



Associate Deputy Attorney General

Washington, D.C. 20530

MEMORANDUM FOR THE ATTORNEY GENERAL

Through: THE DEPUTY ATTORNEY GENERAL

Eric Holder
11/10/2000

From: Gary G. Grindler
Principal Associate Deputy Attorney General

GGG 11/10/2000

Jonathan D. Schwartz
Associate Deputy Attorney General

J.D. Schwartz

Subject: To Recommend that the Attorney General Authorize Certain Measures Regarding Intelligence Matters in Response to the Interim Recommendations Provided by Special Litigation Counsel Randy Bellows

Timetable: As soon as possible

Discussion: The purpose of this memorandum is to recommend that you authorize certain measures regarding intelligence matters in response to the three interim recommendations provided by Special Litigation Counsel Randy Bellows in a letter to you dated October 19, 1999. (Tab A.) Our recommendations are the product of a working group comprised of senior members of three components -- CRM, FBI, and OIPR -- which met several times late last year and with Bellows on January 4, 2000. As outlined below, our recommendations are supported by the working group with respect to Bellows' first and third interim recommendations, but not his second interim recommendation.

Bellows' first interim recommendation is that you send a memorandum to the relevant components to reinforce the view that the "1995 Procedures," contained in a memorandum from you dated July 19, 1995 (Tab B), are still in force and must be strictly followed. There is unanimity within the working group that the 1995 Procedures set forth the correct substantive standard with respect to notification to CRM, i.e., when "facts or circumstances are developed that reasonably indicate that a significant federal crime has been, is being, or may be committed." For the reasons stated forth in Bellows' letter, however, most working group participants acknowledge that the 1995 Procedures are not being fully implemented in practice.

In our meeting with Bellows, he indicated that, since he submitted his October 19, 1999, letter; he had decided that he may recommend in his final report significant alterations to the 1995 Procedures, specifically those procedures regarding the scope of the "advice" that CRM may provide to the FBI. Because Bellows hopes (but could not say definitively) that he would submit his final report to you in late February or March of this year, the working group agreed that you should refrain at this time from sending out the memorandum described in Bellows' first interim recommendation. Once you receive his final report, the working group will consider all of his final recommendations promptly, suggest changes (if any) to the 1995 Procedures, and then prepare a memorandum for you to send to the relevant components. In the meantime, the valid concerns Bellows has raised about the lack of implementation of the notification provisions of the 1995 Procedures should be addressed through a combination of briefings and the provision of letterhead memoranda (LHMs), as discussed below.

Bellows' second interim recommendation is that the FBI begin providing to CRM automatically all LHMs regarding full FCI investigations of U.S. persons, at or before the time the LHMs are provided to OIPR. In making this interim recommendation, Bellows correctly notes that there is substantial overlap between the substantive notification standard in the 1995 Procedures, which is quoted above, and the standard for opening full FCI investigations set forth in the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations, *i.e.*, "on the basis of specific and articulable facts giving reason to believe that a person, group or organization is or may be" involved in one or more of seven categories of activities.

CRM supports this recommendation. While OIPR has raised the concern that this recommendation may raise legal problems regarding the primary purpose test, we agree with your preliminary assessment that the mere one-way flow of intelligence information from the FBI to CRM in this fashion should raise no meaningful legal concern. The FBI is of several minds on this issue as of the date of this memorandum. Certain key individuals support this interim recommendation; some are opposed; and some only want to provide espionage-related LHMs to CRM during this interim period.

A critical issue in this regard is the uncertainty regarding what ultimately will be Bellows' final recommendation regarding the permissible "advice" that CRM may provide the FBI. It is critical because, as the working group members agree, the mass production to CRM of all LHMs on U.S. persons -- many of which are written at a fairly general level -- inevitably will lead to significant increased dialogue between CRM and FBI about intelligence matters.

In this context, some at FBI have recommended that, at this point, you take no action regarding LHMs until Bellows issues his final report. To the extent Bellows' final report is, in fact, forthcoming in a matter of weeks, we might be inclined to follow this suggestion. Nonetheless, because Bellows' could not provide a firm assurance that his final report will issue by the end of March, and because the second interim recommendation is an important prophylactic measure for the reasons offered by Bellows, we recommend at this time that

espionage-related LHMs that fall within the seventh category of activities in the Attorney General's FCI Guidelines be provided as a matter of course to CRM.

We make this recommendation for three reasons. First, the seventh category of activities is limited to persons, groups, or organizations that are "engaged in activities that violate the espionage statutes." By its terms, this seventh category necessarily involves violations of federal criminal law. The other six categories, by contrast, are not specifically tied to activities that "violate" other criminal statutes, although it should be pointed out that terrorist activity within the United States presumably would violate U.S. statutes. Second, there is agreement within the working group that LHMs that fall within the seventh category are relatively limited in number and typically provide such significant, detailed information that additional dialogue between CRM and the FBI may be limited or unnecessary. Third, any concerns that may exist that LHMs in the other six categories will not be provided to CRM during this interim period should be ameliorated by the briefings discussed in the next section. Those briefings should include *all* cases that meet the substantive notification standard set forth in the 1995 Procedures, and the LHMs for those cases should be available for review by CRM.

Bellows' third interim recommendation is that the FBI immediately begin providing critical case briefings to CRM about FCI investigations. After discussing the briefing recommendation with the working group we propose the following briefing protocol in response to this interim recommendation:

- On a monthly basis, the Assistant Director for the FBI's National Security Division and the Assistant Director for the FBI's Terrorism Division (ADs) will brief the Principal Associate Deputy Attorney General and the Counsel for OIPR on significant intelligence matters. Collectively, these individuals will comprise the "Core Group."
- The Assistant Attorney General for the Criminal Division (AAG) and his or her Chief of Staff will be asked to join that portion of the Core Group's meeting that involves a briefing from the ADs on intelligence matters that the Core Group believes satisfies the substantive notification standard contained in the 1995 Procedures.
- The AAG may provide, as he believes appropriate, the heads of CRM's Terrorism and Violent Crime Section (TVCS) and its Internal Security Section (ISS) as well as the Deputy Assistant Attorney General responsible for those sections with the information he obtained during the portion of the monthly briefing that he attended.
- At this juncture, the only affirmative step that the heads of TVCS and ISS may take is to seek additional information from the ADs or their designees about the matters in question. The ADs or their designees are required to provide all of the

information sought by the heads of TVCS and ISS, unless the Core Group agrees otherwise. A representative of OIPR should be present for meetings, wherein this additional information is provided. Or if the information is provided in writing copies should be simultaneously provided to OIPR.

- At this juncture, the only affirmative step that the heads of the TVCS and ISS may take is to provide the AAG and the responsible Deputy Assistant Attorneys General with the information they obtained from the ADs or their designees. If the AAG believes that CRM either should obtain more information or take any affirmative step (e.g., contact a United States Attorney's Office, issue a grand jury subpoena, seek authorization for a Title III wiretap), he must first consult with the Core Group.
- The Attorney General and/or Deputy Attorney General should be consulted whenever the Core Group cannot reach agreement on any matter before it.

CRM, OIPR, and the FBI have agreed on this briefing protocol.

APPROVAL: *Walter Rouse*

DATE: January 21, 2000

DISAPPROVAL _____

OTHER _____

cc: James K. Robinson
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Larry Parkinson