STATEMENT OF

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FOR THE SOUTHERN DISTRICT OF NEW YORK

before the

Joint Intelligence Committees

October 8, 2002

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Before the Senate Select Committee
on Intelligence and House Permanent
Select Committee on Intelligence
Joint Inquiry into the September 11th
Terrorist Attacks

Mr. Chairmen, members of the Committees, thank you for inviting me to testify before you in this very important joint inquiry. It goes without saying that the terrorist attacks of September 11th profoundly affected and changed each one of us and our nation forever. But the most grievously impacted are obviously the loved ones of those who were so wantonly murdered without warning that day. It is to them that we most owe whatever answers there are to be found for how it happened and the assurance that we, as a government, have done, and will continue to do, everything in our power to prevent such human devastation from ever happening again.

Recognizing the comparative narrowness of the perspective and knowledge that I have on this very complex subject, I am honored to share it for whatever use it may be to your inquiry. This written statement, which is submitted for the record, summarizes that perspective and knowledge from my experience as the United States Attorney for the Southern District of

New York from June 1, 1993 until January 7, 2002. In the course of my statement, I attempt to address the specific questions in your letter of September 17, 2002, inviting my testimony. I would also be pleased to answer any additional questions the Committees may have of me today, or in the future as your work goes forward.*

A. International Terrorism Investigations and Prosecutions in the United States Attorney's Office for the Southern District of New York ("SDNY USAO").

From the beginning of my tenure as United States Attorney in 1993 to its last day in 2002, I, together with a number of extraordinarily dedicated and talented Assistant United States Attorneys ("AUSAs"), agents and detectives from the FBI-NYPD Joint Terrorist Task Force (the "JTTF"), was actively involved in the investigation and prosecution of international terrorists and terrorist organizations who were plotting to attack, or had actually attacked, Americans and American interests, both in the United

* I have also included as an appendix to this statement copies of three of the talks that I have given on international terrorism since September 11th; they summarize some additional thoughts on what we have learned about the nature of the threat from international terrorists and what we must do in the future to address that threat, as well as my views on military tribunals.

States and abroad.* No work in our office of over 200 very busy and productive AUSAs received a higher priority.

The international terrorism work of the SDNY USAO began with the investigation and prosecution of those responsible for the bombing of the World Trade Center ("WTC") on February 26, 1993, in which six people were killed and over 1,000 were injured. It included the investigation and eventual indictment of Usama bin Laden ("UBL"), the leader of the al Qaeda terrorist organization, first in June 1998 for conspiracy, under seal, before he or al Qaeda had massively attacked anyone. (A copy of the June 1998 indictment of bin Laden is at Tab A.) Bin Laden and 22 other defendants were subsequently indicted in November 1998, for their role in the

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* In May 1980, the New York FBI Office and the New York City Police Department formed the JTTF to investigate a rash of terrorist bombings then occurring in New York City. The theory of the JTTF was that interagency cooperation is essential to any effective counterterrorism strategy. In addition to the FBI and NYPD, the New York JTTF includes the ATF, Secret Service, INS, FAA, New York State Police, U.S. Department of State, U.S. Customs, the New York and New Jersey Port Authority Police, the U.S. Marshals, the Amtrak Police, the Suffolk County Police Department, the Naval Criminal Investigative Service, and the Metropolitan Transit Authority Police. The New York JTTF became the template for other JTTFs formed across the county, both before and after September 11th.

bombings of the U.S. embassies in East Africa on August7, 1998, in which 224 innocent people, including 12 Americans lost their lives. In addition to the prosecution of those who bombed the World Trade Center in 1993 and those who bombed our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania in 1998, the SDNY USAO also successfully prosecuted approximately twenty additional terrorist defendants for their roles in three other major terrorist plots, which were fortunately thwarted by law enforcement: the 1993 Day of Terror Plot to blow up government buildings and other structures in New York City; the 1994 Manila Air Plot to blow up a dozen U.S. jumbo jets flying back to America from the Far East; and the December 1999 Millennium Plot of Ahmed Ressam, an Algerian terrorist trained in al Qaeda camps in Afghanistan, to detonate a bomb at the Los Angeles International Airport.*

In all, the SDNY USAO charged and convicted over 30 defendants for international terrorism; there were no acquittals. All of the defendants are

* In 2001, the Seattle USAO successfully prosecuted Ressam and the SDNY USAO successfully prosecuted two defendants who from New York provided material assistance to Ressam's plot in the form of money, credit cards, and phony identification papers.

serving life or very lengthy prison sentences, without the possibility of parole. There are, however, fugitives still at large in several of the cases, including bin Laden himself who, as of September 11th, had been under indictment for over three years and on the FBI's Ten Most Wanted List for over two years. Fifteen of the 22 terrorists on The Most Wanted Terrorist List, announced by President Bush on October 10, 2001, are fugitives in the SDNY cases -- thirteen from the Embassy bombings case; one from the 1993 bombing of the WTC (Abdul Rahman Yasin, who fled New York on the day of the 1993 WTC bombing and who was recently interviewed on "60 Minutes," in a broadcast televised from Iraq); and one defendant from the Manila Air Plot (Khalid Sheik Mohammed, who has been widely reported in the media to be one of the major planners of the September 11th attacks).

B. When the Threat of International Terrorism Was Regarded As a Threat to and in America and the Importance of the Day of Terror Plot.

Certainly, by the time our embassies in East Africa were bombed in 1998, we as a government knew a great deal about the threat posed by bin Laden and al Qaeda to America and, at least by the time the Embassy bombings indictment was filed in 1998 , much of that knowledge was a

matter of public record. But the high risk that international terrorists posed to America, both in America and abroad, was known and appreciated as a significant threat from at least 1993.

The bombing of the World Trade Center on February26, 1993 itself, of course, represented a dramatic incident of international terrorism that Ramzi Yousef, one of its masterminds, had brought from abroad to America. But it was the follow-on terrorist plot in 1993 (the Day of Terror Plot) to blow up in a single day the Lincoln and Holland Tunnels connecting New York and New Jersey, the George Washington Bridge, the U.N., and the New York FBI office in lower Manhattan that led at least those of us in the SDNY USAO and FBI to conclude that international terrorism was a long-term, highly dangerous risk to the safety and national security of theUnited States. The FBI and other public officials testified to this risk and spoke about it publicly to citizens groups. Prior to September11th, I personally gave several talks discussing specifically the point that international terrorism had come fromabroad to America and posed a significant continuing threat to America, both at home and abroad. (A copy of one such talk to the Middle East Forum on September27, 2000 is attached at Tab B.)

The Day of Terror Plot, headed by the blind cleric and leader of the G'amaat terrorist organization, Sheik Omar Abdel Rahman, was fortunately foiled by the New York FBI and the JTTF because they had been able to infiltrate the terrorist cell operating in the New York-New Jersey metropolitan area with an informant posing as an explosives expert. As a result, the plot could be – and was – carefully monitored and stopped before it could come to fruition. The evidence necessary for the successful prosecution of Sheik Rahman and eleven of his followers was also obtained. It was, in short, a very successful prevention and prosecution effort by the New York FBI and the JTTF.

The Day of Terror Plot case thus illustrates one point I want to make today and that is that, at least from our perspective, we viewed the terrorist investigations and prosecutions we did from 1993-2002 as a prevention tool. Everyone's goal was to thwart plots before they occurred and to neutralize dangerous terrorists so that they could not attack in the future. In that effort, we worked very closely with the FBI and, especially later, the CIA and other intelligence agencies, to ensure that the first priorities were always prevention and national security. When criminal investigations and

prosecutions could aid the overall national security effort, we willingly and aggressively offered our help.

From my vantage point, the counterterroristm strategy of our country in the 1990s was not, as I have read in the media, criminal prosecutions. Rather, criminal prosecutions were one tool in our couterterrorism efforts, a tool that certainly neutralized for life a number of very dangerous international terrorists, including Ramzi Yousef, a mastermind of the 1993 WTC bombing and the architect of the Manila Air Plot, and Sheik Omar Abdel Rahman, the leader of the Day of Terror Plot and head of the G'amaat terrorist organization that later joined forces with al Qaeda. It was also, of course, our hope that the indictment of UBL and the leadership of al Qaeda in 1998 would result in the apprehension and neutralizingof these and other terrorists who posed– and still pose – very grave threats to the safety of America and the world. But none of us considered prosecutions to be the country's counterterrorism strategy, or even a major part of it.

In addition to cementing our view that international terrorism posed a significant threat to us here at home, the Day of Terror Plot is also instructive for a number of other reasons. First, it showed the foothold that

international terrorists had or were gaining in the United States – all of the defendants in the case were residing in New York and New Jersey; some were here legally, some illegally.* The Sheik was preaching his anti-American rhetoric in mosques in Brooklyn, New York and Jersey City, New Jersey.

Second, and even more importantly, the Day of Terror Plot illustrates the importance of the infiltration of terrorist cells by human sources and informants. Such infiltration is, in my view, one of the most effective means of preventing terrorist attacks. It is not easy to do. There are significant language, cultural and expertise barriers that must be overcome. There is also always the risk that the informant can be or become a double agent who may facilitate rather than prevent an attack. Nevertheless, in my view, whatever can be done to enhance the FBI's and the Intelligence Community's ability to develop human sources and operatives capable of

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* There is no doubt, in my mind, that it is a critical matter of national security that our immigration policies and procedures be dramatically enhanced. A number of the terrorist defendants in the SDNY cases, including Ramzi Yousef, entered the country illegally or remained in the country illegally, only to surface when they participated in a terrorist attack in the United States.

infiltrating terrorist cells should be done, both in the United States and around the world.

At the conclusion of the trial of the Day of Terror Plot in 1995, I made the decision to form an international terrorism unit in the SDNY USAO and to staff it initially with those half a dozen AUSAs who had been involved in the investigations and prosecutions of the 1993 WTC bombing,the Day of Terror Plot, and the Manila Air Plot.* I personally supervised the unit. I made the decision to establish a permanent terrorism unit because we had concluded that the risk of future terrorist attacks and plots was high and long-term and because, as a result of the knowledge we and the New York FBI and JTTF had gained as a result of the two back-to-back 1993 international terrorism cases, we had, of necessity, amassed a great deal of intelligence about various terrorists and terrorist networks hat we did not want to lose as we went forward. We wanted to pursue all leads of other terrorist conspiracy and attacks. So, unlike with other kinds of prosecutions,

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* The SDNY USAO Terrorism Unit was, to my knowledge, the only terrorism unit in any USAO prior to September 11th.

we did not close up shop after the Day of Terror Plot after the defendantss were convicted and went to jail.

We did not wait for the next attack. We, together with the FBI and JTTF, actively continued to investigate other possible terrorist crimes and conspiracies, to try to learn more, to follow any lead that suggested itself from the facts we did know. Even in 1995, there was a mass of names and snippets of information, certainly not fully understood, but still information bits to be pursued and to learn more about if we could. We learned more each day, and we are continuing to learn moreeach day. The work of these AUSAs, the FBI and the other agents and police officers on the JTTF, together with others in our government including the Intelligence Community, eventually culminated in the indictment of bin Laden and the al Qaeda leadership, and the conviction of over thirty dangerous terrorists. Equally important, it led to a growing body of information on international terrorists, their organizations and operations, including from a growing number of cooperating defendants who provided vduable intelligence information.

In sum, in our view, there was no dichotomy between prevention and prosecutions. Prosecutions were and are part of the prevention effort, as well as a means of bringing terrorists to justice for their terrorist crimes, whether or not the crimes have culminated in an actual attack, as they did in the 1993 WTC bombing and the 1998 East African Embassy bombings, or were stopped at the stage of a conspiracy, or plot that had not ripened into an actual attack, as was the case in the Day of Terror Plot, the Manila Air Plot, the indictment of UBL in June 1998 for conspiracy, and the Millennium Plot of Ahmed Ressam. The ultimate, overarching objective of all involved, including the U.S. Attorney's Office and the FBI, was to obtain the information and evidence of a planned attack or plot and to stop it before it occurred. While it is the reality that not every terrorist attack can be prevented, our objective and priority must always be a perfect prevention success rate. We must do whatever is lawful in our effort to achieve that.

C. The Role and Effectiveness of Criminal Prosecutions

As the SDNY cases demonstrate, criminal prosecutions of terrorist defendants have been and can be effective tools to deal with terrorists who commit federal crimes and as to whom there is sufficient, available evidence

to prove such defendants' guilt beyond a reasonable doubt under the rules governing criminal trials in the American criminal justice system.* Prosecutions can also lead – and did lead – to cooperating defendants who provided invaluable intelligence on the terrorism threat, as well as trial testimony. These prosecutions also neutralized for life or many years a number of very dangerous terrorists who would have otherwise continued to commit further terrorist attacks: some bombs were thus undoubtedly not built and detonated; some planes were not blown up; and some people were not assassinated. That is obviously good.

But criminal prosecutions are plainly not a sufficient response to international terrorism. For that, we plainly need more comprehensive measures and, most especially a strong and continuing military response. This is my view today and was my view prior to September 11th.

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* Often in international terrorism cases, there is evidence of a terrorist defendant's guilt which cannot be used by prosecutors because its public disclosure may compromise intelligence sources or other national security interests. As we understood at the outset of the terrorism prosecutions, the prosecutors must always be prepared to defer to such overriding interests, and we did.

There are a number of obvious limitations on the abilityof our criminal justice system to effectively and broadly combat international terrorism. These include the following:

- Criminal prosecutions of international terrorists have limited deterrent effect. When thousands of international terrorists all over the world are willing, indeed anxious, to die in service of their cause, we cannot expect prosecutions to effect significant deterrence. Each of the SDNY cases I have mentioned in this statement followed the one before it, culminating most recently in the attacks of September 11th. Prosecuting and convicting Ramzi Yousef for the 1993 WTC bombing and the Manila Air Plot did not deter other would-be terrorists from bombing our embassies in East Africa in 1998 or from hijacking and flying those planes into the WTC and the Pentagon on September 11th.

- Criminal prosecutions create unique security issues for witnesses, juries, prosecutors, defense attorneys, judges and the Bureau of Prisons. While those risks can be managed in a limited number of cases, it is neither realistic nor wise to assume such risks routinely. International terrorists are not routine criminals.

- Much of the evidence necessary to prosecute international terrorists increasingly comes from abroad and is often obtained by foreign officials under very different systems and rules. This creates an array of difficult issues, including novel questions of law, and uncertainty about the admissibility and the continued availability of important witnesses and evidence.

These issues were especially pronounced in the Manila Air Plot and East Africa Embassy bombing cases.*

- The criminal discovery rules governing criminal trials, coupled with the extensive amount of classified and otherwise sensitive information that relates to international terrorism cases, make successfully prosecuting terrorist defendants, while at the same time safeguarding intelligence sources and methods, extremely difficult. Although I believe we successfully achieved that balance in all of the SDNY cases, it is an ever-present and very difficult issue and risk.

D. The Sharing and Dissemination of Information Related to the Threat of International Terrorism

I understand that one of the Committees' concerns is whether, prior to September 11th, the information about international terrorism gathered by the various parts of our law enforcement and intelligence communities was shared and disseminated sufficiently. This is one of those areas where I

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* At times, critical witnesses or evidence the prosecutors had assumed and been promised were available from foreign sources, proved not to be so when the time of trial arrived. In this regard, it is important to point out the significance of the personal involvement and work of FBI Director Louis Freeh to the successful prosecutions of international terrorists in the SDNY, as well as other international terrorism cases. Director Freeh established the FBI as a global presence and formed the necessary cooperative relationships with his counterparts around the world to make possible successful investigations, prosecutions and thwarting of terrorist attacks. He also personally and repeatedly dealt with heads of governments and agencies to secure critical evidence, testimony and cooperation.

must defer to others who have the complete picture. While we certainly had concerns about this, my general impression was that the information and evidence developed in at least the terrorism investigations and prosecutions in the SDNY was generally shared by the FBI with the Intelligence Community and other parts of our government, as well as with local and state authorities. Much of the information was, in fact, developed by the Intelligence Community and local and state agencies worked directly on the JTTF which worked each of the SDNY cases.

I cannot speak to what information the IntelligenceCommunity may have had that was not shared with the FBI or law enforcement generally, but I can say that the relationship was a very positive and cooperative one. The CIA, in particular, was of invaluable assistance in the SDNY cases and investigations. I can also say from my personal experience as a prosecutor and U.S. Attorney for many years that, under the leadership of FBI Director Louis Freeh and DIA George Tenet, the working relationship and cooperation between the FBI and the Intelligence Community at their highest levels was excellent and saw a seachange of improvement in the 1990s in the ranks of the agencies as well. Nowhere was this cooperation

more apparent and productive than in the investigation of the terrorist threat posed by al Qaeda and bin Laden.

It is also important to recall that a great deal of the information and evidence developed in the SDNY investigations and prosecutions had become public through indictments and public trials, long before September 11th. Perhaps one of the best summaries of what was publicly known about the threat bin Laden and the al Qaeda terrorist organization posed to America prior to September 11th is in the indictment returned and filed in the SDNY in 1998 following the August7, 1998 bombing of our embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. (The indictment is at Tab C of this statement.) The information in the indictment was later amplified publicly at the trial of four of UBL's followers who were convicted in the SDNY in May 2001 for their roles in the bombings. The Embassy bombings indictment sets forth, among other facts, the following:

- Bin Laden and al Qaeda's top leadership are named as defendants, including Aymad Al Zawahiri, the head of Egyptian Islamic Jihad, Muhammed Atef, the military commander of al Qaeda, and Mamdouh Mahmud Abdullah, al Qaeda's financial director.
- The command and control structure of al Qaeda is detailed.

- Al Qaeda's wealth and businesses used to raise money for terrorist operations are detailed.

- The worldwide reach of al Qaeda, including its presence within the United States is detailed.

- Bin Laden's alliance with the National Islamic Front in Sudan and with representatives of the Iranian government and Hizballah for the purpose of working together against their common enemies in the West, including the United States, is detailed.

- Bin Laden's efforts to acquire the components for nuclear and chemical weapons are set forth.

- Al Qaeda's role in training those in Somalia who killed eighteen American soldiers in October 1993 as they served as part of the U.N.'s Operation Restore Hope is set forth.

- The details of the simultaneous bombings of our American embassies in Kenya and Tanzania on April 7, 1998 are set forth in 224 separate murder counts for those killed, including 12 Americans.

- Efforts to recruit American citizens as workers and members of al Qaeda are described.

- The al Qaeda conspiracy to kill Americans dating from at least 1991 is detailed.

- Bin Laden's fatwas directing Muslims to kill all Americans, including civilians, wherever in the world they can be found, are recited.

This may be the right juncture to talk about another point relating to the dissemination of information. The issue is what limitations, prior to its

amendment in the USA Patriot Act, did the grand jury secrecy rules, embodied in Rule 6(e) of the Federal Rules of Criminal Procedure, impose on the sharing of information between the law enforcement and the Intelligence Community. My view is that Rule 6(e) was not a significant barrier to the sharing of information developed in the SDNY investigations and prosecutions.

Rule 6(e) of the Federal Rules of Criminal Procedure, prior to its amendment in the USA Patriot Act after September 11th, did not make provision for providing grand jury informationto intelligence agencies for purposes of safeguarding the national security, either with or without a court order. Thus, if information was obtained through the grand jury by prosecutors, or criminal division agents of the FBI working with prosecutors and the grand jury, Rule 6(e) could operate to prevent the sharing of the information with, for example, the CIA.

It has been said by some, I gather, that, as a result of Rule 6(e) and grand jury secrecy, there was a "treasure trove" of grand jury informationin the files of the prosecutors in the SDNY and the FBI that could not be and was not shared with the Intelligence Community. Although plainly Rule

6(e), prior to its amendment, posed the risk of insulating relevant information at least until trial, I donot believe that it did so in the SDNY investigations and prosecutions. (I have confirmed my understanding on this point with the Assistants in my office who were in charge of the investigations.)*

Grand jury secrecy rules do not appear to have impeded he sharing of information in the SDNY investigations and prosecutions for several reasons. First, the vast majority of information obtained was not obtained through the grand jury, but by non-grand jury means of investigation to which grand jury secrecy rules do not apply. Second, if any relevant information was obtained through the grand jury to which Rule 6(e) might apply, we were generally able to obtain it through alternative means as well so that it could be shared. Third, quickly over time, the information we and the FBI obtained in our investigations became a matter of public record through publicly filed indictments and other court documents, as well as

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* The SDNY USAO would not itself generally pass information tothe intelligence or national security communities. By policy and protocol, it would be conveyed by either the FBI or DOJ.

public trials with detailed written transcripts and publicly filed exhibits. (I earlier cited the East Africa Embassy bombing indictment and trial as one example of the amount and range of information publicly available on the threat of international terrorism and on bin Laden and al Qaeda, in particular.)

That the grand jury secrecy rules did not impede the sharing of information in the SDNY cases is not to say that the grand jury secrecy rules might not have prohibited the sharing of information with the intelligence and national security communities. They could well have, which is why I advocated, when asked by FBI Director Robert Mueller and representatives of the Department of Justice shortly after September 11th for recommended legislative changes, that Rule 6(e) be amended to permit the sharing of national security-related information with the Intelligence Community.* One final point on this: our constant mindset was to try to maximize the sharing of information real-time so that it could hopefully be used by others

* This was a part of my very strong recommendation to "get the walls down" between the intelligence and law enforcement parts of our government dealing with terrorism.

to gain further information and, most importantly, to be used to possibly detect terrorist plots and to safeguard against any threats posed.

This leads me to another point about information sharing, but in the other direction. If I were to single out one significant concern that I had about our counterterrorism efforts prior to September 11th (dating from at least 1995), it was that I feared we could be hampered in our efforts to detect and prevent terrorist attacks because of the barriers between the intelligence side and law enforcement side of our government. Some of these bariers were (and perhaps still are) statutory; some were (and perhaps still are) cultural; some were (and still are) court-imposed; some were (and may still be) voluntarily imposed by the agencies by way of guidelines to assure compliance with all legal requirements and to make an adequate record of such compliance.

Our Intelligence Community is charged with gathering foreign intelligence to protect the national security. The FBI has a foreign counter intelligence function and law enforcement or criminal function. The functions are separately staffed. International terrorism, however, cuts across both of these functions; it does not fit as neatly into one category or

the other as espionage may have during the Cold War. Much of the information gathered in by the Intelligence Community is most often also evidence of a possible criminal conspiracy or other crime. Much of the information gathered by law enforcement as evidence of a terrorist-related plot is also most often foreign intelligence information relevant to the national security. And yet, at least as things were done in the 1990s through September 11th, that evidence, if gathered on the intelligence side, could not be shared with prosecutors unless and until a decision was made in the Justice Department, that it was appropriate to pass that information "over the wall" to prosecutors, either because it showed that a crime had been committed that needed to be dealt with by an arrest or further overt investigation, or because evidence of such crime was relevant to an ongoing criminal investigation. Because of this structure and these requirements, I do not know even today what evidence and information that might have been relevant to our international terrorism investigations were never passed over the wall.

To make a decision to pass information over the wall requires, in the first instance, a recognition of what that information is and what its

significance is. In the area of international terrorism, this is a very difficult task, made more difficult by a combination of language and cultural barriers, coded conversations, literally tens of thousands of names of subjects that are confusing and look alike, and an unimaginably complex mass of snippets of information that understandably may mean little to the people charged with reviewing and analyzing the information and deciding whether to recommend that it be "passed over the wall."

A prosecutor or criminal agent who has for years been investigating particular terrorist groups or cells and who has thus amassed a tremendous body of knowledge and familiarity with the relevant names and events might well recognize as significant what seems to other conscientious and generally knowledgeable agents or lawyers as essentially meaningless. What can happen, and I fear may have happened, is that the two halves of the jello box are never put together so that the next investigative step that could eventually lead, when combined with other information or steps, to the detection and prevention of a planned terrorist attack does not occur.

We must, in my view, do everything conceivably possible, to eliminate all walls and barriers that impede our ability to effectively counter

the terrorism threat. If policy and culture have to change to do that, they must change. If the law must be changed to do that, I would change the law. Indeed, I believe the Justice Department and Congress thought that the law had been changed to help address this problem by the USA Patriot Act. A recent decision by the Foreign Intelligence Surveillance Act ("FISA") court (now on appeal), however, suggests otherwise. In re All Matters Submitted to the Foreign Intelligence Surveillance Court, filed May 17, 2002.

That court decision also alludes to certain enhancements to the "wall" that the FISA court imposed prior to September 11th, effectively making the court the wall in certain international terrorism investigations. The walls that so concerned us throughout my tenure as United States Attorney thus were built higher prior to September 11th. While we were not made privy to the full rationale for the decision and would not condone any misrepresentations to any court or any abuse of the FISA authority, raising the walls did concern us greatly from a public safety point of view. We voiced those concerns with officials in the Department of Justice prior to September 11th. We do not know what, if any, relevant information was kept behind the wall.

Again, others who were and are behind no walls and fully privy to all of the facts will have to give you the complete picture. But from my vantage point, it appeared to me that the bifurcation of intelligence gathering and law enforcement, together with the requirements of FISA (prior to its amendment) requiring, in the view of some, that "the primary purpose" of every FISA search had to be for national security purposes impeded the FBI in its foreign counter intelligence function. Part of the problem appeared to stem from how conservative the Justice Department was in seeking FISA search authority in terrorism investigations when there were also ongoing criminal investigations and prosecutions on the same general subject because of the fear that a court would decide, in some later prosecution, that the FISA authority had been abused and used by the FBI to circumvent the generally stricter requirements of Title III to obtain a court-authorized wiretap for a criminal investigation.

The conservatism was, to a point, understandable. Some courts had decided that the FISA authority could only be used if "the primary purpose" of the search was to safeguard national security. When there were parallel ongoing criminal and intelligence investigations, there was a greater chance

that a court would find that the FISA authority had been inappropriately used. And plainly, no one wanted to risk losing the FISA authority, which is so vital to safeguarding the national security. But, in my view, the Department may have been too conservative in seeking approval for FISA searches out of excessive concern for the litigation risk should there be a criminal prosecution in which the FISA search was challenged.

This same conservatism stemming from the same concerns, I believe, may have spilled over to what was allowed to be passed "over the wall" to prosecutors and criminal agents, thus creating my nightmare of the two halves of the jello box never being put together. We cannot, as we go forward, risk these gaps in our intelligence gathering, sharing or analysis.

The single most important recommendation I would make to the Committees would be to address the full range of issues presented by the bifurcation of the intelligence and law enforcement communities and functions, as they operate in international terrorism investigations, including the permissible use of FISA and the dissemination and use of the product of FISA searches and surveillances.

E. Some Specific Recommendations.

The specific recommendations contained in my statement are:

1. Address and eliminate wherever possible the bifurcation of the intelligence and law enforcement functions in international terrorism investigations.

2. Make the necessary legislative and policy changes to FISA to address the bifurcation issue. Deal with privacy and abuse concerns through enhanced accountability.

3. Set up a mechanism to ensure that all relevant intelligence about international terrorism is, in fact, being fully shared, analyzed and disseminated real-time.

4. Gain control over our borders through a dramatic enhancement of the INS and its procedures.

5. Enhance the ability of the FBI and the Intelligence Community to develop and use human sources to infiltrate terrorist organizations.

Conclusion

Thank you for giving me this opportunity to share my perspective and concerns with the Committees. I am very grateful for your efforts. Your work is critical to the future of our nation and the world.

Mary Jo White

APPENDIX

1. "Prosecuting Terrorism in the Criminal Justice System," address given by Mary Jo White on October 4, 2002 at the University if Illinois at Urbana-Champaign, Conference on Rethinking Terrorism and Counterterrorism Since 9/11.

2. "Terrorism: A Law Enforcement Perspective," address by Mary Jo White on June 14, 2002 to the Philadelphia Police Department at a Counter-Terrorism Seminar.

3. "The Criminal Justice Response to Terrorism," address given by Mary Jo White on March 27, 2002 at the Yale Law School.

Tab A

SDNY indictment of Usama bin Laden to destroy U.S. defense facilities, filed under seal, June 1998.

Tab B

Speech delivered to Middle East Forum on September27, 2000, entitled "Prosecuting Terrorism in New York", reprinted in Middle East Quarterly, Spring of 2001.

Tab C

SDNY indictment against Usama bin Laden, the al Qaeda leadership, and twenty-two defendants for the East Africa Embassy bombings on August7, 1998.