concern about Moussaoui's inability to explain the source of income, Martin wrote, "I added words to cover your point."

Martin declined to make some of the other changes requested by Gary and offered explanations for his edits. With respect to the "defensive tactics" change, Martin wrote, "We don't need to provide verbatim answers to [interview questions]. I think the way I've set it out here is accurate." With respect to the question put to Al-Attas about whether he had heard Moussaoui make a plan to kill people who harm Muslims, Martin wrote that he did not believe how it had been written made sense and that "the way it reads in [my] draft is fine." With respect to the "dangerous one" comment, Martin wrote that what was in the paragraph was adequate.

At the end of the e-mail, Martin wrote, "I tried to tighten up the language and make it more concise. There's not necessarily anything wrong with [the LHM] – I'm just trying to make an adjustment for our new targeted audience."

Gary told the OIG that he believed Martin's edits "softened" the FBI's position. He said that he questioned why Martin had taken out the foreign power information when it was legally required to obtain the FISA warrant, and claimed he was given "no real explanation" for why Martin omitted the foreign power information. Henry told the OIG that he believed that Martin's edits appeared to be "dumbing [the LHM] down" and that the edits "would definitely cause [the FISA request] to fail."

In response, Martin told the OIG while he believed that the LHM was generally well-written, the three paragraphs for the foreign power section of the LHM were not adequate to establish the foreign power element, and he intended, along with Robin, to compile a "real" foreign power section when an NSLU attorney gave approval to move forward with the FISA request. Martin said that handling the request this way was common and denied that he was attempting to "torpedo" the case.

Robin also told the OIG that, as they did with other cases, she and Martin were preparing to create a new foreign power section for the Moussaoui LHM that would be comprehensive. She said that Martin's edits were normal and that the changes were designed to create "a logical, intelligent package that we thought would get to court" and to make the LHM less "inflammatory." She explained that by "inflammatory" she meant that the Minneapolis LHM was not focused, but rather used terms that were geared toward getting someone's attention without providing any evidentiary support. Robin asserted that Martin was streamlining the document and adding the "buzzwords" that he

knew from experience OIPR would require in order to get the package to the FISA Court. Robin stated that the RFU wanted FISA requests to get OIPR's attention but did not want the RFU to seem like "maniacs."

17. Consultation with NSLU chief Spike Bowman

On the afternoon of August 28, Martin and Robin met with Bowman to discuss the Moussaoui FISA request. Don told the OIG that he had planned to attend the meeting but that on his way to Bowman's office he was called into a meeting with Section Chief Rolince. No one from Minneapolis was asked to participate in the meeting.

Bowman told the OIG that it was "quite unusual" for him to be consulted about a particular FISA request. He said that it also was unusual for the field office to be so adamant that it had sufficient evidence to obtain a FISA warrant and for the Headquarters SSA to be as adamant that the FISA warrant was not sufficiently supported.

Martin orally briefed Bowman about the facts of the Moussaoui case but did not provide him with any of the documentation that he had with him. Robin told the OIG that she thought that Bowman was very familiar with the facts because he had been briefed by other attorneys who had been involved in the matter.

Martin said that Bowman advised that even if everyone were to agree that the Chechen rebels could be pled as a foreign power, the Minneapolis FBI lacked sufficient evidence to establish that Moussaoui was an agent of that foreign power. Martin told the OIG that Bowman said that Tufitri stating that Moussaoui told Amnay how to serve Allah by fighting with the Chechen rebels did not meet the standard of an agent of a foreign power.

According to Bowman, Martin conveyed the opinion that he did not believe there was sufficient information for a FISA. Bowman said he was aware that Moussaoui was a French citizen who had overstayed his visa, that he was a bad flight school student who paid in cash and who could not satisfactorily explain how he was being supported in the United States, that he was asking odd questions about the airplane (such as whether you could open the doors during flight), that he was more interested in learning how to take off and land the airplane than flying it, that he was traveling with a friend who did not seem to share his interest in aviation, and that the French authorities had

reported that Tufitri was blaming Moussaoui for recruiting Amnay to fight in Chechnya on behalf of the rebels there.

Bowman told the OIG that he did not believe, based upon the facts, that there was sufficient evidence of a link to a foreign power. He said that he was aware that the Minneapolis FBI wanted to argue that because there was some connection between Moussaoui and Khattab and because there was a relationship between Khattab and Bin Laden, Moussaoui was an agent of al Qaeda. Bowman said that it was his understanding that it was common knowledge that Khattab and Bin Laden had "some kind of relationship," but in his opinion this was not a close enough link to argue that Moussaoui was an agent of al Qaeda. Bowman also stated that one Muslim encouraging another Muslim to fight in a Muslim cause was not sufficient to meet the requirements of an agent of a foreign power under FISA.[137]

We asked Bowman whether he had read the Phoenix EC and whether it would have made a difference in his advice. Bowman stated that he read the Phoenix EC only after September 11, but that he believed for several reasons it would not have made any difference if he had read it at the time. He asserted that the Phoenix EC was a routine communication pointing out what a field office believed was an "anomaly" and that it was not an "alarmist" communication. In addition, he said that the Phoenix EC did not connect any of the people referenced in the Moussaoui case with any foreign power. He said that it did not "associate Moussaoui with anything."

After meeting with Bowman, in an e-mail to Gary and Acting SAC Roy, Martin informed the Minneapolis FBI of Bowman's opinion that there was insufficient evidence of a connection to a foreign power. Martin wrote:

> We just left a meeting w/ Spike Bowman, #1 in NSLU. He says we have even less than I thought. Apparently, even if we could show that the ZM that recruited [the person] in France is the one

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[137] As discussed in Chapter Two, the legislative history of FISA provides that to meet the definition of an agent of a foreign power, there must be "a nexus between the individual and the foreign power that suggests that the person is likely to do the bidding of the foreign power" and that there must be a "knowing connection" between the individual and the foreign power.

you have locked up in INS detention, we still don't have a connection to a foreign power. We would need intel to indicate the guy was actually a part of the group, an integral part of the movement or organization, and not just an individual [redacted]."

In the e-mail, Martin advised Gary to call him to discuss the next course of action. Roy responded by e-mail and wrote, "Thanks for your help and continued support."

Gary's notes indicate that Martin and Gary also spoke on the telephone after the Bowman meeting and Martin explained that the FBI needed more information linking Moussaoui to a foreign power. The notes state that Martin told Gary, "we need [Moussaoui] to be an integral part of a terrorist organization."[138] The notes also indicate that Martin conveyed that more intelligence information was needed on "how he is acting on behalf of a foreign power." The notes state: "Bottom Line – You don't have a foreign power." The notes also state that Martin advised Gary to ensure that Moussaoui was entered on a watch list and that the FBI's Paris Legat was contacted about deportation arrangements for Moussaoui (which we discuss below).

18. Additional information about Al-Attas and Moussaoui

a. Minneapolis FBI explores use of undercover officer in Moussaoui's jail cell

In an e-mail from Gary to Roy on August 29, Gary wrote that he and Henry were "exploring the feasibility" of inserting an undercover officer who spoke Arabic in Moussaoui's jail cell "in an attempt to elicit from Moussaoui

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[138] Bowman told the OIG that Martin accurately conveyed his advice that even assuming that there was a foreign power to which the FBI could attempt to connect Moussaoui, the Minneapolis FBI lacked sufficient evidence to establish that Moussaoui was acting as an agent on behalf of a foreign power. He stated, however, that Martin's interpretation of his advice that agency law requires a showing that the target was an "integral part" of the terrorist organization was not correct. He opined that the agency standard required a showing that the target was "serving the interest" of the foreign power.

the name of (or descriptive information which would identify) the recognized foreign power with whom he is aligned." Gary told the OIG that Roy, Charles, and Rowley all were consulted about this idea, and all of them stated that they did not see any limitations that would prevent this from occurring. Gary noted in the e-mail that the Minneapolis FBI did not know yet whether the use of the undercover officer for the proposed operation had been approved.

Roy provided the information about using an undercover officer to Don in an e-mail in which he wrote, "The use of the [undercover officer] is also exploratory as we do not want to leave any stone unturned prior to [Moussaoui's] release." Don responded in an e-mail and wrote, "Let us look into this asap. Do NOT go forward with the [undercover officer] until we weigh in . . .." Roy replied, "We were only been [sic] exploring the possibility of the [undercover officer] – we are by no means ready to go forward with it. The point may be moot because it seems the deportation to France is a more likely outcome and it may be more timely."

Don told the OIG that he discussed the issue with an employee detailed to ITOS with expertise in this area and that the employee stated that the idea was "ridiculous" and that it could not be done. Don said that having an undercover employee involved with something in which information could be obtained that might be used in a criminal proceeding was problematic since the undercover officer would not be in a position to testify. According to Don, he conveyed this information to Roy, and Minneapolis did not pursue this idea further.

b. Translations of recorded conversation between Al-Attas and "Ahmed" and Al-Attas' will

With regard to Al Attas, Henry asked an Arabic speaker who was not employed by the FBI to translate Al-Attas' will, and to translate and transcribe the tape of a 9-minute conversation between Al-Attas and the individual we call "Ahmed," the imam from Al-Attas' mosque whom Al-Attas called while he was in custody. According to an e-mail from Gary to Roy on August 29, the translation by the translator stated Ahmed had said on the tape, "I heard you guys wanted to go on Jihad." Gary's e-mail also stated that the translator reported that Al-Attas immediately responded on the tape, "Don't talk about that now." In addition, Gary's e-mail stated that the translator informed the Minneapolis FBI that Ahmed became very upset when he heard that

Moussaoui was going to be deported. Gary's e-mail added that, according to the translator, the translation of the will that Al-Attas had with him stated that "death is near" and that "those who participate in Jihad can expect to see God."[139]

On August 29, Roy transmitted the information from the will to Don by e-mail, stating, "I obtained some additional information this afternoon and I am forwarding that to you. Please understand that this is only preliminary and we realize the interpretation was not done by a certified linguist." Roy did not ask that Don do anything in particular with the information.

Don responded by e-mail, writing, "The 'will' is interesting. The Jihad comment doesn't concern me by itself in that this word can mean many things in various muslim [sic] cultures and is frequently taken out of context." Don told the OIG that the term "jihad" often was used and had many different meanings.

19. Failure to reconsider seeking a criminal warrant

After Martin conveyed to the Minneapolis FBI that FBI Headquarters believed that the FISA warrant was not feasible, the Minneapolis FBI and FBI Headquarters began taking steps to finalize Moussaoui's deportation. Yet, neither FBI Headquarters nor the Minneapolis FBI reconsidered the criminal search warrant issue or trying to contact the Minneapolis U.S. Attorney's Office (USAO) about a criminal search warrant, even after the legal decision was made that insufficient evidence existed to obtain a FISA warrant. Initially, as noted above, the decision was made not to seek a criminal warrant, in part because if a criminal warrant was not obtained, this would violate the "smell test" and jeopardize the chances of obtaining a FISA warrant. Once the FISA

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[139] The will and the tape also were sent to the FBI's Chicago Field Office for translation and transcription by an FBI linguist, which was completed around September 6, 2001. The Chicago translation of the tape was the same as that of the initial translator: "Sheikh do not talk about it now. Do not talk about it now sheikh." The Chicago translation said the will stated that "death has approached" and expressed Al-Attas' hope that "Allah will award him with paradise and keep him with the prophets, martyrs and pious." Henry forwarded these translations to FBI Headquarters in an e-mail dated September 6, 2001, with a lead that stated "For information."

warrant was ruled to be unobtainable because of the foreign power requirement, the smell test was no longer an issue. Yet, no one sought to attempt to obtain a criminal warrant, or apparently even discussed this issue.

Don told the OIG that he did not know why he, Martin, or the Minneapolis agents did not raise the issue again about seeking a criminal search warrant, once a decision was made not to pursue the FISA warrant. He suggested that it did not happen because no one thought to raise the matter again. Don said that looking back on the matter now, he wished that there had been a discussion about seeking a criminal warrant once the FISA route was exhausted. Martin told the OIG that if the Minneapolis FBI believed that it had sufficient evidence to obtain a criminal search warrant, then the Minneapolis FBI should have raised the issue. He said, however, that he did not believe that there was sufficient evidence of a crime to obtain a criminal search warrant.

When Henry was asked why he did not propose seeking a criminal warrant once the FISA route was exhausted, he responded, "I never thought about it." He stated that he "could have done that but it did not occur to [him]." Gary told the OIG that he did not pursue a criminal search warrant because FBI Headquarters would not obtain the requisite authorization from the Department of Justice. Rowley told the OIG that she did not know why a criminal warrant was not sought once the FISA route was exhausted. She noted that she did not have a leadership role in the case and she felt that the people who were involved knew what they were doing.

20. Additional French information received about Moussaoui

On August 30, the FBI's Paris ALAT provided additional French information to the Minneapolis FBI and FBI Headquarters about Moussaoui. The ALAT's report included information from a person who we call "Idir" who knew Moussaoui.[140] Idir confirmed the relationship between Moussaoui and Amnay. Upon learning of Amnay's death, Idir had accused Moussaoui of causing the death. Idir explained that Moussaoui had become a radical fundamentalist and that he had brought Amnay to these beliefs. He said that

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[140] We do not use Idir's real name because the FBI considers that information to be classified.

Moussaoui and Amnay "were inseparable, one was the head and the other was the armed hand of the same monster." Amnay states that when Moussaoui had come to his community, Idir had warned the local Muslim community of the moral danger Moussaoui posed to young Muslims and that Moussaoui was "driven from at risk urban areas by his coreligionists for propagating hismessage of intolerance and hatred."

The report from the Paris ALAT also stated that Idir recalled that Moussaoui had traveled to Kuwait, Turkey, and Afghanistan. Idir said Moussaoui was a "strategist" who was potentially very dangerous and was devoted to Wahabbism, the Saudi Arabian sect of the Islamic religion adhered to by Bin Laden. Idir also described Moussaoui as "extremely cynical" and "a cold stubborn man, capable of nurturing a plan over several months, or even years and of committing himself to this task in all elements of his life." The date of birth Idir provided for Moussaoui was the same as the one in Moussaoui's passport, which had been seized upon his arrest in Minneapolis.

The Paris ALAT's report also stated that the ALAT had inquired with the French authorities about deporting Moussaoui to France and that the French authorities were interested in pursuing the matter. In the lead portion of the EC, the Paris ALAT wrote a lead for the Minneapolis FBI that stated, "With FBIHQ concurrence and assistance, advise Legat Paris of interest in further exploring the possibility of deporting [Moussaoui] by U.S. law enforcement escort to France as described in the text of this EC." The lead for the RFU was a "read and clear" lead.

Gary's notes indicate that Martin brought this new information to Gary's attention in a telephone call on August 30. In addition, Martin advised him that the French government would be able to hold Moussaoui for several days with his property quarantined. The notes reflect that Martin told Gary that the French authorities were "very interested in Moussaoui" and that they wanted him "escorted to France" and his "property quarantined." Gary's notes also indicate that Martin advised Gary that the French terrorism statutes would allow the French to hold Moussaoui for "several days to determine what he's up to."

G. Deportation plans

Martin and the Minneapolis FBI coordinated with the INS to finalize plans for Moussaoui's deportation. Under the law, Moussaoui could be deported to either France, his country of citizenship, or England, his country of last residence. The French advised that they could hold Moussaoui and search his belongings, and on approximately August 30, it was decided to deport Moussaoui to France.

During the deportation planning, the Minneapolis FBI and the FBI Paris ALAT requested permission from FBI Headquarters for Henry and an INS agent to accompany Moussaoui to France in order to brief French authorities and to assist in evaluating the information obtained in the search. Minneapolis Acting SAC Roy wrote in an August 30 e-mail to Don that the French authorities were requiring that Moussaoui be accompanied by a law enforcement officer from the United States and that Moussaoui's property be kept separate from him. Roy wrote, "If possible, we would like the Minneapolis agents to be present while the exploitation of the computer is conducted so we can act immediately on any information obtained."

Don initially was opposed to sending FBI agents to escort Moussaoui. He sent a reply e-mail to Roy on August 31 stating that he believed that the deportation of Moussaoui should "remain an INS issue." (Emphasis in original.) Don wrote in the e-mail the Minneapolis FBI should ensure that the FAA was involved and noted that FAA sky marshals were armed.

Section Chief Rolince told the OIG that he also was initially opposed to sending a Minneapolis agent with Moussaoui to France. He said that at first he thought it was unnecessary because, based on his past experience, the agent would have accompanied Moussaoui in an attempt to obtain information. He said that he changed his mind when it later was explained to him that the Minneapolis agent was going to accompany Moussaoui as part of an overall strategy to ensure that Minneapolis obtained all of the information from the search and further investigation.

Roy replied by e-mail to Don a few minutes later and asked whether Don's e-mail meant that FBI Headquarters would not support a Minneapolis agent accompanying Moussaoui to France. Gary also provided additional information to Don, such as that the French authorities preferred that an FBI agent accompany Moussaoui to France and that Martin had informed the

Minneapolis FBI that FAA sky marshals would not be traveling with Moussaoui.[141]

Don replied by e-mail three hours later, stating that he could not discuss the matter at the moment but would call Roy the following week. Don added that he did not believe that the FBI would be turning over the case to the French authorities by not sending an FBI agent to escort Moussaoui. He added that the FBI's Paris ALAT would be present for the search and had been involved with the Moussaoui investigation from the beginning.

On September 4, Don, Martin, and Roy received an e-mail from the Paris ALAT in which he stated that he wanted to confirm the deportation plans. He wrote that it was his understanding that the proposal was to send Moussaoui to Paris with an INS escort and the FBI case agent. The ALAT noted that "[t]his would fit nicely with what the French have requested" and that the agents would need to stay in France a couple of days to assist with briefing the French authorities and to obtain the results of the search by the French authorities. Martin replied by e-mail that Don "still [held] the position that [Moussaoui] will be escorted by INS, and that no FBI personnel is needed." Martin also wrote that because the case had been opened only two weeks and because the interviews were well documented, the ALAT and the French authorities should be able to handle the case without the FBI sending the case agent.

The Paris ALAT responded by e-mail to Don, providing his opinion on whether a Minneapolis agent should accompany Moussaoui to France. The ALAT stated that he did not feel that he was in a position to adequately answer some questions that could be raised about the FBI's investigation of Moussaoui, such as other investigation conducted of which the ALAT was unaware, and questions about Moussaoui's personality for purposes of approaching him in an interview. He wrote that he therefore believed that an agent from Minneapolis or FBI Headquarters should accompany Moussaoui.

Don responded to the ALAT's e-mail the same day. He wrote, "Do we need to fly FBI agents all over the world to conduct basic investigation. [sic] I don't like the idea of [a Minneapolis FBI agent] 'escorting' this guy --- This is

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[141] Martin's e-mail about the FAA stated, "[The FAA] did not indicate a desire to escort the guy, and indicated the INS escort would suffice."

not that complicated. It may be to [sic] late, but in the future I would like [the ALAT] to handle such matters."

The next day, September 5, Henry e-mailed Martin about a meeting he had with the INS supervisor who was going to be responsible for sending Moussaoui to France. Henry explained that the INS supervisor had raised a number of issues about the deportation of Moussaoui and recommended that the FBI request that the INS transport Moussaoui on a government aircraft (a Justice Prisoner Alien Transportation System (JPATS) flight). Martin responded to this e-mail by stating that he would discuss the issue with the INS supervisor assigned to the RFU. Martin also forwarded the e-mail to Don.

Don replied the next day, September 6, writing, "Isn't a JPATS flight awful expensive for a guy SUSPECTED of being up to no good??? Again, I'm of the belief that we consider that a FAA sky marshal(s) be present on the flight."

According to Gary, he repeatedly asked Roy to raise the issue at a higher level at the FBI regarding Minneapolis agents accompanying Moussaoui to France. According to Gary, Roy was waiting for a call back from Don, and because Don had not given Minneapolis a definite "no," Roy was hesitant to go up the chain of command.

According to Roy, he did not hear from Don about the deportation issue. When Don still had not responded by Monday, September 10, Roy sent another e-mail to Don asking whether he had given consideration to a Minneapolis FBI agent escorting Moussaoui.

Don replied by e-mail a few hours later stating that FBI Headquarters decided to concur with a Minneapolis agent accompanying Moussaoui to France.

Gary also told the OIG that he had suggested at some point that Roy "go up" the chain of command about Minneapolis' FISA request, but that Roy did not. Gary told the OIG that he believed that Roy was "not aggressive enough" because he did not appeal to anyone in upper management at FBI Headquarters, but that Roy may have decided to focus on the deportation issue and "drop" the FISA issue. Gary told the OIG that he believed that part of the reason that Roy did not contact anyone above Don about the Moussaoui FISA request was because he was an acting SAC, and also possibly because Roy did

not have any international terrorism experience. Gary also said that Gary himself was "on a learning curve too," and that if he had more experience, he would have sought assistance from someone above Don with trying to get FBI Headquarters to submit the Moussaoui FISA request to OIPR.

Roy responded to this issue by stating that he did not go above Don because, before the September 11 attacks, there was no apparent "urgency" to the Moussaoui matter, and he believed that the Minneapolis FBI had taken the matter through the appropriate channels, since the head of the NSLU also had given his opinion on the FISA request. Roy added that shortly after Bowman's opinion was received, the deportation plan was in place and that plan was going to result in Moussaoui's belongings being searched, which was what Minneapolis was attempting to achieve.

H. Dissemination of information about Moussaoui

On August 28, Don received an e-mail from the FBI detailee to the CIA who we call Craig, which indicated that the CIA had not yet received a formal communication from the FBI about the FBI's requests in the Moussaoui investigation. Don e-mailed Martin and Robin on August 31 to request that they prepare a "comprehensive teletype" to the CIA about Moussaoui. Don wrote that they should pass to the CIA all information, such as biographical information, pocket litter, and telephone numbers, and formally ask for traces on all of the information even though the requests already had been made informally. Don noted that the information needed to be in "formal channels" and instructed Martin and Robin to include the Minneapolis FBI and appropriate Legat offices on the teletype so that the offices would know what FBI Headquarters was doing. Martin replied that he had spoken to Craig about the lack of a formal request and that Martin had begun preparing a teletype, but that he had not yet completed it.

On the same day, in an e-mail from Don to Roy in which Don recommended that FAA sky marshals be used to escort Moussaoui when he was deported to France, Don wrote that he "would also suggest that [Minneapolis] ensure FAA is on board (figuratively and literally). FAA needs to know that FBI suspects that your subject may have been up to no good which included his desire to obtain 747 pilot training." Roy responded in an e-mail that the Minneapolis FBI was working on an LHM and would disseminate it to the FAA in Minneapolis as soon as possible.

Henry told the OIG that he began drafting an LHM to the FAA and that he thought it was important to inform the FAA that Minneapolis believed that Moussaoui wanted to seize control of an airplane and that he might be released soon after he was back in France. Henry prepared a 7-page LHM in which he summarized the FBI's investigation, including what the FBI had learned from the flight school employees about Moussaoui and his interest in and ability to use the mode control panel. Henry noted, "While it is not known if his physical training and study of martial arts are also connected to this plan, such preparations are consistent with facilitating the violent takeover of a commercial aircraft."

Henry also included a section at the end of the LHM labeled "threat assessment" in which he wrote:

> Minneapolis believes that Moussaoui, Al-Attas, and others not yet known were engaged in preparing to seize a Boeing 747-400 in commission of a terrorist act. As Moussaoui denied requests for consent to search his belongings and was arrested before sufficient evidence of criminal activity was revealed, it is not known how far advanced were his plans to do so.

Henry wrote that the French authorities were planning to receive Moussaoui into custody when he was deported and would search his belongings, but that it was not known whether he could be detained over the long term. Henry added that "most significantly" it was unknown whether the French authorities would be able to retain Moussaoui's property indefinitely, including the flight manuals and "materials believed to be contained on his laptop which pertain to his plan." Henry wrote that if the materials were returned to Moussaoui and he was released, "Moussaoui may have the ability to continue with his plan to utilize a 747-400 for his own ends." Henry added, "As the details of his plan are not yet fully known, it cannot be determined if Moussaoui has sufficient knowledge of the 747-400 to attempt to execute the seizure of such an aircraft if he becomes free to do so in the future."

On September 4, Gary discussed this LHM with Martin. According to Gary's notes of the conversation, Martin told him not to provide the LHM to the FAA because FBI Headquarters was issuing a teletype that day to all agencies. Martin instructed Gary to provide the local FAA office with a copy of the teletype once it was received in Minneapolis.

Martin's 11-page teletype was issued on September 4. It was addressed to the FBI Minneapolis and Oklahoma City offices, six FBI Legat offices, the CIA, FAA, Department of State, INS, U.S. Secret Service, and U.S. Customs Service. The teletype consisted of a summary portion and the details of the Moussaoui investigation. In the summary portion of the teletype, Martin wrote that Moussaoui had been detained on a visa waiver overstay violation after he was brought to the attention of the FBI by instructors at the Minneapolis flight school, who had become suspicious of him because he was taking flight simulation training for a 747-400 aircraft. The teletype stated that this training is normally given to airline pilots, and that Moussaoui had no prior experience and had paid $8,300 in cash for the course. The teletype included the information received from the French authorities about Moussaoui, including that he adhered to radical Islamic fundamentalist beliefs and he had recruited a person to join the jihad against Russian forces in Chechnya. It also included the later information received from the French, such as the description of him as "full of hatred and intolerance and completely devoted to the Wahabite cause" and that he was "considered to be potentially very dangerous because of his beliefs and the nature of his character." The teletype added that Moussaoui had traveled to Pakistan for two months prior to his arrival in the United States and that "it is noted that Islamic extremists often use Pakistan as a transit point en route to receiving training at terrorist camps in Afghanistan."

After the summary portion of the teletype, Martin included specifics from the investigation, most of which were taken from the 26-page EC prepared by Henry at the initiation of the investigation. Unlike the LHM Henry had prepared to give to the FAA, however, the teletype did not contain a threat assessment or any indication that the Minneapolis FBI believed that Moussaoui, Al-Attas, and others not yet known were engaged in preparing to seize an airplane in commission of a terrorist act.

On September 5, Henry and an INS agent provided Martin's teletype to the FAA office in Minneapolis and briefed FAA employees on the threat that the Minneapolis FBI believed Moussaoui posed. Henry told the OIG that while the teletype contained most of the facts of the investigation, it lacked conclusions and analysis and had "no statement of opinion as to the threat that this represents."

Martin told the OIG that at the time that he was preparing the teletype, he was not aware that the Minneapolis FBI was preparing an LHM to provide to

the local FAA office. He stated that he discussed to whom to address his teletype with the IOS at FBI Headquarters who prepared teletypes for the FBI when it disseminated threat information, and he also discussed the contents of the teletype with an FAA employee detailed to FBI Headquarters. Martin told the OIG that he included in the teletype what he believed was supported by the facts of the investigation. He asserted that Minneapolis had a "gut feeling" that Moussaoui was "up to no good," but did not have intelligence information of an ongoing plot or plan to hijack an airplane.

Don told the OIG that the FBI used teletypes to disseminate facts gathered from an investigation and to disseminate information about threats. He said that Martin's teletype was a compilation of the facts and did not "speculate as to what Moussaoui was up to." Don said that the FBI anticipated that the recipient agencies would provide the FBI with their reactions to the teletype or information that was relevant to the teletype.

I. September 11 attacks

On September 10, Henry received an e-mail from Carol, the FBI Headquarters employee whom he had contacted for more information about Khattab's connections to Al Qaeda. She asked whether Henry had ever received anything that he could use in support of a search warrant for Moussaoui's belongings. Henry responded that the RFU had determined that Minneapolis had insufficient evidence to pursue either a FISA or a criminal warrant. He noted that Minneapolis "did not pursue this further because [FBI Headquarters has] directed that this is an INS matter." He added that he "strongly disagree[d]." He also wrote that Moussaoui was being deported to France and that his "big fear" was that Moussaoui would be released following his deportation. He concluded by thanking Carol for her assistance.

Carol responded a few minutes later by e-mail in which she wrote, "Thanks for the update. Very sorry that this matter was handled the way it was, but you fought the good fight. God Help [sic] us all if the next terrorist incident involves the same type of plane."

On the morning of September 11, at 8:34 a.m. Eastern Standard Time, Martin sent an e-mail to Gary finalizing plans for Moussaoui's deportation, which the FBI believed would occur within several days. Just 12 minutes later, the first hijacked airplane hit the north tower of the World Trade Center.

After the first airplane hit, Martin tried to call Minneapolis ASAC Charles but reached Rowley instead. According to Rowley, she told Martin that it was essential to get a criminal search warrant for Moussaoui's belongings. Rowley said that Martin instructed her that Minneapolis should not take any action without FBI Headquarters approval because it could have an impact on matters of which she was not aware. In her May 20, 2002, letter to the FBI Director, Rowley wrote that in this conversation with Martin she had said "in light of what just happened in New York, it would have to be the 'hugest coincidence' at this point if Moussaoui was not involved with the terrorists." Rowley wrote that Martin replied "something to the effect that I had used the right term 'coincidence' and that this was probably all just a coincidence." Rowley told the OIG that she agreed to follow Martin's directive not to immediately seek a criminal warrant, and she was told that FBI Headquarters would call her back.

Martin told the OIG that he recalled that there was a lot of confusion when he spoke to Rowley. Martin said that he did not recall making the statement about a coincidence to Rowley. He explained to the OIG that he did not feel comfortable giving legal advice about seeking a criminal warrant, so he went to the NSLU attorney who we call Tim, who advised that the Minneapolis FBI should seek the criminal search warrant.

While Rowley was waiting for a return call from FBI Headquarters, Minneapolis ASAC Charles was on the telephone with Don. Because Acting SAC Roy was out of the office, Charles was responsible for the Minneapolis office and had called FBI Headquarters immediately after the first airplane hit the World Trade Center. Charles had reached Don and asked him for permission to seek a criminal search warrant for Moussaoui's belongings. According to Charles, Don responded that he still did not believe that there was enough evidence to support a criminal search warrant. Charles stated that, during the course of this conversation the Pentagon was hit by another hijacked airplane, and that Don then told Charles to go to the USAO for a criminal warrant.

Don confirmed that he spoke to Charles on the morning of September 11. He asserted that he immediately told Charles that the Minneapolis FBI could

seek a criminal warrant.[142] Don told the OIG that it was a brief conversation that lasted several seconds at the most.

Once Don authorized contact between the Minneapolis FBI and the Minneapolis USAO, Henry and Rowley went to the USAO to obtain a criminal search warrant for Moussaoui's belongings. They consulted with several senior Assistant United States Attorneys, and drafted an affidavit in support of the search warrant. The affidavit stated that there was probable cause to believe that the laptop computer and other items seized from Moussaoui would contain evidence of a violation of 18 U.S.C. § 32 – destruction of aircraft or aircraft facilities. The affidavit contained much of the information reported in Henry's 26-page EC about Moussaoui's interactions with the flight school and interviews with the Minneapolis FBI, as well as the information from Al-Attas' will and from the transcribed conversation of Al-Attas while he was in custody. The affidavit also included information about the September 11 attacks on the World Trade Center and the Pentagon. The search warrant was granted that day.

The FBI searched Moussaoui's belongings that were being held at the INS offices in Minnesota, including the laptop computer, associated computer software such as diskettes, spiral bound notebooks, clothes, and a cellular telephone. The return from the search warrant stated that the following items, among other things, were found: a pair of shin guards; a Northwest Airlines 747 cockpit operating manual; two 747 training videos; seven spiral notebooks containing handwritten notes about aviation; a Microsoft flight simulator book; a PowerPoint compact disc; a cell phone; binoculars; headphones; a skullcap; a cassette recorder; European coins; eyeglasses; disposable razors; and several documents, including financial records, blank checks, and identification papers from France.

Moussaoui's belongings did not reveal anything that specifically provided a warning or an indication of an imminent terrorist attack. There were no plans, correspondence, or names or addresses in his computer or notebooks that linked him directly to the September 11 terrorist attacks. However, information was

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[142] The 1995 Procedures provided that the FBI could go directly to the USAO without obtaining permission from the Criminal Division if "exigent circumstances" were present.

obtained in the search that, through further traces, was used by the government to indict Moussaoui for conspiring in the September 11 terrorist plot.

J. Information received from British authorities on September 12 and 13

On September 11, after the attacks, the London Legat again requested information about Moussaoui from the British. According to British reports that the FBI reviewed on September 12 and 13, Moussaoui had attended an al Qaeda training camp in Afghanistan.

It is not clear why the information from the British was not provided to the FBI until after September 11. The FBI's ALAT in London first contacted the British authorities by telephone and in a written communication dated August 21. The ALAT summarized the status of the FBI's investigation of Moussaoui, provided a document describing the results of the investigation at that time, and asked for traces to be conducted on Moussaoui and all of the individuals listed in his communication and in an enclosed document.

The ALAT told the OIG that he had had several meetings and telephone calls with the British authorities in which Moussaoui was discussed. He said that the British were well aware of the importance of the matter. In addition, he said that on September 5 he provided the British with the additional information about Moussaoui that the FBI had received from the French authorities. The ALAT told the OIG that he did not know why the British authorities failed to provide the information about Moussaoui sooner. However, he said that 10 to 15 days to respond to a request for information from the FBI was normal.

K. Moussaoui's indictment

On December 11, 2001, Moussaoui was indicted by a grand jury on six conspiracy counts directly related to the September 11 attacks. He is still awaiting trial.[143]

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[143] On July 22, 2002, Al-Attas pled guilty to making false statements to federal investigators. He was sentenced on October 22, 2002, to time served.

III. OIG Analysis

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

A. No intentional misconduct

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

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

B. Probable cause was not clear

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Initial evaluation of the request for a FISA warrant

a. Prevailing standards

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

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

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

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

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

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

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

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

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

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

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

(Emphasis in original.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Failure to reconsider criminal warrant

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

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

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

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

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

3. Conservatism with respect to FISA

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

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

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

arguments in support of this assertion. First, FBI employees said that OIPR required more than what FBI employees believed was necessary under FISA to get a FISA warrant. One former unit chief told the OIG that OIPR's standard for probable cause was "too high." The former head of NSLU told the OIG that OIPR attorneys often asked for details about the investigation that were not related to the issue of probable cause. He asserted that, by comparison, Title III applications were "far cleaner and far more succinct" than the FISA applications. As an example of OIPR's conservatism, another NSLU attorney asserted to the OIG the fact that in FISA applications involving a particular terrorist organization as the foreign power, OIPR required a substantial number of pages worth of facts to support the assertion that it was a terrorist organization, despite the fact that this terrorist organization was designated as a foreign terrorist organization by the State Department.[147]

Second, FBI employees told the OIG that they believed that OIPR was not aggressive in its use of FISA. They asserted that OIPR was not interested in pleading "new" foreign powers – foreign powers that had not previously been pled to the FISA Court. FBI employees told the OIG that with respect to each potential target, they had to identify which terrorist "box" the target fit into, and that OIPR was primarily interested in using a particular terrorist organization as the box and pleading it as the foreign power. FBI personnel explained to the OIG that while terrorist groups were at one time recognizable as a collection of individuals belonging to an organization with a well-defined command structure and could easily be placed in a terrorist "box," this was no longer the case by the mid-90s. Instead, terrorists were often Islamic extremists who were not necessarily affiliated with any specific terrorist group and who received support from or shared the same goals with several different groups. To address this change in terrorism, the FBI proposed to OIPR in 1997 and again in 2000 creating a new foreign power – which they called the "International Jihad Movement" – that would target these kinds of terrorists. According to FBI employees, the FBI presented its position to OIPR on several occasions, but OIPR was not receptive to this idea. By the summer of 2001,

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[147] At the request of the FBI, in 2001 this information was eventually revised and shortened substantially.

however, OIPR had agreed to review documentation the FBI compiled in support of creating the new foreign power.

James Baker, the Counsel of OIPR, acknowledged that OIPR had this reputation, but he did not believe that it was accurate. He stated that significant changes had occurred before September 11, 2001, as well as in the past few years. He said that at the time of the millennium (year 2000), the threat of terrorist attacks was high and OIPR was very aggressive in its use of new theories of probable cause, which the FISA Court approved. He said that OIPR attorneys – in their oversight role – asked a lot of questions of the FBI and did not automatically approve FISA applications, causing some frustrations in the FBI. He also stated that another source for the perception of OIPR within the FBI was the fact that field offices had no contact with OIPR, and as a result were not aware of the work that OIPR contributed to bolstering the FISA package. But he said that the FBI generally brought meritorious cases to OIPR and that he instructed his staff to be advocates for each application and to "pull the thing together and see if it can fly."[148] With respect to the new foreign power suggested by the FBI, Baker told the OIG that the FBI was requested repeatedly by OIPR to draft a memorandum setting forth the evidence supporting the existence of this new foreign power, but the FBI did not present any documentation to OIPR concerning this theory until after September 11, 2001.

In our review, it was clear to us that the perceptions about OIPR affected how aggressively FBI Headquarters handled requests for FISA warrants from the field. As we discuss below, the FBI was hesitant to plead new foreign powers or to plead unnamed foreign powers in FISA applications. Most FBI

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[148] The OIPR Deputy Counsel, Margaret Skelly-Nolen, also told the OIG that she believed that the FBI's criticism of OIPR had been "unfair." She stated that OIPR learned what FISA Court judges would and would not approve based on their comments and questions in court sessions involving FISA applications. She stated that obtaining FISA orders in counterterrorism cases was "harder" than in the traditional espionage cases, although she acknowledged that not all of the attorneys in OIPR were "equally aggressive." However, she also described OIPR as "proactive" and the FISA Court as "responsive" to the needs of the government. She added that the FBI knew "how to press" OIPR when the FBI really wanted a FISA warrant to go through. She stated that what she tried to do with FISA requests was determine what was the most accurate and expeditious way to plead the case.

employees we interviewed did not even consider the possibility of pleading unnamed foreign powers, and many did not even know that it was possible. In addition, an ongoing OPR investigation about errors in FISA applications increased the caution with which the FBI approached FISA.

a. Failure to plead new foreign powers

As discussed above, the government generally sought FISAs for subjects that had previously been approved by the FISA Court. As a result, at the time of the Moussaoui investigation, the FBI did not routinely try to plead "new" foreign powers or otherwise seek to use the FISA statute creatively. FBI Headquarters SSAs, IOSs, and NSLU attorneys evaluated cases and gave advice to the field offices based upon what they thought would get a FISA package through OIPR and to the FISA Court, not based upon what may have been legally possible under FISA. They therefore focused on "recognized" foreign powers – those that had previously been pled to the FISA Court – and sought evidence of direct links between the target and the foreign power. If the case fell outside those parameters, the FBI was not usually aggressive or creative in analyzing the possibilities under FISA. OIPR Counsel Baker confirmed that prior to September 11 it was far easier to show that someone was a member of an established group that was engaged in international terrorism, such as al Quaeda. In reviewing the Moussaoui case, he stated that although it was theoretically possible to allege a connection between Moussaoui and the Chechen rebels (because of Moussaoui's recruitment of Amnay to go to Chechnya), it would have been far easier to use al Quaeda as the foreign power if sufficient information could be developed to support such a connection.

One NSLU attorney told us that, by the summer of 2001, most of the FBI concerns were not necessarily about the legal sufficiency of the FISA request, but rather whether, as a practical matter, information could be presented to OIPR in such a way to get approval for presentation to the FISA Court. Several ITOS employees told us that because of the resistance to pleading new or unnamed foreign powers, a particular terrorist organization therefore was being used as a generic terrorist group in cases where there were doubts about ties to a specific group. Several analysts told us that even if the link to this particular terrorist organization was tangential and the subject appeared to be more closely aligned with other individuals or to be operating alone, they

would still try to link the potential target to this particular terrorist group in order to obtain FISA Court approval.

Reflecting this view, Martin and Don advised Minneapolis that a "recognized foreign power" was required in order to obtain a FISA warrant. The French information about Moussaoui showed a potential link between Moussaoui and Khattab's group of rebels in Chechnya. While Martin, Robin, and the NSLU attorneys were aware that the Chechen rebels could in theory constitute a terrorist organization and therefore be a foreign power under FISA, they did not believe this was a viable option. Their advice to the Minneapolis FBI that it needed to link Moussaoui to a "recognized foreign power" was based on their understanding that the Chechen rebels had not been pled to the FISA Court previously, the belief that the intelligence was lacking to support pleading that the Chechen rebels were a terrorist organization, and their concern that it would take months to build a case for a new foreign power.

FBI employees pointed out that even if they could get a new foreign power approved by the Department and before the FISA Court, it was still significantly faster and easier to plead an already accepted foreign power. For foreign powers that had been pled before the FISA Court, the FBI could use previously drafted FISA applications, which contained language that already had been scrutinized and accepted. This approach required using the available language on the foreign power and filling in the individual facts of a case. It required less research and time to develop a persuasive package for OIPR and the FISA Court. In contrast, pleading a new foreign power required making a persuasive argument that would require several levels of approval from within the FBI and OIPR. This was a time consuming process, with an uncertain outcome.

In the Moussaoui case, the available evidence showed a much more likely link between Moussaoui and Khattab and the Chechen rebels rather than a link to al Quaeda. While the FBI's belief about the likelihood of success with OIPR and the time it would have taken to plead a new foreign power were important considerations, this potential option was never explored by FBI Headquarters. Most important, no one discussed it with OIPR, despite the Minneapolis FBI's strong belief that Moussaoui was dangerous and its strong desire to seek all legitimate means to obtain access to his computer and other belongings.

b. Failure to consider pleading unnamed or unknown terrorist groups as a foreign power

The FBI could have sought to plead that Moussaoui was linked to an "unnamed" foreign power. The legislative history of FISA states that an individual cannot be a foreign power, but that "[w]here two or three individuals are associated with one another, it might be argued that they are an 'association' or an 'entity,' which, if the proper showing is made could be considered a 'foreign power.'" OIPR Counsel Baker told us that based on this legislative history he believed that a foreign power could be as small as two people. He also told us that the foreign power does not necessarily need to have an agreed upon name or need to be widely known.

No one at the FBI involved in this case considered trying to plead Moussaoui as an agent of an unnamed, new foreign power. If they had, it might have been possible to plead Moussaoui as an agent of an unnamed terrorist group composed of Moussaoui and a group operating in Oklahoma, such as Al-Attas, the persons who helped Al-Attas get out of jail, and the persons from whom Moussaoui indicated he received money.

September 11 provided the impetus for the Department and the FBI to be far more aggressive in the use of FISA. Based upon OIG interviews and review of documents, we determined that the Department has shown a great degree of flexibility in pleading foreign powers since September 11.

We recognize it is not readily apparent that trying to plead Moussaoui as an agent of an unnamed foreign power would have succeeded had it been pursued. But no one at the FBI even considered this option, despite Minneapolis' adamant concerns about Moussaoui. Moreover, no one even consulted with OIPR about this option, or any other option, to see what could be accomplished to support the Minneapolis FBI's investigation.

c. Ongoing DOJ OPR investigation

We believe that the FISA Court reprimand of the FBI and an ongoing DOJ OPR investigation of how FISAs were handled contributed to the FBI's conservatism in seeking FISA requests. As discussed in Chapter Two, in September 2000, OIPR notified the FISA Court of errors in approximately 75

FISA applications.[149] In November 2000, the Office of the Deputy Attorney General referred the matter to DOJ OPR, and DOJ OPR opened an investigation.

Beginning in October 2000, the FISA Court began to require all Department personnel who received FISA information in cases involving the terrorist group that had been the subject of the majority of the errors to certify that they understood "that under 'wall' procedures FISA information was not to be shared with criminal prosecutors without the Court's approval." Everyone who reviewed such FISA-derived information was required to sign the certification stating that they were aware of the FISA Court order and that the information could not be disseminated to criminal investigators without prior approval of the Court. After being notified of additional errors in FISA applications in March 2001, the FISA Court banned one FBI SSA from appearing before it. DOJ OPR was asked by the Attorney General to expand its investigation to include a review of these additional errors in FISA applications.

We heard differing opinions within the FBI about how the DOJ OPR investigation affected FBI employees.[150] Martin told us that there was "a big push for accuracy" with new procedures being implemented and that there "were concerns that you just never know when an OPR is going to be opened up on you." However, he said that the matter did not significantly impact his work. Don said that ITOS SSAs were upset about the DOJ OPR investigation and were concerned that the investigation would harm their careers and their ability to get other jobs within the FBI after their stint in ITOS. But Don

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[149] As discussed in Chapter Two, a significant number of the errors concerned inaccurate information in FISA applications about the "wall" procedures that had been put into effect to separate criminal investigations from intelligence investigations.

[150] In her May 21, 2002, letter to the Director, Rowley wrote: "Our best real guess [for why Headquarters acted as it did in the Moussaoui matter]. . . is that, in most cases, avoidance of all 'unnecessary' actions/decision by FBIHQ managers (and maybe to some extent field managers as well) has, in recent years, been seen as the safest FBI career course." She said that FBI officials who made decisions or took actions that turned out to be mistaken saw "their careers plummet and end. This has in turn resulted in a climate of fear which has chilled aggressive FBI law enforcement action/decisions."

asserted that he did not believe the OPR investigation had "chilled" the efforts of the FBI. Robin stated that, while the OPR investigation caused FBI employees to be more careful about accuracy, she did not feel it had created any timidity in the use of FISA warrants.

Other ITOS personnel believed that the OPR investigation and the increased scrutiny by the FISA Court had a bigger impact on FISA applications. One SSA who formerly was assigned to ITOS told us that, after the revelation of FISA application errors, there was a climate of fear and reluctance in ITOS. He stated that in 2000 and early 2001, all ITOS SSAs were aware that they would be held accountable for any mistakes made in FISA applications, even mistakes by field offices that the SSAs oversaw. He added that, because the SSA position in ITOS is temporary, most SSAs are planning to be promoted to a position in a field office. This would be difficult if an agent had been disciplined or was under investigation. He said that agents were concerned that their ability to be promoted would be adversely affected by any investigation into their actions.

In addition, OIPR personnel said that the OPR investigation impacted the FBI's work on FISAs. The OIPR Deputy Counsel told us that the OPR investigation caused repercussions that affected the entire process. She said that the FBI allowed a number of FISAs to expire because agents were concerned that they would find themselves under investigation or banned by the FISA Court for errors in applications. She said that she had heard agents comment that they are "not going to be another [the agent who was banned by the FISA Court]."

We believe that the atmosphere in the FBI was affected by the OPR investigation and the FISA Court ban of the SSA. The added procedural requirements, concerns about individual liability, and the increased scrutiny of information in a FISA request likely caused agents to be more careful and sometimes become apprehensive about pursuing an unusual case or a case where all the facts were not immediately ascertainable.

We also believe that this atmosphere affected Martin's approach to FISA applications, including the Moussaoui matter. Indeed, in an e-mail on June 12, 2001, Martin cautioned Henry about the rules related to FISA with regard to minimizing an intercepted conversation in another intelligence case:

While you folks may perceive me as being too critical at times, I need to be certain that I am representing facts and issues properly to DOJ and the Court. There are a few folks looking for scalps these days. I'm only trying to keep yours and mine from being removed.

D. Assessment of probable cause

FBI Headquarters also did not analyze the facts in their totality and too readily discounted individual facts when assessing the Minneapolis FBI's concerns about Moussaoui. The standard for probable cause is the same for both FISA warrants and criminal warrants. The Supreme Court defined probable cause in Illinois v. Gates, 462 U.S. 213, 236-38 (1983), as whether, given the "totality of the circumstances" there is a "fair probability" that contraband or evidence of a crime will be found in a particular place. The Supreme Court emphasized that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause." This standard allows for drawing reasonable inferences from the facts and does not require direct evidence.

Yet, we found that the RFU and the NSLU tended to view the facts of the Moussaoui case individually rather than consider the totality of those facts. They evaluated the Moussaoui investigation for direct evidence of Moussaoui's links to a foreign power, particularly al Qaeda. While the perception at FBI Headquarters may have been that this was what was required by OIPR, FISA required only "probable cause" that a target was an agent of a foreign power.

For example, in evaluating Moussaoui's potential links to al Qaeda, Martin and Robin focused on the intelligence indicating that Khattab was no longer believed to be a part of the al Qaeda organization and did not take direction from Bin Laden. Although Martin and Robin were correct that the FBI lacked sufficient information to tie Moussaoui directly to al Qaeda, it does not appear that either of them evaluated the totality of the evidence for facts that would allow for reasonable inferences that there were sufficient indirect connections to al Qaeda.

An example of information that could have been considered in support of the FISA request was the telephone conversation between Al-Attas and the Oklahoma imam while Al-Attas was incarcerated. In that conversation the

imam stated to Al-Attas, "I heard you guys wanted to go on Jihad." Al-Attas immediately responded, "Don't talk about that now." Don stated in an e-mail to Minneapolis: "The Jihad comment doesn't concern me by itself in that this word can mean many things in various muslim [sic] cultures and is frequently taken out of context." Don told us that he saw the use of the term "jihad" all the time and there are always questions about what the term really means. Yet, while the term may be open to interpretation, it is a significant comment that in context should have been given greater weight in considering whether there was probable cause to believe Moussaoui was connected to a terrorist group. Baker told us that "he would have tied bells and whistles" to the jihad comment in a FISA application.

Don also discounted Al-Attas' will. He stated in an e-mail that the will was "interesting," but he told the OIG that it is not uncommon for Muslims to have a will. However, as pointed out in the criminal search warrant obtained after the September 11 attacks, the will was in a mailing envelope as though it was ready to be sent to relatives.

We believe that the RFU failed to appreciate the significance of these individual facts and failed to analyze their effect on the totality of the circumstances. Instead, it treated each fact individually and too readily discounted their significance. The end result of this approach was that all of the facts were never fully considered in their totality or fully presented to anyone for a legal sufficiency review – whether by the NSLU or OIPR.

E. Conflict between Minneapolis and FBI Headquarters

Many of the problems that arose in the handling of the Moussaoui case also were affected by strained relations between the Minneapolis FBI and the RFU. Prior conflicts with the RFU led the Minneapolis FBI agents to mistrust the judgment of the RFU, and Martin in particular. The Minneapolis FBI thought that the RFU was "raising the bar," was not aggressive, and acted out of an abundance of caution. The Minneapolis agents also thought that the RFU did not support the field adequately, undervalued the Moussaoui case, and undermined their efforts. Minneapolis therefore was skeptical of the advice from Headquarters and attempted to bypass Headquarters to obtain relevant assistance and evidence from other agencies.

By the same token, the RFU mistrusted the Minneapolis FBI based on experience in prior matters and believed that in the Moussaoui case Minneapolis was proceeding from "gut feelings" rather than evidence. Martin and others in the RFU did not have faith in the judgment of some Minneapolis FBI agents, and thought they had a tendency to claim "the sky was falling." The RFU also believed that Minneapolis did not adequately understand the law or the requirements for a FISA warrant.

This friction – as well as the clash of personalities – resulted in poor communication and misunderstandings between FBI Headquarters and Minneapolis. The atmosphere was not conducive to, and did not lead to, the field and Headquarters carefully considering the best options for proceeding in the investigation and jointly seeking an appropriate result. Instead, both sides mistrusted the other and hardened in their positions. As a result, the RFU's response to requests from Minneapolis and to new evidence appeared to be skepticism and a quick reaction that the evidence was not sufficient. This caused the Minneapolis FBI to believe even more strongly that Headquarters was undermining its efforts. The communications became increasingly adversarial and incomplete.

For example, Martin advised the Minneapolis FBI that, to obtain a FISA warrant, it needed to connect Moussaoui to a "recognized foreign power." This advice was shorthand for a foreign power that had previously been pled to the FISA Court. The Minneapolis agents, who were not experienced in FISA matters, did not understand the advice and disagreed with it. This can be seen in Henry's e-mail to Gary and the Paris ALAT in which Henry wrote that the RFU advised that the French information was not sufficient for a FISA warrant because it did not connect Moussaoui to a "named group." Henry also wrote, "I don't agree. . .who said that a foreign power has to be a named group?" In an e-mail to the London ALAT and others, Henry wrote, "Help us establish that [Moussaoui] is acting on behalf of a foreign power (which RFU seems to think must be a named group or a country)." Had there been better communication between the two offices, we believe the Minneapolis FBI agents would have understood better why FBI Headquarters was advising the Minneapolis FBI that a "recognized foreign power" was needed.

F. Problems with legal review of FISA request

We concluded that this case did not receive a sufficient FBI legal review. While the RFU consulted with several NSLU attorneys about the Moussaoui case, it consulted a different attorney each time. A single NSLU attorney was not assigned to the case, and no NSLU attorney ever reviewed all the facts or the documentation from the field before providing an opinion as to the sufficiency of the evidence to obtain a FISA warrant.

In addition, when presenting the case to NSLU attorneys, Martin made clear that he did not think there was sufficient evidence for a FISA warrant and orally provided some facts of the case. While oral briefings and consultations on an ad hoc basis may have been adequate for most FBI FISA requests, it was not adequate in an unusual case like this one. Here, there were indications that Moussaoui was connected to terrorist groups, but the connection to a foreign power was not clear. Moreover, the time frame to obtain a warrant was compressed because of Moussaoui's imminent deportation. There also was vehement disagreement in this case between the field office and FBI Headquarters about the FISA request. In light of these unusual factors, the NSLU should have been apprised of all of the facts, the strength of the field's belief in the need for a warrant, and the depth of the field's disagreement with Headquarters' position on this case.

Martin consulted with four NSLU attorneys about the Moussaoui FISA request. He gave each attorney an oral briefing on what he believed were the relevant facts as to whether Moussaoui was connected to a foreign power. Although Martin had the documents provided by the Minneapolis FBI that described in detail the facts of the Moussaoui investigation, he did not provide this documentation to any of the attorneys. The attorneys gave verbal advice based only on Martin's oral presentation. No one asked whether there was documentation that had been generated in the case or asked to review any such documentation, and two told the OIG they did not believe such documentation existed.

Although it is impossible to reconstruct Martin's exact conversations with the NSLU attorneys, the evidence shows that Martin provided a brief recitation of the facts that contained less than all of the available information about Moussaoui. At the start of the briefings Martin also conveyed to the NSLU attorneys his belief that there was insufficient evidence for a FISA. He

did not present the request to NSLU attorneys neutrally or convey the Minneapolis FBI's strong concerns that Moussaoui was likely to commit a terrorist act. Martin undersold the case to the attorneys and conveyed it in a way that did not fully present the field's views.

Martin had identified the issue in the Moussaoui case as the lack of a foreign power and said he focused on the information that he believed was relevant to that issue, which according to Martin was the French information indicating that Moussaoui had some connection to Khattab and his group of Chechen rebels. Because the FBI's focus at the time was on establishing direct links between a potential target and a foreign power, however, Martin overlooked facts from which reasonable inferences might have been drawn that Moussaoui was involved with a terrorist group. This included Moussaoui's recent travel to Pakistan and Al-Attas' statements about Moussaoui's radical fundamentalist Islamic beliefs. None of this information was provided to the NSLU attorneys.

We recognize that at the time it was normal practice for SSAs and IOSs to give only oral briefings to NSLU attorneys and that they determined what information needed to be discussed with the NSLU attorney. They were not required to provide all of the underlying documentation to the NSLU attorneys with whom they were consulting, and NSLU attorneys were not required to read all of the underlying documentation before providing advice. But given the Minneapolis FBI's urgency to obtain a warrant and the strong disagreement between Headquarters and the field office over whether a FISA warrant could be obtained, we believe that Martin should have presented the documentation to the NSLU attorneys to ensure that Minneapolis' position was being presented fairly and completely to the NSLU. The RFU had promised the Minneapolis FBI that the NSLU would give the Minneapolis request a "good faith review," but the RFU did not present all the documentation, or all the facts, to any NSLU attorney for that review. We also believe that the Minneapolis FBI should have been asked to participate in the discussions with the NSLU, partly to ensure that its views were conveyed and also to ensure that it understood the legal advice that was given.

NSLU chief Bowman told the OIG that it was unusual for a field office to be so adamant that there was sufficient information to support a FISA warrant and for the SSA to be so adamant that there was not. Moreover, the Moussaoui FISA request was unlike most other FISA requests. In most others, even if the

NSLU did not believe that there was sufficient information to support going forward on the FISA request, the field office could continue to investigate the subject for months, acquire additional information in support of the FISA request, and come back to the NSLU for another opinion. Because Moussaoui was going to be deported shortly, the opinion that there was insufficient evidence to seek a FISA warrant was, in effect, a denial of the FISA request. In light of the unusual circumstances of this case, it would have been a better practice for the NSLU attorneys to inquire about available documentation and review it before rendering an opinion. In this case, however, a comprehensive legal review of the documentation in the Moussaoui investigation did not take place.

Part of the problem was that the FBI did not assign one NSLU attorney to be responsible for a case. Both Martin and Don told the OIG that they relied on the NSLU attorneys to help them apply the relevant legal standards to the facts collected from the field and elsewhere. Because they sought advice from several NSLU attorneys in the Moussaoui case, none who felt solely responsible for the case, no one from the NSLU considered all of the information available and no one from the NSLU was sufficiently informed to assess the totality of the facts and circumstances.

It is impossible to determine for certain whether any of the NSLU attorneys would have provided a different recommendation concerning the Moussaoui FISA request if they had read all the documentation, including the 6-page LHM or the 26-page EC. Moreover, we are not suggesting that SSAs should be required to provide, or that NSLU attorneys should be required to review, all of the documentation with respect to FISA requests in every case. But we believe that the circumstances of the Moussaoui FISA request warranted a full review of all available documentation and a more careful legal analysis of that information.

We also found that the advice that was presented to the field was not complete or accurate. For example, in the meeting between the RFU and Bowman to assess whether there was sufficient evidence to seek a FISA, Bowman advised that even if the FBI could establish a foreign power for the Moussaoui FISA request, the request lacked sufficient evidence to show that Moussaoui was an agent of that foreign power. After the meeting Martin did not correctly report to the field what was required to establish such an agency relationship. While Martin accurately reported Bowman's advice that there

was insufficient evidence to establish that Moussaoui was an agent of a foreign power, he wrote that the FBI needed evidence to show that Moussaoui was an "integral part" of a terrorist organization to establish agency. This was not correct. To show agency, the FBI needed to show that the agent of the terrorist organization demonstrated more than mere sympathy or vocal support for the goals of a terrorist organization. The agent must be shown to be working "for or on behalf of" the terrorist organization. Nothing in the legislative history of FISA, the Attorney General Guidelines, or the caselaw suggests that the purported agent would have to be an "integral part" of the terrorist organization to fulfill the FISA requirement of agency.[151]

The FBI also did not ensure adequate involvement by the CDCs in the field's preparation of FISA requests. Field offices were not required to consult with CDCs about their FISA requests. The role of the CDC in providing advice on intelligence investigations and FISA applications varied by office, but we were told by many witnesses that the CDCs in smaller offices were not generally involved. NSLU attorneys we interviewed also told us that CDCs generally were not sufficiently knowledgeable about FISA to provide advice and that they generally deferred to the NSLU. We were also told that it was not uncommon for the CDCs in the field to avoid intelligence investigations.

In this case, CDC Rowley acknowledged that she lacked extensive knowledge about FISA and that she was not in a position to advise the Minneapolis FBI on the issues surrounding the FISA request. We believe that the FBI should have ensured that CDCs, at a minimum, had sufficient training and visibility among agents to assist them in assessing the legal requirements in intelligence investigations.[152] Such expertise would be helpful to field offices, especially in cases like Moussaoui where there were problems connecting him to a foreign power and the field disagreed with the advice it was receiving from FBI Headquarters.

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[151] Bowman told the OIG that he did not advise Martin that the FBI needed evidence showing that Moussaoui was an integral part of a terrorist organization and that Martin must have misunderstood their discussion.

[152] NSLU attorneys informed us that they had provided training to CDCs at various conferences and sessions. However, despite this training, CDCs were not as knowledgeable about FISA law and processes as they needed to be.

Finally, because of the strong disagreement between Minneapolis and FBI Headquarters on this case, we believe the matter should have been at least referred to OIPR for its evaluation. While the Minneapolis FBI did not push for an OIPR review, and FBI Headquarters did not seek it, such a review would have been an appropriate approach to resolving the dispute in this case. The role of the NSLU is to provide advice and guidance to the field, but we believe the NSLU should have consulted with OIPR in this case, particularly because the field office felt so strongly that Moussaoui posed a danger. As discussed above, while it is not clear whether OIPR would have, in fact, sought the FISA warrant given the prevailing standards at the time, OIPR should have at least been consulted on this matter.

G. The Phoenix EC

The FBI's computer records show that RFU IOS Robin accessed and printed the Phoenix EC on August 22. She saw it when she searched in ACS for the term "Ibn Khattab." Khattab is mentioned in a paragraph of the Phoenix EC that describes how the author of the EC interviewed the subject of an investigation who had a picture of Khattab and a picture of Bin Laden on the wall of his apartment. As described fully in Chapter Three, the EC also asserted there were "an inordinate number" of persons of interest to the FBI who were receiving training in aviation-related fields of study and that there was a possibility that Bin Laden was coordinating an effort to train people in the United States to conduct terrorist activity in the future.

Robin told the OIG that she did not specifically recall reading the Phoenix EC, although she believed that she must have read it because her practice was to read documents that she printed. She did not bring the Phoenix EC to anyone else's attention at FBI Headquarters, such as Martin or attorneys in the NSLU, or in any field office, including in Minneapolis.[153] She said she did not know why she did not bring the EC to anyone's attention. She added that after reading it some time after September 11, she concluded that she must have thought there was nothing in the EC that bolstered Moussaoui's

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[153] As discussed in Chapter Three, although Don and Martin's names were on the "attention" line of the Phoenix EC, neither Don nor Martin accessed it in ACS or otherwise became aware of the Phoenix EC until after September 11.

connection to Khattab for the foreign power element of the FISA request. She also suggested that the reporting of information about individuals who were of interest to the FBI – that they were Middle Eastern and were in flight school – was not significant because there were thousands of Middle Eastern men in U.S. flight schools at the time.

We discussed the Phoenix EC with the four NSLU attorneys who were consulted about the Moussaoui matter. All said they had not seen the Phoenix EC before September 11. All said that the Phoenix EC itself would not have conclusively led to a FISA warrant, but three of the attorneys said that if they had seen the Phoenix EC in connection with the Moussaoui case, they would have responded differently than they did when asked about the adequacy of the Moussaoui FISA request. When asked about the adequacy of the Moussaoui FISA request, Howard said that if he had seen the Phoenix EC at the time, it would have "made a difference in the pucker factor," and he would have called CDC Rowley in Minneapolis and discussed the importance of tracking down the available leads to find out as much information about Moussaoui as possible. Susan and Tim said that if they had read the Phoenix EC at the time, they would have been concerned enough about Moussaoui to bring the matter to an OIPR attorney's attention. According to Susan, she had even asked Robin whether the FBI had any information indicating anyone was sending people to the United States for flight training, but Robin did not mention the Phoenix EC.[154]

We believe that Robin should have recognized the potential relevance of the information in the Phoenix EC to the Moussaoui investigation and made others aware of it. Although the EC did not specifically mention Moussaoui or anyone else involved in the Moussaoui investigation, the EC discussed the possibility that persons under investigation by the FBI were terrorists working for Bin Laden and receiving training in aviation-related fields in the United States for the purpose of conducting terrorist activity in the future. The

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[154] Contrary to the other three NSLU attorneys, Bowman told the OIG that while coincidences between Moussaoui and the information in the Phoenix EC were apparent after September 11, he did not believe that he would have made any such connections or taken different action if he had read the Phoenix EC at the time of the Moussaoui matter.

Minneapolis FBI also suspected Moussaoui of being a terrorist receiving flight training, and the Phoenix EC was relevant to that theory.

Robin's failure to bring the Phoenix EC to anyone's attention is another example of how the FBI focused on establishing direct links between targets and foreign powers, but failed to appreciate how indirect evidence also could be useful in supporting FISA requests.

H. Edits to Minneapolis FBI's FISA request

Rowley and some of the Minneapolis FBI agents believed that Martin edited the Minneapolis FISA request to ensure that it would fail. They were most concerned that Martin had removed the section describing Moussaoui's connection to a foreign power. They asserted that Martin softened the language of the FISA request in other respects, and that FBI Headquarters should not have made substantive changes to the field's FISA request because it altered the meaning and tended to make it less accurate.

Our review found that Martin edited the request as he did other requests, and we do not believe he changed the document to intentionally undermine the Moussaoui FISA request. Moreover, Martin sent all of his proposed changes to Minneapolis for review. Martin deleted the three paragraphs of information about Moussaoui's connections to Khattab and the statement that Khattab was a close associate of Bin Laden. When Gary raised concerns about this deletion, Martin responded with an e-mail stating that the foreign power information would be added back in once an NSLU attorney had approved the use of al Qaeda as the foreign power.

Gary also questioned the accuracy of some of the other changes Martin had made. In some instances, Martin agreed to some of the wording Gary suggested but kept his own wording in other instances.

Preparing the FISA request for approval within FBI Headquarters and the NSLU for eventual submission to OIPR was primarily the responsibility of the SSA assigned the FISA request. An SSA and an IOS at FBI Headquarters typically edited the LHM submitted by the field office requesting the FISA warrant. The extent of the editing depended on the quality of the field office's LHM and the judgment of the SSA and IOS who were handling the FISA request. In some instances, the LHM was completely rewritten and a different

foreign power was used. In other cases, the IOS would check the accuracy of facts as reported by the field office, with no other editing.

The foreign power section of the LHM was usually several pages long. The SSA or IOS normally would copy relevant language from other FISA requests in which the same foreign power had been used. They also would add information to the LHM when they had uncovered additional information in their research to support the foreign power element.

Martin was the SSA responsible for the Moussaoui FISA request and the SSA who would have had to swear to the affidavit filed with the FISA Court. Most of the edits made by Martin were stylistic. Moreover, Martin did not hide any of his edits. He returned the revised draft of the LHM to Gary for his review and asked for comments. The evidence also showed that Martin was planning to prepare an entirely new foreign power section that would contain all of the necessary foreign power information. Martin also responded to Gary's concerns about the removal of the foreign power information and the other edits. Martin made some changes based on Gary's suggestions and gave explanations for the edits that he declined to change. We believe these actions suggest that Martin was not intentionally undermining Minneapolis' attempts to obtain a FISA warrant.

We also concluded that Martin's edits did not significantly change the FISA request. For example, the Minneapolis FBI had written, "Moussaoui had no convincing explanation for the large sums of money known to have been in his possession," which Martin changed to "Moussaoui would not explain the large sums . . . ." After Gary noted in his e-mail that the problem was that the Minneapolis FBI believed that Moussaoui could have explained that matter but chose not to, Martin changed the statement to "Moussaoui did not give a logical explanation for the large sums . . . ."

However, a few of Martin's changes were unnecessary and altered the meaning of the LHM to some extent. For example, Martin changed the statement that "Al-Attas admitted that Moussaoui . . . is preparing himself to fight" to "Al-Attas stated that he and Moussaoui [sic] own boxing gloves and

train together in defensive tactics."[155] Gary responded that neither Al-Attas nor Moussaoui used the term "defensive tactics," and that the change "soften[ed] our argument" and misrepresented Al-Attas' statements. In his response e-mail, Martin simply wrote that he believed that the way he had it written was "accurate."

Although Gary challenged some of the changes as "softening" the FISA request, Martin wrote that he believed that the way he had it written was "accurate."

We believe that some of Martin's edits made Minneapolis' request slightly less persuasive had it gone forward to OIPR. However, the edits did not make major changes and were not indicative of a deliberate attempt to sabotage the Minneapolis FBI request.

I. Inadequate dissemination of threat information

Although FBI Headquarters disseminated a teletype to the Intelligence Community about Moussaoui on September 4, the FBI did not include any of the threat assessment information about Moussaoui that was drafted by the Minneapolis FBI. We found that the FBI did not have clear guidelines for what threat information should be disseminated and where it should go. It was normally left to the discretion of an analyst or agent, without significant supervisory oversight.

When the decision was made to deport Moussaoui and the FBI was considering using FAA sky marshals to accompany him to France, Don instructed the Minneapolis FBI to get the FAA "up to speed" on the case. Henry wrote a detailed memorandum providing the facts of the Moussaoui case and an assessment of the threat that Minneapolis believed he posed. Henry stated the belief that Moussaoui's flight training was preparation for some future terrorist act and that his physical training and study of martial arts were "consistent with facilitating the violent takeover of a commercial aircraft." Henry wrote:

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[155] This was a reference to Al-Attas' statement that he and Moussaoui were taking martial arts training.

> Minneapolis believes that Moussaoui, Al-Attas, and others not yet known were engaged in preparing to seize a Boeing 747-400 in commission of a terrorist act. As Moussaoui [redacted] was arrested before sufficient evidence of criminal activity was revealed, it is not known how far advanced were his plans to do so. As the details of this plan are not yet fully known, it cannot be determined if Moussaoui has sufficient knowledge of the 747-400 to attempt to execute the seizure of such an aircraft if he becomes free to do so in the future.

One of the purposes of Henry's assessment was to ensure that the FAA was made aware of Moussaoui.

By contrast, the teletype prepared by the RFU and distributed outside the FBI did not have any threat assessment. According to Don, the purpose of the teletype was to provide information to and solicit input from the Intelligence Community, not to provide a threat assessment. He added that, prior to September 11, the FBI was a "case driven, fact specific" agency that did not ordinarily "speculate" or include "hypothetical information" in a teletype to the Intelligence Community. He stated that since September 11 the FBI has attempted to provide more analysis in disseminations of this type about potential threats from individuals or groups. Similarly, Martin told the OIG that he attempted to include the known facts about Moussaoui in the teletype.

We concluded that the RFU's teletype on Moussaoui omitted significant facts, such as the fact that Moussaoui knew how to operate the 747-400 Mode Control Panel, the aircraft's automated feature that allows the aircraft to fly, navigate, and, in some cases, land in a fully automated manner. Nor did it contain any assessment of the facts – either Minneapolis' or the RFU's – despite Martin's acknowledgement that he considered Moussaoui to be "a dirty bird," even if he did not believe Moussaoui could be connected to a foreign power under FISA. The RFU's teletype was not distributed to all FBI field offices, an action that may have generated helpful responses, especially in locations like Phoenix where similar issues had arisen. The teletype also was not distributed to all agencies in the Intelligence Community.

J. Inadequate training

We found that the FBI did not provide adequate training to the SSAs and the IOSs in ITOS, on either analytical procedures or on building a FISA package. The IOS and the SSA in this case had not received any specific training on FISAs or on foreign intelligence generally.

SSAs came to FBI Headquarters with different backgrounds, and the level of training given to the agents in intelligence matters varied. Moreover, the SSAs normally stayed approximately 18 months in ITOS and then moved back out to the field. While Martin had a background in terrorism investigations, he had handled FISA applications and renewals with respect to only two targets while working in the field. He told us that one of the two cases already had an active FISA order when he was assigned to the case, and he handled only the renewals. Thus, after initiating only one FISA application in the field, Martin assumed responsibility in FBI Headquarters for advising the field on FISA issues and creating FISA packages for OIPR on behalf of multiple field offices. He received little formal training in this area. In addition, although the FISAs he handled covered surveillance of different terrorist groups, he did not receive any additional formal substantive or process-oriented training prior to assuming his SSA position at FBI Headquarters.

We were told that most of the SSAs' training at FBI Headquarters was provided informally by the IOSs, who were permanent Headquarters employees and did not rotate through the units like SSAs. Several ITOS employees told us that the section could not have run without the IOSs. Prior to September 11, there were several paths to becoming an IOS. Some IOSs were promoted from within the FBI from other, sometimes clerical, positions. The FBI also hired some IOSs from outside the FBI, many of whom had graduate degrees. From our interviews of the IOSs, we found widely divergent skill and knowledge levels.

The IOS in the Moussaoui case, Robin, had no formal analytical training. She began with the FBI as a clerk in the records branch after graduation from high school. Her formal training consisted of some courses at Quantico several years ago, and occasional briefings from NSLU attorneys regarding updates and changes in the law. This training was not sufficient for the many analytical challenges they faced. It also clearly was insufficient to have the IOSs do most

of the training of incoming SSAs, who are responsible for overseeing, coordinating, and contributing to all field intelligence investigations.

IV. Individual performance

As detailed above, numerous systemic problems affected how the FBI handled the Moussaoui case. We believe that these systemic problems caused the main deficiencies in the Moussaoui investigation. Placing blame on individuals alone for the problems in the Moussaoui case would unfairly single them out for actions that we believe were not inconsistent with the FBI's prevailing practices at the time.

However, some deficiencies by individuals in this case warrant criticism. Although we believe that no one committed intentional misconduct, deliberately undermined the case, or violated established FBI or Department policies or procedures, we believe that some individuals did not do all they could have, and should have, to help pursue the Minneapolis FBI's strong concerns about Moussaoui. By contrast, the actions of some individuals warrant praise. In this section, we discuss the performance of individuals involved in the case.

A. RFU

1. Don

As Chief of the RFU, Don was responsible for ensuring that the Minneapolis FBI's requests to obtain a warrant to search Moussaoui's possessions received adequate review. Don recognized that the Moussaoui case was unusual. He directed his staff several times to consult with NSLU attorneys on the FISA request. He also took the unusual step of seeking a review of the request from the chief of the NSLU, Bowman.

Yet, we believe that Don too quickly concluded that there was insufficient probable cause for a criminal search warrant in the Moussaoui case, and he never carefully reconsidered that view, despite the additional evidence that was uncovered. He also never reviewed the entire file or ensured that the NSLU received all the documentation or the facts, despite the RFU's pledge that the NSLU would give it a good faith review. He did not reconsider whether a criminal warrant could be obtained, even when the FISA request was no longer considered an option.

However, these shortcomings were not an intentional attempt to sabotage the case, as Rowley implied. We have no doubt that Don believed there was insufficient evidence for probable cause. It is also important to recognize that he had numerous other cases in the unit and responsibilities that demanded his attention. But the Moussaoui case was unusual, given the circumstances under which it was presented to FBI Headquarters and the vehemence of the field office's concern that Moussaoui was preparing to commit a terrorist act. In light of that background, Don did not give the matter the careful evaluation this case deserved. Nor did he address the problem of a suspected terrorist like Moussaoui who could not be connected to a "recognized" foreign power under FISA. According to the Minneapolis agents, when they raised questions about this issue and asked about other options, Don said there were none and that they should not worry about it. He did not look for solutions in this case, which was the role of the RFU.

He also too quickly discounted important facts, such as the statement by Al-Attas about going on "jihad." OIPR Counsel Baker suggested that this comment was significant and he would "have tied bells and whistles" to the jihad comment in a FISA application. In sum, we believe Don too quickly discounted the facts and the assessment of the field office in assessing the possible threat that Moussaoui posed.

2. Martin

By many accounts, Martin was a responsible and conscientious agent. It is important to note that he assisted with the plans to deport Moussaoui to France. He consulted with the Legat Offices in both London and Paris to see which country would best be able to handle a search of Moussaoui's belongings upon entry. Martin was informed that French authorities believed they would be able to search his belongings upon his arrival, and Martin was supportive of this plan and assisted in coordinating it.

However, we concluded that Martin's performance in this case was lacking in many respects. Although his personality was described as "easy going" by some, it is clear that he and the Minneapolis agents clashed. The Minneapolis agents distrusted his advice, and he believed that the Minneapolis Field Office became "spun up" too easily.

Like Don, Martin quickly viewed the Minneapolis agents as jumping to conclusions based only on gut feelings. We believe he hardened his position and did not evaluate the case fully. He was not open-minded or creative in his approach to obtaining a FISA warrant in this unusual case. Rather, he told the field what it could not do, but never fully considered solutions to the FISA problem or even explained the problems to them fully. Despite the fact that the Minneapolis FBI was extremely concerned that Moussaoui could be involved in a terrorist act and Martin's own acknowledgment that he thought Moussaoui was "a dirty bird," Martin did not aggressively seek to help Minneapolis understand the barriers or think creatively about how it could obtain what it believed it needed.

It also appeared to us that he viewed the Minneapolis FBI as an adversary, rather than helping the agents understand the options and guiding them through the complicated issues of FISA. We also were troubled by Martin's response when we asked whether he reconsidered seeking a criminal warrant after the FISA route was ruled out. He suggested it was Minneapolis' responsibility alone to consider this option. In our view, this response demonstrates a lack of initiative and acceptance of some of the responsibility by Martin.

We also believe Martin undersold the case when he presented it to the NSLU attorneys for review, and he did not ensure that the attorneys received all the facts. He started the briefings by stating his belief that there was not enough evidence to obtain a warrant, rather than by explaining the case fully and seeking NSLU guidance. He never gave the NSLU attorneys the documentation prepared by Minneapolis. He did not ask the field to participate in the briefing or suggest that the NSLU contact the field directly. Although it was not the standard practice to involve the field in that way, this was not a standard case, and we believe the field should have been involved in the discussions.

Martin also did not provide complete or accurate legal advice to the field office. He used shorthand – such as Moussaoui must be tied to a "recognized" foreign power or Moussaoui must be an "integral" part of a terrorist organization. This was not correct. This shorthand also did not provide the field clear guidance on what it needed to obtain a FISA warrant.

Martin's edits to the field's FISA request exacerbated the problem. Although most of his changes were stylistic, other changes softened the language slightly and appeared to us as unnecessary. We recognize that it was his job to review and edit a FISA request, where appropriate. But his edits furthered Minneapolis' concern that Headquarters was not doing what it could to obtain a warrant and was instead unnecessarily and unfairly impeding the field's efforts.

Martin also did not ensure that the information presented by the field about the potential threat from Moussaoui was disseminated. He did not believe that a threat assessment should be sent without input from the Intelligence Community, and he disseminated his own teletype rather than forward the document prepared by Minneapolis that contained a threat assessment. But his teletype omitted important facts, and he did not provide it to all agencies in the Intelligence Community.

In our view, Martin did not adequately handle this unusual case. He did not work with the Minneapolis agents adequately, educate them on FISA, or guide them through the complicated FISA process to determine if the FBI could legitimately accomplish what the field wanted and needed in order to thoroughly investigate Moussaoui. He did not fully brief the NSLU. He did not adequately provide the information on the potential threat posed by Moussaoui within and outside the FBI. He did not adequately consider alternative options for a criminal warrant after he concluded that there was not enough evidence for a FISA warrant under the prevailing standards at the time. Although his conduct did not violate a clear FBI policy, we believe his performance in this case was significantly lacking.

3. Robin

Robin, the IOS who worked with Martin, is also considered a hard working and competent employee. The IOS's role was to support the SSA, and Robin supported Martin's requests. However, when she uncovered the Phoenix EC, she did nothing with it. We believe she should have at least recognized the relevance of the EC and the potential relationship of its theories to the Moussaoui case. Several NSLU attorneys told us that had they known about the Phoenix EC, it might have made a difference in how they addressed the Moussaoui matter. At the least, they said, it would have caused them to consult with OIPR about the possibility of obtaining a FISA warrant for

Moussaoui. We think Robin should have brought the Phoenix EC to someone's attention.

B. NSLU attorneys

Several NSLU attorneys provided advice to the RFU on the Moussaoui case, based on what they were told about the case. None read the documentation in the case or learned all the facts. The advice that they gave, based on what they were told and the prevailing conservative interpretation of FISA, was not unfounded. We do not believe any of the individual attorneys, including Bowman, were wrong in their advice or that they violated any specific policies or practices in place at the time. Yet, we believe that given the unusual nature of this case – in particular the strong disagreement between the field and Headquarters about whether probable cause existed to obtain a FISA warrant – they should have considered alternative approaches, contacted the Minneapolis FBI for more information, or at least consulted with OIPR to determine if there were creative approaches to this case.

Part of the problem was how the NSLU operated – no single attorney was assigned responsibility for a FISA request. Instead, several attorneys were consulted at various times, and no one was required to review or understand the facts and be responsible for providing comprehensive advice on a FISA request. As a result, the attorneys relied on brief explanations from the RFU and never reviewed all the documentation. Nor did any attorney consider all the potential approaches, including whether the field should approach the USAO after the possibility of a FISA warrant was exhausted. But given this system, and the facts available to the NSLU, we do not think any of the NSLU attorneys committed misconduct or provided clearly inappropriate legal advice.

C. Minneapolis FBI employees

The Minneapolis agents deserve praise for their relentless efforts and their accurate instincts in assessing Moussaoui's actions. They believed that Moussaoui posed a threat, and they aggressively and tirelessly investigated this prospect. Their tenacity deserves praise and recognition.

We also believe that Rowley deserves credit for bringing forward the important issues relating to how the Moussaoui case was handled. Her complaints resulted in an important reassessment of how the FBI handled this

matter, and some of them raised valid concerns about FBI employees and operations. However, as we discussed in this chapter, we did not find that all of her allegations about the FBI or FBI employees to be meritorious.

Moreover, Rowley's performance in the Moussaoui investigation itself was lacking in several regards. As the Minneapolis CDC, she was responsible for guiding the Minneapolis agents through the complicated interrelationship between a criminal and an intelligence investigation. At the outset, she assumed that the USAO would not support a criminal warrant. Contrary to the implication in her letter, which placed the blame for failing to seek a criminal warrant solely on FBI Headquarters, she advised the field agents not to seek a criminal warrant. She did so without fully understanding the requirements of FISA and the difficulty of connecting Moussaoui to a recognized foreign power. She never provided guidance or help to the field agents on this critical issue. She did not consult with the NSLU about what was required under FISA or whether attempting to seek a criminal warrant was a better avenue. Nor did she ever reconsider her initial advice that the USAO would not seek a criminal warrant, even after the FISA route was exhausted. Along with FBI Headquarters, she should share some of the criticism for the failure to carefully and creatively assess the options for obtaining a warrant.

While the Minneapolis agents' aggressiveness in pursuing the Moussaoui investigation was commendable, we also believe that the Minneapolis agents contributed to some of the problems in the handling of the Moussaoui investigation. Gary and Henry sought to open a criminal investigation after opening the intelligence investigation without fully considering the ramifications of doing so or evaluating the potential tools available before deciding which avenue presented the best option. In addition, they failed to reconsider pursuing a criminal warrant once the FISA route was exhausted. Even if they believed that FBI Headquarters would still be unsupportive of a criminal warrant, there would have been nothing to lose in raising the issue again, and they could have attempted to bolster their argument for seeking a criminal warrant with the additional information that had been uncovered in the case since the matter was initially discussed.

We also concluded that the Minneapolis FBI management should have taken more aggressive action to support its field agents. Several FBI employees commented to us that if the Minneapolis FBI felt strongly about this case, it should have raised its concerns at a higher level in FBI Headquarters.

They said that field office SACs often called the ITOS Section Chief in Headquarters, or a higher official, when the field office disagreed with the advice of a unit chief or wanted a further review of the unit chief's decision. Section Chief Rolince told the OIG that he routinely received telephone calls from field office managers about disputes between the field and Headquarters and that approximately once a week a field manager would come to his office at Headquarters to discuss a dispute or issue between the field office and Headquarters.

Gary even advised the Acting SAC, Roy, to push the issue up the "chain of command" at Headquarters. Roy talked to Don, but Roy did not push the issue further. Roy stated to the OIG that he believed that the Minneapolis FBI was "working things out" and that the Minneapolis FBI had yet to receive information that caused him to believe it was necessary to push the issue further. We believe, however, that given the adamant views of the field agents, he should have raised this issue to a higher level at the FBI. While we are not certain it would have made a difference, we believe he should have expended the effort.

V. Conclusion

In sum, we did not find that any employees committed intentional misconduct, or violated established FBI policies or practices, or attempted to deliberately sabotage the Moussaoui case. But the performance of several individuals involved with the case was lacking. The Minneapolis agents, who deserve credit for their tenacity and accurate instincts, did not receive sufficient support, either from their field office management and legal counsel or from FBI Headquarters.

We believe that singling out individuals for criticism alone would miss the main problems demonstrated by the Moussaoui case. Even if FBI employees pursued this case more aggressively, consulted with OIPR, or sought a criminal warrant, it is not clear that this approach would have succeeded in obtaining a search warrant for Moussaoui's possessions before September 11. However, this case evidenced systemic problems in how the FBI handled intelligence cases and provided guidance to the field. The problems included a narrow and conservative interpretation of the FISA requirements, inadequate analysis of whether to proceed as a criminal or intelligence investigation, adversarial relations between FBI Headquarters and

the field, and inadequate and disjointed review of potential FISA requests by the NSLU. In our view, these systemic problems were a more important cause of the deficiencies we found in the Moussaoui case. In addition the systemic problems hindered the FBI's ability to detect and deter terrorism.