

An Investigation of the Department of Justice's Actions in Connection with the Search for Absent Texas Legislators



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I. INTRODUCTION

On May 11, 2003, over 50 members of the Texas legislature left Texas to prevent a quorum in the Texas House of Representatives so that a proposed re-districting plan could not be voted upon. On Monday, May 12, the Chief Clerk of the Texas House of Representatives issued warrants directing “any Peace Officer of the State of Texas” to “send for and arrest” the absent legislators and return them to the Texas House of Representatives.¹ See Exhibit A. At that time, the Texas Department of Public Safety (DPS) began efforts to locate and return the absent legislators to Texas. It was widely reported that DPS employees, other Texas officials, and Congressional staff contacted various federal agencies for assistance in locating and returning the absent Texas legislators.

Shortly thereafter, several Members of Congress requested that the Inspectors General at three agencies – the Department of Homeland Security (DHS), the Department of Transportation (DOT), and the Department of Justice (DOJ or the Department) – investigate what role their respective agencies played in the search for the absent Texas legislators. As a result of these requests, the Offices of the Inspector General at DHS and DOT issued investigative reports about this matter.²

This report describes the results of the DOJ OIG investigation. In this investigation, we attempted to identify any request made to a DOJ employee for assistance in finding or returning the Texas legislators, and what those DOJ employees did in response to the requests.

The OIG determined that Department employees received various inquiries and requests for assistance in connection with the absent Texas legislators. Requests were received by Department employees at the Main Justice Building in Washington, D.C.; by Federal Bureau of Investigation (FBI) offices in Texas and Oklahoma; and by the United States Attorney in the Western District of Texas. We found that, in response to these requests, Department employees, with one exception, recognized that this was a state

¹ The warrants were administrative in nature (rather than based on a criminal or civil statutory violation) and were provided for by the rules of the Texas House of Representatives.

² On June 13, 2003, the DHS OIG issued its redacted Report of Investigation that discussed the role of the DHS Air Marine and Interdiction Coordination Center in the search for the aircraft transporting the Texas legislators. On July 11, 2003, the DOT OIG issued its report, which describes the actions of the Federal Aviation Administration (FAA) in the efforts to locate the aircraft.

matter and did not provide any assistance to the search for the Texas legislators.

In one instance, an FBI special agent in Texas received a request for assistance from an employee of the Texas DPS who was searching for two of the absent legislators. The DPS officer and the FBI special agent worked together on a local Joint Terrorism Task Force (JTTF).³ The FBI special agent also had previously worked with (and was personal friends with) one of the Texas legislators who the DPS was attempting to locate. To assist the DPS officer, the FBI special agent made two calls to the cell phone of the absent legislator who he knew. The FBI special agent spoke to his legislator friend, and the legislator told the FBI special agent that he and other legislators were in Oklahoma. The FBI special agent relayed this information to the DPS officer.

Except for this one incident, Department employees responded that they would not take any action in response to those requests or become involved in any way in the search for the Texas legislators.

II. THE OIG INVESTIGATION

As noted above, the purpose of our investigation was to determine whether any Department resources were used to assist in the search for, or return of, the missing Texas legislators. Our investigation was therefore limited to those employees and components within the Department of Justice, including the FBI, United States Marshals Service (USMS), the United States Attorneys' Offices, and Justice Department Headquarters in Washington D.C.

The OIG sought to uncover any requests to DOJ employees for assistance with the search for, or the return of, the Texas legislators who were absent from May 11 through May 15, 2003. We did not investigate – and it is beyond the scope of our jurisdiction to review – the basis for or the appropriateness of any actions taken by other federal or state officials in connection with the search for the missing Texas legislators.

In our investigation, we pursued all known or reported leads that suggested potential involvement by DOJ employees in the search for the Texas

³ A JTTF is a group composed of various law enforcement agencies that focuses on terrorism and terrorism-related matters. Each of the FBI's 56 domestic field offices now leads a JTTF in its respective geographic area of responsibility. The FBI's New York Division formed the first JTTF in 1980. Participants in JTTFs include the Bureau of Immigration and Customs Enforcement in DHS; U.S. Secret Service; USMS; U.S. Customs Service; Offices of the Inspector General; Postal Inspection Service; Internal Revenue Service; Department of the Interior Bureau of Land Management; U.S. Park Police; Defense Criminal Investigative Service; and other federal, state, and local law enforcement agencies.

legislators. In addition, we conducted a canvas of those DOJ offices most likely to have been involved in this matter, including the FBI, U.S. Attorney, and USMS offices in Texas and in the Eastern and Western Districts of Oklahoma to determine if they received any requests for assistance in connection with this matter.

Although the actions of the Texas DPS in connection with this matter are beyond the scope of this report and the jurisdiction of this office, we sought information from the DPS about its contacts with DOJ employees. In addition, to the extent that the Texas DPS possessed notes or documents that may have corroborated or shed light on the contacts between DPS and DOJ employees, we asked the DPS for these notes or the reasons why those notes no longer exist.⁴

In pursuing our investigation, the OIG conducted more than 25 interviews. We interviewed employees from the DOJ, the FBI, the USMS, the Texas DPS, the Texas Attorney General's Office, and the Office of United States Majority Leader Tom DeLay. We also obtained and reviewed e-mail, telephone, and computer records that relate to the inquiries made to the DOJ about the missing Texas legislators.

In the following sections of the report, we describe in detail the results of our investigation. Section III contains our factual findings. In that section, we detail the various inquiries and requests which were made to Department officials in connection with the search for and return of the missing legislators, and the actions of Department employees in response to those requests. We examine each request individually, first reviewing those made to Department Headquarters, then those made to the FBI, followed by the requests to the U.S. Attorneys' and USMS offices. In Section IV, we identify the policies which govern the actions taken by the Department in connection with this matter, and we assess whether those policies were violated. In Section V, we provide our conclusions and recommendation.

⁴ The investigation of any allegations of misconduct by DPS employees or any allegations against DPS employees for destroying documents would be outside the jurisdiction of the OIG. Rather, these matters would be within the jurisdiction of Texas State officials. In addition, any allegations of possible federal criminal violations related to the destruction of documents would be under the jurisdiction of the FBI, not the OIG. However, in our limited interviews of DPS officials, we did not see evidence demonstrating a federal criminal violation.

III. FACTUAL FINDINGS

A. Department of Justice Headquarters

1. Inquiry from the Office of United States Majority Leader Tom DeLay

On May 13, 2003, William Moschella, the Assistant Attorney General in the Office of Legislative Affairs (OLA), received a call on his cell phone from a counsel to Majority Leader Tom DeLay (the Counsel).⁵ The Counsel previously had served as a Principal Deputy in OLA and, prior to that, had worked with Moschella as a staff member on the House Judiciary Committee. Moschella said he was in a meeting when the call came in, but when he returned to his office shortly thereafter, sometime between 8:30 a.m. and 9:30 a.m., he called the Counsel back and had a short conversation of about five minutes. According to Moschella, the Counsel said he was calling to find out if the Department of Justice had any legal authority to intervene in the Texas legislators matter, although the Counsel said he thought he knew what the response would be. Moschella told the OIG that he understood the Counsel to mean that he knew the response would be “no.”

Moschella said the Counsel did not ask him to take any action, and phrased his request as a legal question. The Counsel also told Moschella that he had already spoken to Johnny Sutton, the U.S. Attorney for the Western District of Texas. Moschella remembered that the Counsel mentioned that Sutton was traveling and the Counsel had reached Sutton at the Dallas airport.

Moschella told the OIG that he anticipated that the answer to the Counsel’s question would be no, the Department could not intervene. However, because this issue was not a matter within Moschella’s substantive jurisdiction, he said he decided to consult with other Department officials and he agreed to get the Counsel a quick answer.

Moschella then e-mailed Edward Whelan, the Acting Assistant Attorney General in the Department’s Office of Legal Counsel (OLC). Moschella copied Deputy Assistant Attorney General Alice Fisher and Assistant Attorney General Michael Chertoff, both of the Criminal Division, on the e-mail. In the e-mail, Moschella described his conversation with DeLay’s Counsel and asked whether

⁵ Moschella informed the OIG that, as a matter of policy, OLA does not normally release information about who has contacted it for advice, or the substance of those contacts. According to Moschella, this policy is intended to encourage Members of Congress and their staff to contact OLA with concerns relating to DOJ policy issues. He said that disclosure of specific inquiries could chill OLA’s relationship with Members of Congress. In this instance, however, Majority Leader DeLay’s office has already disclosed the fact that his staff contacted OLA in connection with this matter, and Moschella agreed to provide the details of the contact.

“the Department has the legal authority to assist the Texas House’s Sergeant-at-Arms enforce the ‘arrest’ warrant issued to bring certain Texas State legislators back to Texas to vote.” The e-mail stated that the Counsel had already spoken to U.S. Attorney Sutton, whose opinion was that the Department did not have authority to intervene. The e-mail asked that something be turned around in a “couple of hours” and suggested that “we give them a preliminary read with the caveat that their [sic] are substantial issues to consider.”

In response to the e-mail, Fisher called Moschella on the telephone. She told the OIG that her response to Moschella was that the Criminal Division is not involved in enforcing warrants – that is the responsibility of the USMS. She referred Moschella to Associate Deputy Attorney General Paul Murphy, who handled USMS issues for the Deputy Attorney General’s Office. Fisher said she told Moschella that “this is not something the Department should be getting involved with.”

Whelan told the OIG that after he received the e-mail from Moschella, he sent a follow-up question to Fisher and Chertoff, asking if they knew of any federal criminal violations that had occurred in the Texas legislator case. They did not respond to Whelan’s e-mail. He told the OIG that he thought that any idea of the DOJ getting involved in this matter struck him as “wacko.” He said he presumed that Moschella was just checking, and that Moschella felt the same way he did.

Whelan told the OIG he thought about the matter for a couple of minutes and could not think of any federal violation. He said he considered whether there might be certain arrangements with local law enforcement regarding assisting in detaining the people sought by Texas authorities. He said he therefore e-mailed his question to Paul Murphy asking, “If Texas asked the U.S. to arrest someone who was subject to an ordinary arrest warrant in Texas, is there some existing agreement that spells out the terms and conditions of any federal assistance? Or would this be an exercise of the inherent sovereign power of the United States to assist a State?”

Murphy responded to Whelan’s e-mail with an e-mail stating that the USMS “does have the authority to pursue state fugitives . . . [b]ut that authority, I believe, is limited to assisting state authorities to execute court-issued felony warrants. I doubt that USMS, as it stands now, could take any action on this matter. That’s my initial take on the legal issue. From a practical standpoint, this is a hornet’s nest.”

Moschella recalled a conversation he had with Whelan that same day in which they decided that the DOJ would not write a legal memorandum on this topic or conduct any further research. According to Moschella, within one to two hours of his original conversation with DeLay’s Counsel, Moschella called

the Counsel back to say that there was nothing the DOJ could do. Moschella said he explained that the DOJ had no legal “hook.” He also said he told the Counsel that the DOJ had not conducted an in-depth analysis of the issue.

Moschella told the OIG he is not aware of any other inquiries or requests made to the DOJ in connection with the search for or return of the legislators.

The OIG interviewed DeLay’s Counsel about his contacts with the Department on this issue. His recollection was substantially similar to that of Moschella’s. Like Moschella, the Counsel described the two conversations he had with Moschella on May 13, a few hours apart. The Counsel told the OIG that he asked Moschella, “As a matter of law, is it appropriate for the Department of Justice to assist the state of Texas to execute the warrants for the Texas legislators?” The Counsel told the OIG that he explicitly informed Moschella that he was simply asking him to look at a legal issue and was not asking him to take specific action. The Counsel said that Moschella stated that he understood the nature of the inquiry, and a few hours later Moschella told the Counsel that the Department would not get involved.

The Counsel told the OIG that he viewed his actions in bringing this request to Moschella as constituent service, because Texas officials had asked for Congressman DeLay’s help in this matter. The Counsel stated that he was not aware of any other DOJ employees being contacted other than U.S. Attorney Sutton. The Counsel also said he did not know of any DOJ involvement in the search for the missing Texas legislators.

2. OLA’s Statement Regarding the Department’s Involvement in the Texas Matter

On May 13, 2003, OLA received a letter from Representative John Conyers about the Texas matter. The letter stated that federal intervention in the issue would be inappropriate and asked “on what authority any Federal intervention would be based, and what precedent, if any, exists for Federal action in such a case?” Moschella told the OIG that he wanted to respond to the letter right away, because he knew the DOJ had not been involved in the matter.

A member of his staff drafted a response for Moschella’s signature. Within the next few days, pursuant to its normal practice, the draft response was circulated to the Criminal Division, the Civil Rights Division, the Deputy Attorney General’s Office, the Executive Office for United States Attorneys, and the FBI. The staff member also verified with all four U.S. Attorneys Offices in Texas that they had taken no action to assist with the search for or return of the absent Texas legislators.

The original draft of the response letter stated in part, “Accordingly, we have no plans to deploy our law enforcement resources in connection with this matter.” A Special Counsel in the FBI’s Office of Congressional Affairs who reviewed the letter said she had some concerns about the tense used in that sentence, because she thought that by the time the letter was issued the legislators would be back in Texas. She told the OIG that, in her opinion, it did not make sense to say that the Department had “no plans to deploy,” when future deployment would essentially be moot. She therefore suggested substituting the phrase “have not deployed.” It appears that her suggestion led the DOJ to state in the letter that they “have not deployed and have no plans to deploy our law enforcement resources in connection with this matter.” The FBI Special Counsel told the OIG that at the time she reviewed the letter she was not aware of any involvement by any FBI employee in the search for the Texas legislators.⁶

On May 16, 2003, OLA sent the letter, signed by Moschella, which stated that, “We [the Department] are not aware of any information pertinent to the Texas State legislators that would warrant action by federal law enforcement authorities, including those of the FBI. Accordingly, we have not deployed and have no plans to deploy our law enforcement resources in connection with this matter.” A copy of the letter is attached as Exhibit B. The Department subsequently sent the letter to 30-40 other Members of Congress who had inquired about this matter.

On May 30, 2003, the Department’s Office of Public Affairs issued a statement with similar language: “[T]he Justice Department is not aware of any information pertinent to the Texas State legislators that warranted action by federal law enforcement authorities, including those of the FBI. Accordingly, we did not deploy our law enforcement resources in connection with this matter.”

B. Federal Bureau of Investigation

The OIG canvassed various FBI offices to determine if they had any involvement in the search for the absent Texas legislators, and we interviewed several FBI employees about this matter. The following sections describe the results of our investigation.

⁶ As detailed below, an FBI special agent in Corpus Christi already had made several calls in connection with the search for the legislators. However, the FBI Special Counsel did not know of these calls when she reviewed the letter. She said she did not learn about the calls until she read about them in the press on June 7, 2003.

1. FBI Headquarters

The OIG interviewed two members of the FBI's Office of Public and Congressional Affairs (OPCA) because we were informed that requests for assistance received at FBI Headquarters likely would go to the attention of that office. The OPCA is the only section within the FBI that is authorized to respond to Congressional requests. The OPCA employees we interviewed said they were unaware of any requests for assistance with the search for or return of the Texas legislators.

2. FBI Dallas Division

The Chief Division Counsel in the FBI's Dallas Division reported that a special agent in the FBI's Sherman, Texas, Resident Agency (RA), received a telephone call regarding the absent Texas legislators from a local Republican Party member whose name the agent could not recall. The special agent also could not remember the exact date of the call, but said it came in when the news began to be aired about the flight to Oklahoma of the missing legislators. The caller asked the special agent if the FBI could be "involved" if the Texas legislators crossed state lines. The agent explained that the only way the FBI could be involved was through an Unlawful Flight to Avoid Prosecution (UFAP) warrant, and only if the Austin District Attorney's Office issued a criminal felony warrant and agreed to extradite and prosecute if the FBI located and arrested the legislators. The agent further explained that the current situation did not appear to be a criminal matter and that the voters or legislators should address this in the future. The Dallas Division of the FBI took no action and had no other involvement in this matter.

3. FBI El Paso Division

The Chief Division Counsel of the FBI's El Paso Division reported to the OIG that the results of a survey of all division employees revealed that no El Paso Division employees had any involvement with the search for the Texas legislators.

4. FBI Oklahoma City Division/Ardmore Resident Agency

We determined that the Ardmore, Oklahoma, RA of the FBI's Oklahoma City Division was contacted by the Office of the Texas Attorney General in connection with the warrants for the absent Texas legislators, but the office declined to provide any assistance on this matter.

An FBI special agent in Ardmore told the OIG that on May 12, 2003, he received a call from a southwest Texas area code. Although the caller identified himself, the special agent did not hear the name. The caller said that the

special agent should call the Attorney General of the State of Texas, and the caller said that the Attorney General was in the Speaker of the Texas House of Representatives' office. The FBI special agent said he initially thought it was a crank call. He responded that the Attorney General could contact him at the same telephone number the caller had dialed.

A minute later, the special agent received a call from Jay Kimbrough, whom the special agent described as the Attorney General (AG) for the State of Texas. (Kimbrough is, in fact, the Deputy AG.) According to the FBI special agent, Kimbrough stated that Texas authorities had tracked the absent Texas legislators to Ardmore, Oklahoma. According to the FBI special agent, Kimbrough said the legislators had flown in an aircraft and that they had "run out on Congress." Kimbrough told the special agent, "we've got letters to order them back." The special agent said he asked whether the letter was along the lines of a "contempt of Congress," and Kimbrough said that it was. The special agent asked whether there was a state statute or federal statute involved, and Kimbrough said no. The special agent said he responded that, "It did not sound like there would be much the FBI could do, but he said he would check." He asked Kimbrough to fax the letter to him.

After receiving the faxed letter, the FBI special agent called his supervisor, a Senior Supervisory Resident Agent in Muskogee, Oklahoma, and discussed the letter. According to the special agent, the supervisor checked with the FBI Oklahoma Division's Chief Division Counsel who agreed that this was not a federal matter and there was nothing the FBI could do.

The special agent said he called Kimbrough back at the Office of the Speaker of the Texas House of Representatives. The special agent stated that the FBI could not be involved. He stated that it could become a federal matter if there was a state charge and Texas obtained a UFAP warrant based on the state charge.⁷ The special agent also told Kimbrough that, to request such a warrant in this case, he should address himself to the Austin RA of the FBI.

The OIG interviewed Kimbrough about these conversations. Kimbrough stated that he called the FBI RA in Ardmore at the direction of Texas House Speaker Tom Craddick, who told him that a game warden in Oklahoma said he knew an FBI agent who had said he could help in returning the legislators because they had crossed state lines. Speaker Craddick gave Kimbrough a phone number, which turned out to be the number of the FBI RA in Ardmore. Kimbrough said he called the number and spoke with the FBI special agent. Kimbrough's description of the two conversations was similar to that of the FBI special agent, and Kimbrough confirmed that the special agent's ultimate response was that there was nothing the FBI could do. Kimbrough said he did

⁷ UFAP warrants are discussed in more detail in Section III.C.1. of this report.

not have any contact with any other Justice Department employee in connection with this matter. He said that, with the exception of the Ardmore FBI special agent and U.S. Attorney Sutton, he was not aware of any Justice Department employee being contacted in connection with this matter, other than what he has read in press reports.

5. FBI San Antonio Division/Brownsville Resident Agency

The Special Agent in Charge (SAC) of the San Antonio Division, Patrick Patterson, reported that on May 12, 2003, two FBI special agents in the Brownsville, Texas, RA were contacted by a Texas Ranger. The Ranger asked the two special agents what the procedure was for establishing a “trap and trace” on a telephone. Both special agents informed the Ranger that this investigative technique required a court order. One of the special agents told the SAC who conducted the canvass that he was aware that the Ranger’s inquiry was made in connection with the search for the absent legislators. The other special agent told the SAC that he later surmised that the inquiry was made in connection with the missing legislators. Neither agent provided any assistance to the Texas Ranger on this matter.

At the OIG’s request, a canvass of the FBI San Antonio Division did not reveal any other requests for information or assistance made of the division in connection with the absent legislators.

6. FBI Houston Division/Corpus Christi Resident Agency

We determined that, in response to a request from a DPS officer, an FBI special agent in the Corpus Christi RA telephoned one of the absent Texas state legislators to obtain information about his location and the location of one other legislator. The FBI special agent subsequently provided this information to the DPS officer. The following sections describe this incident.

a. Telephone Call to Representative Juan Escobar

The Corpus Christi FBI special agent told the OIG that he first learned of the Texas legislators’ departure for Oklahoma on the news as he was driving to work. He could not recall the exact date, but the records make clear that the date was May 13. When the special agent reached the office that morning, another FBI employee told him that information about the absent legislators had come across their TCIC printout.⁸ The TCIC bulletin included the name of

⁸ TCIC stands for the Texas Crime Information Center. TCIC printouts contain data on warrants, convictions, and other information relevant to law enforcement. According to the FBI special agent, if the TCIC contains information relevant to the Corpus Christi area or to one of their cases, that information is shared within the office. The OIG confirmed that on May 12, 2003, at 6:09 p.m., a message was sent to all Texas law enforcement agencies stating: (cont’d)

a former Border Patrol agent and colleague, Representative Juan Escobar, who had been a member of the Organized Crime Drug Enforcement Task Force (OCDETF) in Corpus Christi prior to becoming a Texas state legislator in May 2003. According to the special agent, he got teased that day for being friends with a “fugitive” because of the employees who worked in the Corpus Christi FBI office he was the person who was the friendliest with Escobar.

The FBI special agent told the OIG he has known Escobar for 12 years and first met him when Escobar was an Immigration and Naturalization Service (INS) agent. During the past four years, while Escobar had been with the INS, the two men had spent many hours together working on OCDETF cases, and they had become personal friends. Escobar, who left the Border Patrol in March 2003 to run for Texas state representative, was elected in a special election in early May 2003.

The FBI special agent said that sometime during the morning of May 13, he was speaking on the telephone with a sergeant from the Texas DPS. They had been planning to work together that day in connection with a JTTF matter.⁹ The DPS sergeant informed the FBI special agent that he would not be able to work that day on their JTTF matter because the sergeant, along with most of his unit, had been reassigned to locate the missing Texas legislators. While the sergeant recalls speaking with the special agent about Escobar that morning, he does not recall this specific conversation. In particular, he does not recall asking the special agent to call Escobar.

The FBI special agent said that he and the sergeant speak on the phone almost every day related to their JTTF work. The special agent was unable to say, with respect to the telephone call in connection with the search for the absent legislators, whether he had called the sergeant initially, or whether the

“The following fifty-three legislators are reported to be absent from the 78th legislative session. Under the Texas constitution and the rules of the Texas House of Representatives, these individuals are subject to immediate arrest. Your assistance is requested in locating these absent legislators. If a legislator is located, notify the nearest office of the Texas Department of Public Safety. DPS will transport the legislators back to Austin and deliver them to the floor of the House. If your agency has or develops any information concerning the whereabouts of any absent legislator, please report that information to your local DPS office or call our tip line at 1-800-525-5555.” The notice then listed the names of the legislators, their dates of birth, driver’s license information, and last known addresses. The message was rescinded on May 13, 2003, at 8:45 p.m.

⁹ The FBI special agent had, for the past 12 years, worked a variety of cases, several of which have involved organized crime/drug enforcement task forces. These cases often involve working with the Texas DPS. For the past eight years, he also has worked on OCDETF cases, and numerous DPS Narcotics and Special Crime Services (SCS) units have been members of the task force. Immediately after September 11, a JTTF was formed in Corpus Christi, which at times included the entire Texas DPS SCS unit in Corpus Christi.

sergeant had called him. At some point during their first conversation that day, he told the OIG, they began discussing Escobar. According to the special agent, he suggested that the DPS sergeant simply call Escobar to find out where he was and save himself the trouble in trying to locate him. The special agent explained that the DPS sergeant also had worked with Escobar over the past two years, so both he and the special agent had Escobar's contact numbers.¹⁰

According to the special agent, the DPS sergeant responded that he did not have Escobar's numbers with him. The sergeant also said that the special agent knew Escobar better than the sergeant did, so Escobar might be more receptive to a call from the special agent. The special agent told the OIG that he therefore agreed to "reach out" to Escobar.

Shortly thereafter, the special agent contacted Escobar on Escobar's cell phone. According to the special agent, he and Escobar first chatted about non-work matters, and the special agent congratulated Escobar on his election, since it was the first time they had spoken since the election. After the "small talk" including mention of Escobar's retirement party from the INS, Escobar began to explain what was going on with the legislators. He said the legislators had been busy in session dealing with school financing and similar issues, and "all of a sudden" the issue of redistricting was raised by the governor, so he and his fellow legislators had "left." Escobar said he was in Oklahoma with "the rest of them," and that they would not be leaving until the legislative session was over.

The FBI special agent told the OIG that during the conversation Escobar "admitted" that he was in Oklahoma with the other legislators. The special agent said he commented to Escobar something to the effect that, "one minute he's a law abiding citizen working with us, and the next minute he's a fugitive." The special agent said his comment was made in a joking manner. Escobar mentioned that a member of the Texas Rangers was in Oklahoma verifying the location of the legislators. Escobar then said that he had to go and would call the special agent back later. According to the special agent, this conversation, which occurred before 10 a.m., lasted five minutes or less.

Although Escobar's recollection of the details of this conversation was somewhat different, the main points were similar. According to Escobar, sometime on May 13 he received a phone message from the FBI special agent.¹¹

¹⁰ The special agent told the OIG that he assumed Escobar was in Oklahoma with the other legislators. (The fact that a number of the legislators were in Oklahoma had been reported on the news that morning.)

¹¹ Representative Escobar said this message may have been as early as 12:20 a.m. on May 13.

The message was brief and simply requested a call back. Escobar called the special agent's office number, and the phone was answered by one of the support staff at the FBI office in Corpus Christi. She commented something to the effect of, "My, my Juan, you're gone, and there's a list for you guys." The FBI special agent was not in the office, so Escobar said he left a message for him.

According to Escobar, the special agent called him back at approximately 11 a.m., and they had a brief conversation lasting a minute or so. Escobar said the special agent asked, "Hey, how are you doing?" and Escobar replied, "Okay." The special agent asked, "Are you in Oklahoma?" and Escobar said, "Yes." The special agent responded, "Okay." They then had a brief conversation about personal matters, such as how their families were doing. Escobar said the special agent said something to the effect of, "Talk to you later," and the conversation ended.

Escobar said he thought the call was a personal call, although it "sent a flag" because he had not heard from the special agent in some time. Escobar stated that his previous conversation with the special agent had occurred shortly before Escobar had resigned from the INS on approximately March 20, 2003. On that occasion, Escobar told the special agent he was leaving to run for office. The special agent told him to take care and wished him luck. Escobar noted that the special agent did not contact him during the campaign and did not contact him to congratulate him on winning the election. Escobar said that between March 20, 2003, and May 12, 2003, Escobar had not heard from the special agent.

Escobar explained that he had known the special agent since 1991, when Escobar arrived in Corpus Christi. He and the special agent began working closely together in approximately 1999. From that point on, they worked together on a daily or weekly basis, depending on the requirements of their cases. The special agent had Escobar's home and personal cell phone numbers, and there were many occasions when the special agent contacted Escobar at his home in connection with their task force work.

Escobar at one point told the OIG that the special agent "never" called unless it was work related. However, he acknowledged that the two had been bike riding together "a couple of times" the previous fall, and when Escobar was recovering from a knee injury the special agent had called him multiple times in connection with that. After Escobar re-injured his knee in January 2003, they stopped going on bike rides.

b. Additional Telephone Calls About Escobar

After speaking with Escobar on May 13, the FBI special agent called the DPS sergeant to say that Escobar was in Oklahoma, so that the DPS did not

need to do any surveillance on him. The special agent told the OIG he could not recall whether he reached the sergeant directly or not, and that he may have relayed this message to someone else at SCS.

We interviewed the DPS sergeant, who told us that the conversation in which the FBI special agent informed him that Escobar was in Oklahoma was the first conversation he could recall having with the FBI special agent that day. The sergeant said he believes the FBI special agent contacted him rather than the other way around. According to the sergeant, he told the special agent that he was “tied up looking for Texas legislators,” and the special agent responded, “I figured that.” The special agent then told the sergeant that Escobar had called the special agent and said that he was in Ardmore, Oklahoma – that they [the Texas legislators] were all up there in Oklahoma. The sergeant said he had not told the special agent that he was doing surveillance on Escobar. He said he would not have told him that because that was not the case. According to the sergeant, during this call he did not realize that the “Escobar” the special agent was referring to was the same Juan Escobar they had both worked with on the drug enforcement task force. It was not until the sergeant passed the information on to his captain that the sergeant was informed by the captain that the Escobar in question was a former law enforcement colleague.

According to the DPS captain, whom we also interviewed, she and the DPS officers under her command were assigned to find a number of the absent legislators, although Escobar was not among those they were assigned to find. Nonetheless, once she learned from the sergeant that the FBI special agent had spoken with Escobar, she contacted the DPS Command Center to find out if DPS also was looking for Escobar. The captain reported to the lieutenant at the command center that the FBI had made contact with Escobar. The lieutenant responded that he was not the one “calling the shots.” The captain offered to call the FBI special agent to confirm the information about Escobar, and the lieutenant told her to go ahead and do so.

According to the DPS captain, she then called the FBI special agent. The captain, who is also a member of the JTTF task force, said she speaks with the FBI special agent on the phone an average of three to four times a week. She asked the FBI special agent where Escobar was. The special agent told her Escobar was in Oklahoma, that they were all in Oklahoma. The captain told the OIG that this conversation lasted less than five minutes, perhaps as little as two minutes. She said the conversation gave her the impression that the FBI special agent had called Escobar because he knew him, not as an “official act.” She stated that his tone was that it was a call to someone with whom he worked. After the conversation with the special agent, the captain called the DPS Command Center and reported that she had confirmed that the FBI had information that Escobar was in Oklahoma.

The FBI special agent and Escobar had a number of additional conversations that day. According to the FBI special agent, Escobar called the special agent again approximately 30 minutes after their first conversation. In a short telephone call, Escobar asked the special agent whether he had previously called that day on behalf of himself or on behalf of the FBI. The special agent responded that he could not answer for the FBI as a whole, because he did not know what it was doing in Austin or in other parts of the country, but that neither he nor anyone in the FBI Corpus Christi RA was looking for Escobar. The special agent told the OIG he was not sure why Escobar called him back to ask this question, but he suspected that after talking with others in Oklahoma, Escobar became concerned that the FBI was looking for him. During this phone call, the special agent said he told Escobar that he hoped Escobar “knew what he was doing,” because if DPS had obtained a warrant and Escobar had crossed state lines to avoid the warrant, then, if requested, the FBI could get a UFAP warrant. The special agent told the OIG that his motive in making these statements to Escobar was that, as a friend of Escobar, he did not want to see Escobar’s law enforcement work and integrity “go down the drain” over this. He was concerned that this could impact Escobar's ability to get a concealed handgun permit, or otherwise negatively impact what he had worked so hard for as a law enforcement agent.¹²

Escobar first told the OIG that he could not recall such a conversation. He said he did not recall the FBI special agent ever mentioning the warrant. He also told the OIG that the special agent never threatened him or pressured him to come back. After reviewing his cell phone records, he said he may have called the special agent back at the end of the day to ask him what his calls had “been about,” but he was not sure he had reached the agent to ask him this question. He said he may have simply reached support staff at the FBI office.

c. Phone Call to Determine the Location of Representative Canales

In the late afternoon that same day, May 13, at approximately 4:00 p.m., the FBI special agent learned that the Texas DPS had been assigned to conduct surveillance at a location where Texas State Representative Gabi Canales was expected to speak. The special agent told the OIG that he was not certain from whom he first learned of this planned surveillance. However, the DPS captain told the OIG that she or the DPS sergeant had called the special agent again on May 13 to tell him that their unit might have to do surveillance to locate Canales. She said they called because they did not want to expend DPS resources needlessly conducting surveillance on someone who was out of state.

¹² This reflects the special agent’s mistaken belief that the warrant in question involved potentially serious criminal and civil consequences.

As a result, the DPS wanted the special agent to call Escobar again to find out if Canales was with him in Oklahoma.

According to the DPS sergeant, he told the FBI special agent, "If you've got contact with Juan [Escobar], could you call and see if Gabi Canales is in Ardmore too, because maybe then they'll cut us loose." The special agent responded that he would try. The special agent told the OIG that surveillance is labor intensive and costly, and based on what Escobar had said during their earlier conversation (that he was there with the "rest of them"), there was no doubt in his mind that Canales was in Oklahoma with Escobar.

According to the special agent, he called and left a message on Escobar's cell phone. In the message, he said he was calling to find out if Canales was in Oklahoma, because the DPS was going to try to find her. The special agent said he asked Escobar to call him back if he could so they would not have to go "sit wherever they were going to sit." According to the special agent, Escobar called back approximately 40 minutes later. Escobar told the special agent that Canales was in Oklahoma with him and that she did not plan to leave. Escobar said the phone call was less than a minute long. According to both the special agent and Escobar, they have not spoken again since that conversation.

With respect to their conversation about Canales, Escobar's recollections are similar in most respects. According to Escobar, the conversation was brief, perhaps 30 seconds to a minute. Escobar was not certain about the timing of when the call occurred, but he said that during this call the special agent asked him how he was doing and then asked if Canales was there [in Oklahoma]. Escobar responded, "Yeah, I'm looking at her right now." The special agent replied, "Oh, okay, that way we'll pull surveillance off and not have to spend any more money on her." Escobar said the special agent did not specifically indicate which law enforcement agency was doing surveillance. Escobar told the OIG he later learned that DPS had been to his house. Escobar said he does not recall the special agent asserting that he was calling on behalf of the FBI, but Escobar assumed that was the case.

After speaking with Escobar about Canales, the special agent called the DPS sergeant and said that Escobar had informed him that Canales was also in Oklahoma. The DPS captain told the OIG that she learned either from the sergeant or the FBI special agent that Escobar said Canales was in Oklahoma. She believes she received this information from the special agent prior to 1:00 p.m., because she told the OIG that it was at 1:00 p.m. that day that the legislators in Oklahoma held a press conference in which they stated their location and their intention to remain in Oklahoma. Shortly thereafter, the captain went onto the Internet where newspapers were posting photographs of the legislators who had been talking to the press. The captain found

photographs on the web, including pictures of Canales, further confirming the information from the FBI special agent.¹³

Escobar told the OIG that shortly after his conversation with the FBI special agent about Canales, he joked with Canales, “you’re becoming popular, even the FBI is looking for you.” A week after his return to Texas, Escobar received a call from the Associated Press. He is not sure how the media learned of the phone calls from the FBI special agent, but assumes that it was a result of his comment to Canales.

d. The Special Agent Informs his Supervisor of the Telephone Calls

The FBI Supervisory Senior Resident Agent (SSRA) in Corpus Christi told the OIG that he recalls that, at some point on May 13, when he walked past the FBI special agent’s desk, the special agent told him that he had called Escobar and that they [the legislators] were up in Oklahoma. The special agent told the OIG that he did not feel he had to keep his supervisor, the SSRA, informed about the calls, but he thought the SSRA would find it interesting because Escobar had worked in their office and the SSRA knew Escobar as well. The SSRA was out of the office the rest of that day. The next day the Special agent told the SSRA that he had spoken to Escobar again. According to the SSRA, the special agent explained that the DPS sergeant had called to see if the special agent could check to see if Canales also was in Oklahoma.

According to both the special agent and the SSRA, the special agent had not been directed by anyone in the FBI to place the calls to Escobar. The SSRA did not express concern to the OIG that the special agent had made these phone calls. The SSRA cannot recall any other discussion of the calls until reporters contacted the special agent about the calls several weeks later.

The SSRA said that, as the supervisor for the Corpus Christi and Victoria RAs, he often keeps a record of assistance provided to local law enforcement in a “control file.” He does this so that he can account for the man-hours put in by his agents that do not appear elsewhere in FBI records. He said that with respect to the special agent’s calls to Escobar, the SSRA did not keep such documentation, because the activity was so minimal and there was never any “official” request. The SSRA told the OIG that he did not view the phone calls as “official” FBI calls.

¹³ It appears the captain may be mistaken with respect to when she received this information from the special agent, because the special agent’s cell phone records suggest he spoke with Escobar about Canales after 3:00 p.m. on May 13, 2003.

e. Notes and Records of the Special Agent's Calls

The OIG sought to obtain telephone records, notes, and other documentation relating to these calls. The telephone records provided by the FBI reflect only two relevant calls for May 13. The first relevant call is one from the special agent's cell phone to Escobar's cell phone at 3:10 p.m. on May 13 lasting 1 minute and 12 seconds. The second is an incoming call at 4:21 p.m. to the special agent's cell phone from an unknown number that lasted less than one minute. The phone records of the Corpus Christi RA do not reflect any relevant call because local calls are not retained in the FBI's regular phone system.

The telephone records provided by Escobar reflect a total of five calls from his cell phone to the FBI office in Corpus Christi on May 13. They do not reflect any phone calls to or from the special agent's cell phone.¹⁴ The first call was placed by Escobar to the FBI's offices at 9:48 am on May 13 and lasted approximately 2 minutes. Escobar said he believes he placed that call to return the special agent's first message. He believes a support staff person paged the special agent within the office, but he did not come to the phone, so Escobar hung up. The second call was placed by Escobar from his cell phone to the FBI office in Corpus Christi at 9:54 a.m. and lasted approximately 1 minute. It is the call in which, according to Escobar, the support staff member teased him for being a fugitive, as described above. The third phone call was placed from Escobar's cell phone to the FBI office in Corpus Christi at 11:08 a.m. and lasted approximately 4 minutes. According to Escobar, that is the conversation in which he told the special agent about his location and they briefly discussed personal matters. Escobar's phone records reflect that he subsequently checked his voicemail at 11:45 a.m. Escobar said that it was at that point that he received a message from the special agent seeking another call back. Escobar could not recall the exact contents of the message. The phone records reflect that a fourth phone call was placed from Escobar's cell phone to the FBI Corpus Christi RA at 12:05 p.m. The call lasted approximately 3 minutes. According to Escobar, he did not reach the special agent on that occasion but spoke to someone on the support staff. The phone records reflect a fifth and final call at 4:22 p.m. that lasted approximately 2 minutes. That may have been the conversation in which Escobar told the special agent that Canales was with him. Neither the FBI agent nor Escobar took any notes in connection with these conversations.

¹⁴ This may at first seem unusual, given that the special agent's cell phone records, as described above, show an outgoing call to Escobar's cell phone at 3:10 p.m. However, the special agent stated that he left a voicemail message, and the Representative's phone records apparently do not show incoming calls that are connected directly to voicemail.

The DPS captain and sergeant told the OIG they could recall taking notes in connection with their conversations with the FBI special agent. The sergeant stated that he had destroyed his notes in connection with the search for the legislators at the instruction of his superiors. However, he declined to discuss the destruction of notes further. The DPS captain told the OIG that she destroyed her field notes at the instruction of her commander. The captain acknowledged that the Command Center may have made a record of the information she passed on to them, but she has no specific knowledge of that.

Marshall Caskey, the Chief of the Criminal Law Enforcement (CLE) Division of the Texas DPS, which includes SCS, told the OIG that there may have been some notation of the fact that the legislators discussed by the FBI special agent and the DPS officers had been located. He stated that if such a notation was made, it could have been among the notes that were destroyed pursuant to an e-mail instruction on May 14.

Chief Caskey stated that Title 28 of the Code of Federal Regulations, Part 23, which regulates criminal intelligence systems operating policies, prohibits his organization from keeping intelligence data on persons who are not suspected of criminal activity. He stated that there was no criminal predicate in this case that would have permitted CLE to maintain the information gathered by DPS employees related to the search for the absent legislators. Because it was determined that the Texas legislators matter was not criminal, Caskey said that no field notes made in connection with that matter could be placed in any of the CLE intelligence files. He added that intelligence data cannot be mixed with investigative data.

Chief Caskey told the OIG that Texas law provided authority for the DPS to go and arrest the missing legislators. He said it therefore was appropriate for the DPS to gather “skip-trace type” information on them – which included details about their children and families. However, this is not the kind of information, according to Caskey, which should remain in DPS intelligence files when there is no allegation of criminal wrongdoing. Caskey also stated that no formal reports were made in connection with this matter, so no reports were destroyed, only field notes. He explained that field notes are often destroyed in the normal course of business. He stated that Texas law does require that field notes be kept and that the DPS is “not required to keep every jot.” He noted that, in a normal case, he typically destroyed his field notes once his formal reports were finished. He said this was a matter of personal choice, and that field notes may be shredded.

In addition, Chief Caskey noted that this situation, where notes containing intelligence data were appropriately created in a situation where there was no criminal predicate, was very unusual. He said there was “no manual on how to do this.” He told the OIG that in this instance, the issue of what to do with the intelligence data that had been gathered came up when a

legal counsel in the DPS General Counsel's Office raised the issue with him. They discussed the propriety of "hanging onto the information" and the legal counsel said it was not pertinent. Based on this conversation, Caskey contacted the Commander of SCS and told him to make sure that the field notes were not put into criminal files. The Commander then contacted his secretary and had her send out an e-mail to carry out the Chief's instruction. However, Caskey said the e-mail went beyond what the Chief had intended, because the e-mail included a directive to destroy all "correspondence" and "photos."

Chief Caskey indicated that the DPS website contains large volumes of documents produced in connection with the DPS's conduct in this matter. He asserted that the DPS did not destroy all its records in connection with its search for the missing legislators. For example, he noted that the computer "footprints" for the records checks that were done are retrievable and were produced. He said no attempts were made to erase those records.

f. Other Cooperation with Local Law Enforcement

The FBI special agent told the OIG that he was aware that there are rules governing assistance by FBI agents to local law enforcement agencies. While he did not know off-hand the details of these FBI policies, he stated that the assistance he could provide depended on the level of FBI involvement in the case and the type of assistance requested. He said that he does not believe that the telephone calls he made were in violation of any FBI policy. He added that there have been times in the past when he has contacted friends or relatives of fugitives for assistance in finding fugitives. He also has provided assistance to local law enforcement in the past along the lines of a computer database check. As part of his task force work, he has assisted both DPS and the Nueces County District Attorney's Office by seeking to execute UFAP warrants. While he realized that any information provided to him by Escobar would have to be passed on to other law enforcement agents if relevant to their investigation, he asserted that his purpose in calling Escobar was based on his past relationship with and concern for Escobar.

The Corpus Christi FBI SSRA also told the OIG that the FBI regularly provides assistance to local law enforcement. For example, the Corpus Christi RA works with local law enforcement on violent crime fugitive cases, including instances where there is no federal warrant. Similarly, in certain circumstances the FBI may need "back-up" from local law enforcement because they do not have enough personnel to handle a situation. In that case, local law enforcement provides assistance.

The DPS sergeant also described a number of occasions where the FBI has provided assistance to the Texas DPS in connection with work on a Texas state case. He recalled instances in which FBI special agents assisted in

searching for fugitives wanted by the state. He also believes that the DPS SCS crime analyst regularly receives help from the FBI with her work, and she provides assistance to the FBI when requested. The DPS sergeant stated that law enforcement agencies in the Corpus Christi area, including local and federal authorities, have a good working relationship. Other FBI agents and officials with whom the OIG spoke described similar cooperation and assistance.

The FBI policies which govern an agent's ability to provide assistance to local law enforcement in such a situation are discussed in the analysis section.

C. U.S. Attorneys' Offices

The OIG also canvassed U.S. Attorneys' Offices in Texas and the Western District of Oklahoma to determine if they had any involvement in the search for the missing legislators. The following sections describe the results of this review.

1. U.S. Attorney's Office for the Western District of Texas

We found that the Office of the Texas Attorney General contacted the U.S. Attorney's Office for the Western District of Texas in connection with this matter. Within a few hours of that contact, U. S. Attorney Johnny Sutton said he responded that his office did not have jurisdiction in the matter and would not get involved.

Sutton told the OIG that he recalled being contacted on May 13, 2003, when he was on his way from Texas to an Attorney General's Advisory Committee meeting in Washington, D.C. He received a page and called the number indicated, reaching Barry McBee, First Assistant to Texas Attorney General Greg Abbott.¹⁵ McBee asked whether there was any federal jurisdiction for Sutton's office to assist the State of Texas in getting the absent Democratic legislators back. McBee said that a "Department of Justice" lawyer was aware of the situation and had done some research on this issue. McBee told Sutton he could talk to the lawyer (who, it later turned out, was the former Department of Justice lawyer now serving as Counsel to Majority Leader Tom DeLay, whose actions we describe in section III.A.1., above). McBee also wanted to know if the FBI could become involved. McBee said his office had contacted the FBI in Oklahoma and that the FBI would not do anything without Sutton's involvement. Sutton responded that he did not think there was any federal interest in this issue, so McBee should keep his expectations low, but Sutton said he would check.

¹⁵ Sutton had had prior contact with McBee when Sutton was criminal justice policy director for President Bush during the President's campaign.

Sutton said he called his First Assistant U.S. Attorney (John Murphy), his criminal Chief (Richard Durbin), and the Deputy United States Attorney (Robert Pitman) and asked them to look into the matter. In a memorandum dated May 13, 2003, Durbin wrote that he considered whether the United States Attorney “may or should authorize the filing of a federal criminal complaint charging unlawful flight to avoid prosecution in violation of 18 U.S.C. § 1073 based on a violation by Democratic State Legislators of a rule of the Texas House of Representatives, that involves the legislators’ willfully absenting themselves from the State of Texas to deprive the Texas House of Representatives of a quorum.” Durbin concluded that the answer to that question was no. He wrote that the statute at issue, the “Fugitive Felon Act,” relates primarily to persons fleeing prosecution in a felony case. The absent legislators were not charged with a criminal offense, and there was no evidence that they fled to avoid prosecution for a felony, so the statute was not applicable to them. Alternate provisions of the statute were deemed equally inapplicable, because the legislators were not fleeing to avoid giving testimony in a pending criminal proceeding or to otherwise hinder a criminal investigation. Thus, the memorandum concluded that the Fugitive Felon Act, 18 U.S.C. § 1073, did not apply to this situation.

Sutton told the OIG that at approximately 5:00 p.m. that same day, after hearing back from his staff, he had a second conversation with McBee in which he confirmed that his office had no jurisdiction to assist the State of Texas in the matter. Sutton added that even if he did have jurisdiction, it was still a state matter. Sutton also called the Counsel to DeLay, and they had a brief conversation in which Sutton said this was not something he would get involved with.

Also on that same day, Sutton recalls reaching out to the Deputy Attorney General's Office to give them a “heads up” about the call and the issues raised. He said he reached Associate Deputy Attorney General Stuart Levey, who agreed with his position that the Department should not get involved. E-mail records reflect that Levey also spoke with two members of Sutton’s staff on May 13 about whether anyone had asked them to intervene and what the response had been.

Sutton told the OIG he also left a voicemail message for Principal Associate Deputy Attorney General Chris Wray, but he did not hear back from Wray. Wray told the OIG he recalls bumping into Sutton in the hallway at the Justice Department sometime later and discussing the matter with him briefly. He agreed with Sutton’s assessment that the Department should not get involved in this matter.

The OIG also interviewed First Assistant Attorney General Barry McBee in connection with these events. Both Sutton’s and McBee’s recollections are

similar with respect to the substance of the calls, although their recollections of the timing of the calls differ slightly. McBee believes that he first called Sutton on May 12, and that they had a total of three brief calls. According to McBee, during the first call, McBee asked whether there was federal jurisdiction. During the second conversation, which took place later on May 12, Sutton said that after a quick review his office did not think there was jurisdiction, but he may have said he would “bounce it off people in D.C.” As McBee recalls it, a third conversation occurred the next day when McBee paged Sutton and Sutton called him back to say his office would not get involved.

McBee’s phone records support his recollection about the timing of the calls. They show a page from McBee’s state cell phone to Sutton’s pager at 6:42 a.m. on May 13, and an incoming call from an unknown number six minutes later. During that conversation, according to McBee, Sutton definitively stated that the federal government did not have jurisdiction in the matter. McBee told the OIG that he is not aware of any Justice Department employee providing any assistance with the search for the legislators.

On May 13, Sutton’s office drafted a short statement for the press in which he said, “The U.S. Attorney’s Office is not aware of any circumstances involving the actions of Texas Legislators that fall within the jurisdiction of this office. This matter falls squarely within the purview of the state authorities and does not invite involvement by federal authorities.”

A canvas of the employees in the U.S. Attorney’s Office for the Western District of Texas revealed only one other inquiry in connection with this matter. On May 13, Deputy U.S. Attorney Pitman received an urgent page in connection with this matter from Texas State Representative Jack Stick, who previously had been an Assistant United States Attorney in the San Antonio office in the district.

According to Representative Stick, he paged Pitman, who is a personal friend of his, and Pitman called him back. They discussed a number of personal matters during their conversation, which lasted a few minutes. Stick said that approximately 20 to 30 seconds of their conversation was devoted to discussing the Texas legislators’ matter. According to Stick, he told Pitman that someone had asked him whether there was anything the “feds” could do. Stick had told that person that he thought there wasn’t. Stick posed the question to Pitman in their telephone call, and said Pitman responded, “I don’t think so.” Stick said Pitman also may have said that he thought the Department had already considered that question and had come up with the same answer. One of them mentioned that a UFAP would not apply, because “there is no ‘P’” (the “P” in UFAP stands for “prosecution”). The conversation continued into personal matters and ended shortly thereafter. Stick said he did not ask Pitman to take any action in connection with the Texas legislators,

and he is not aware of anyone having asked any Department employee to take action in connection with the Texas legislators.¹⁶

We found no other contacts with anyone in the U.S. Attorney's Office for the Western District of Texas about this matter

2. U.S. Attorney's Office for the Southern District of Texas

Michael T. Shelby, the United States Attorney for the Southern District of Texas, reported to the OIG that no employee in his office was contacted or provided any information regarding the search for, or the return of, the absent Texas legislators.

3. U.S. Attorney's Office for the Northern District of Texas

First Assistant United States Attorney James T. Jacks from the Northern District of Texas reported to the OIG that no employee in that office had any contact or was requested in any way to participate in the activities involving the Texas legislators. He said no one sought any legal opinions or other prosecutive function from his office.

4. U.S. Attorney's Office for the Eastern District of Texas

Deputy Chief Assistant U.S. Attorney for Management and Administration Kerry Klintworth reported to the OIG that no employee in the U.S. Attorney's Office for the Eastern District of Texas was contacted or provided any information regarding the search for, or the return of, the absent Texas legislators.

5. U.S. Attorney's Office for the Western District of Oklahoma

First Assistant U.S. Attorney Bob Troester reported to the OIG that, after an inquiry of the entire office, he discovered no contact by state, local, or federal officials regarding the search for or return of the absent Texas legislators. Troester said that because he is the District's press officer he received some media inquiries in connection with those events, but he made no comment other than to note that Ardmore, Oklahoma, is located in the Eastern District of Oklahoma.

¹⁶ Pitman is on extended leave, and we did not interview him.

6. U.S. Attorney's Office for the Eastern District of Oklahoma

Sheldon J. Sperling, U.S. Attorney for the Eastern District of Oklahoma (which includes Ardmore, Oklahoma), told the OIG that he was contacted by a Senior Supervisory Resident Agent in the FBI's Oklahoma City Division about the absent legislators. As discussed in Section III.B.4., an FBI agent in Ardmore was contacted by the Texas Deputy Attorney General and the agent contacted his supervisor. According to U.S. Attorney Sperling, the FBI agent's supervisor contacted Sperling to confirm that the FBI should not become involved in this matter. Sperling told the OIG that he reviewed a copy of the letter from the Texas authorities that had been faxed to the FBI special agent in Ardmore. Sperling told the OIG that he "cautioned" the FBI agent against any FBI action concerning this matter. He told the OIG that he provided similar guidance to the U.S. Marshal for the Eastern District of Oklahoma.

D. United States Marshals Service

1. United States Marshals Service for the Western District of Texas

The USMS office for the Western District of Texas was contacted by the Texas Rangers for information regarding how the Rangers had handled a similar situation in the past. However, the Rangers did not request assistance in locating or returning the absent Texas legislators.

The OIG interviewed United States Marshal Jack Dean. He told the OIG that on the day the legislators went missing, a Senior Captain with the Texas Rangers (a division of the DPS), contacted him to find out how the Texas Rangers had handled the situation when a group of state senators were absent under similar circumstances in 1979. Dean explained to the OIG that he had been Chief of the Texas Rangers before retiring and coming to the Marshals Service. In 1981, when he was a member of the Texas Rangers, Dean had hired the Senior Captain and Dean said they are personal friends.

Dean said that when the Senior Captain contacted him about the absent Texas legislators, he wanted historical information regarding how the Rangers handled the senate situation in 1979, because those events occurred before the Senior Captain worked at DPS. Dean told the OIG that he was willing to provide the historical information, but the call ended abruptly when the Senior Captain said, "I've got to go. I think they found them." Dean said the conversation lasted approximately two minutes. He said the Senior Captain did not ask Dean for actual assistance in locating the missing legislators.

The OIG contacted the Senior Captain about this matter. He said he has a vague recollection of having a very brief conversation about this matter with

Dean. He noted that he and Dean are close personal friends and talk frequently about a number of topics. His recollection was that he said something to the effect of, "Hey, what did the Rangers do back then? What was their participation?" and Dean may have responded, "They all [the senators] came back. No one got arrested." The Senior Captain stated that he did not request Dean's assistance, nor did Dean offer any assistance in this matter.

Dean told the OIG that, other than this one phone call with the Senior Captain, he was not aware of any contacts with, or requests made to, the USMS in connection with this matter by the DPS or by other Texas officials. He said that to the best of his knowledge, neither he nor any member of the USMS's Western District of Texas had received any request to assist in any way with the matter.

2. U.S. Marshals Service for the Southern District of Texas

Ruben Monzon, the U.S. Marshal for the Southern District of Texas, reported to the OIG that no employee in his district was contacted for information nor gave assistance to any federal, state, or local official in connection with the search for the absent Texas legislators.

3. U.S. Marshals Service for the Northern District of Texas

Anthony Odom, Chief Deputy U.S. Marshal for the Northern District of Texas, responded to the OIG that an unknown male caller contacted its office and asked, "what would be necessary for U.S. Marshals to be involved in the arrest of the missing Texas legislators." A representative of the USMS office replied that the office would have to receive a request for assistance from the responsible agency, state or local, that held warrants for the missing legislators. And, if such request was made, and it was determined the missing legislators were in another district, the request would be forwarded to the other district. According to the USMS representative, the caveat also was made that individual USMS offices could choose, even if a request was made, not to assist.

4. U.S. Marshals Service for the Eastern District of Texas

John L. Moore, U.S. Marshal for the Eastern District of Texas, reported to the OIG that he polled his staff and no one in his district participated in any activity or was contacted for any assistance in this matter.

5. U.S. Marshals Service for the Western District of Oklahoma

Michael W. Roach, the U.S. Marshal for the Western District of Oklahoma, reported to the OIG that his office had no involvement in returning the legislators to Texas.

6. U.S. Marshals Service for the Eastern District of Oklahoma

John W. Loyd, the U.S. Marshal for the Eastern District of Oklahoma, reported to the OIG that his office did not receive any requests to assist with the search for or return of the absent legislators. He said that neither he nor his office had any involvement in this matter.

IV. OIG ANALYSIS

As described above, we found that DOJ employees received a total of nine requests for information or assistance in connection with the absent Texas legislators. Eight of these requests resulted in no action being taken by the DOJ to find or seek the return of the legislators. Those eight inquiries, and the responses given by the DOJ employees, are summarized as follows:

- A member of Majority Leader Tom DeLay's staff called a senior DOJ official to inquire whether the Department had the legal authority to assist the Texas authorities in enforcing the warrant for the absent legislators. The Office of Legislative Affairs, after brief consultation with other Department divisions, declined to provide assistance.
- An unknown Texas "Republican party" member contacted a special agent in the Dallas Field Division of the FBI and asked if the FBI could be "involved" if the Democrats crossed state lines. The agent responded that the FBI would not be involved because this did not appear to be a criminal matter.
- A member of the Texas Attorney General's Office contacted the Ardmore, Oklahoma, Resident Agency of the FBI to find out if there was anything the FBI could do in the matter. After briefly checking with his superiors, an FBI agent responded that there was nothing the FBI could do.
- A Texas Ranger contacted two FBI special agents in the Brownsville, Texas, Resident Agency of the FBI and asked what the procedure was for establishing a "trap and trace." Both agents

informed him that this investigative technique required a court order.

- A Texas State representative who had worked as an Assistant U.S. Attorney contacted a Deputy U.S. Attorney in the San Antonio office. They had a brief conversation in which the representative asked if the federal government could do anything with respect to the absent legislators. The Deputy U.S. Attorney said that he did not think so.
- A member of the Texas Attorney General's Office contacted the U.S. Attorney for the Southern District of Texas. The U.S. Attorney had his staff research the issue and responded that his office had no jurisdiction, but even if there was jurisdiction, it was a state matter and his office would not assist.
- A member of the Texas Rangers asked the U.S. Marshal for the Western District of Texas how a similar situation had been handled when legislators were absent from the Texas senate in 1979. The Marshal provided a brief response, based on his recollection from his work for the Rangers during that time.
- An unknown male contacted the U.S. Marshals service for the Northern District of Texas and asked what would be necessary for the Marshals to become involved in the arrest of the legislators. A representative of the office provided a brief description of the relevant procedures.

In these eight instances, the relevant DOJ employees promptly and appropriately declined to become involved in this state matter. In some of these instances, the employees quite reasonably consulted with their supervisors or did some checking before responding to the inquiry. In other instances, the employees provided an immediate response.

In only one instance did we find that a DOJ employee took action in connection with the search for the Texas legislators. We determined that a special agent in the Corpus Christi FBI RA contacted Texas State Representative Escobar two times when he was in Ardmore, Oklahoma. On the first occasion, in response to a request from the Texas DPS, the FBI special agent determined that Escobar was in Oklahoma and reported that information to the DPS. On the second occasion, in response to another request from the DPS, the FBI special agent called Escobar to determine if another Representative, Gabi Canales, was also in Oklahoma. The special agent reported this fact to the DPS as well.

In evaluating the appropriateness of the special agent's actions, we considered several factors. First, a threshold issue is whether the special agent made these calls in his "official capacity." We conclude that he did. Even though the special agent and Escobar had a personal friendship, their relationship was primarily that of former colleagues. Moreover, the special agent called Escobar while on duty, from his office, at the request of the Texas DPS. Escobar knew that the special agent was an FBI agent. While they discussed personal matters on the phone, according to the special agent the purpose of the calls was to obtain information for the DPS on the whereabouts of Escobar and Canales. Thus, though some of the statements the special agent made during his conversations that day with Escobar were motivated by personal concerns, the calls themselves must be viewed as actions taken by the special agent in his official capacity.

The next question is whether the special agent violated any statute or FBI policies by placing the calls. After careful review and consultation with the FBI, we did not find that the agent violated any FBI policy.

FBI policy prohibits employees from divulging information obtained in their official capacities. Manual of Investigative Operations and Guidelines (MIOG), Part 1, Section 1-19(2). The MIOG, however, specifically states that the "FBI is authorized to acquire, locate, or pass on various records to local agencies, effect cooperation between local law enforcement or verify the location of a person whose interview is desired for a local or state law enforcement agency." MIOG, Part 1, Section 62-3.2.¹⁷ The policy states that, "The FBI, on behalf of a local or state law enforcement agency, may verify the location of an individual. No interviews with subjects, suspects, or witnesses should be conducted by Bureau personnel. No extensive efforts are to be expended to locate individuals for interviews. FBI personnel are to merely verify their whereabouts, such as a residence address or employment, etc." MIOG, Part 1, Section 62-3.3(3). The actions of the special agent appear to fall squarely within above policy. He was asked by a local law enforcement agency to "verify the location of any individual." He did not interview the individual. He did not expend "extensive" efforts. Indeed, the phone calls he made were not long distance, because Representative Escobar had a local cell phone number. The special agent simply verified the whereabouts of the representatives and passed the information to local law enforcement.

The FBI's Manual of Administrative Operations and Procedures (MAOP), also provides that, "Dissemination [of information] to any state or local

¹⁷ This provision is based on Title 28 of the United State Code, Section 534, which relates to the Attorney General's authority to acquire and preserve identification, criminal, and other records, and to exchange those records with federal, state, city, penal and other institutions.

government agency should be restricted as a general practice to those agencies directly engaged in the criminal justice process, e.g., police, prosecution, penal, probation, and parole and the judiciary, and only where access is directly related to a law enforcement function of a recipient agency, e.g., in connection with a lawful criminal or intelligence investigation . . .” MAOP, Part 1, Section 9-3.1. According to the DPS officers interviewed by the OIG, they were collecting intelligence information and were conducting surveillance in an effort to execute a warrant, albeit a non-criminal warrant. Chief Caskey described the field notes taken in connection with this matter as “intelligence data.” Thus, because the request regarding the whereabouts of Escobar and Canales was made to the FBI special agent by members of a law enforcement agency who were conducting an intelligence investigation, the MAOP policy permitted the FBI agent to disseminate the information to them.

According to the MAOP, the special agent was not required to open a file in connection with his calls to Escobar. See MAOP, Part 2, Section 2-5.1. FBI case files must be opened when substantial work is done on a case; for example, when “one or more interviews are to be conducted” or “when an informant is being operated.” MAOP, Part 2, 2-5.1. An FBI form exists that can be used for noting an inquiry made with respect to a person or subject in a particular case (the FD 159). However, that form is generally used when there is an existing case file in which to place the form.

The FBI special agent’s supervisor told the OIG that, in some instances, he keeps a record of the expenditure of his agents’ time on local law enforcement matters so that he can justify how their time is spent. The supervisor told the OIG that time spent on this matter was so minimal, however, that no such record was kept. The absence of a record of these calls in FBI files is not a violation of FBI policy.

Further, the special agent’s calls to Escobar did not constitute a misuse of government property, as defined in MAOP, Part 1, Section 1-3. Even if the special agent’s calls to Escobar were, in part, motivated by their personal friendship, given that the special agent intended to (and did) pass on information he obtained during the calls to representatives to the Texas DPS, the calls cannot be viewed as “personal” calls.

FBI personnel are prohibited from engaging in political activities when they are in contact with the public while they are on duty. MAOP, Part 1, Section 1-18.3.2. According to the policy, the reason for this prohibition is that, “[t]he FBI, like all law enforcement agencies, must be perceived by the public as nonpartisan and apolitical.” Although the FBI policy does not define the term “political activity,” the entire section of the MAOP on “Political Activities,” when read as a whole, suggests that the term applies to actions such as voting, expressing opinions on political subjects, and displaying

political pictures, stickers or badges. We do not believe that the special agent's phone calls to Escobar constituted impermissible on-duty "political activity."

V. OIG CONCLUSIONS AND RECOMMENDATION

With one exception, the Department's employees declined to become involved in the search for, and the return of, the absent Texas legislators. In the case of the FBI agent in Corpus Christi, given the FBI policies as they currently exist, the agent was in a situation where he had to decide whether to exercise his discretion to either decline the request or, alternatively, to assist the Texas DPS. The agent had a close working relationship with the requestors and was friends with the person whom they wanted the agent to contact. He mistakenly believed there was a criminal element to this matter, because law enforcement officers making the request were using terms typically used in criminal cases, such as "warrant." All these factors played into the agent's decision to assist Texas DPS by making the calls.

We believe the agent should have declined the request as a better exercise of his discretion. He also might have consulted with colleagues or supervisors to get their opinion about his becoming involved, given that he already was well aware that the matter stemmed from a political dispute and was of substantial public importance. In addition, had he more carefully evaluated the situation, he may have recognized that there was no federal interest at stake and no criminal element to the request.

We also note that the Texas DPS was able to determine through television and the Internet that both Escobar and Canales were in Oklahoma. In addition, this is not a situation where public health or safety was at issue. This further supports our conclusion that it would have been a better practice for the FBI special agent not to involve himself, and therefore the FBI, in this matter. However, we do not believe he committed misconduct or violated any FBI policy.

Finally, the expansion of the Joint Terrorism Task Forces to all 56 FBI Divisions has brought FBI agents into even closer contact with their local law enforcement counterparts during a time of increasing demands on law enforcement resources nationwide. FBI agents will continue to require assistance from local law enforcement on cases of primarily federal interest, and FBI agents, in turn, may be asked for assistance by local law enforcement colleagues with their cases. Given such requests, we believe the FBI should examine the written guidance it provides to its agents with regard to how to evaluate and respond to requests for assistance from local law enforcement. In doing so, the FBI should consider clarifying, consolidating, and reinforcing various policy directives that relate to this topic. The guidelines should seek to

encourage cooperation, when appropriate, and also seek to better assist FBI agents to determine when they should decline to provide assistance in response to such requests.

Errata

Since the initial public release of the report on August 12, 2003, the OIG made three changes to the report:

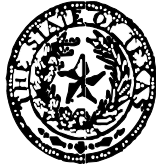
Page 10, subpart 5: Instead of “FBI San Antonio Division/Austin Resident Agency” the phrase has been changed to “FBI San Antonio Division/Brownsville Resident Agency”

Page 27, final bullet: instead of “two FBI special agents in the Austin, Texas, Resident Agency” the phrase has been changed to “two FBI special agents in the Brownsville, Texas, Resident Agency”

Page 28, second bullet: instead of “A member of the Texas Attorney General’s Office, and a member of Majority Leader Tom DeLay’s staff, contacted the U.S. Attorney for the Southern District of Texas” the sentence has been changed to “A member of the Texas Attorney General’s Office contacted the U.S. Attorney for the Southern District of Texas.”

List of Exhibits

- Exhibit A Warrant issued by Texas House of Representatives for Representative Juan Escobar
- Exhibit B Letter sent to Congress signed by AAG Moschella



HOUSE OF REPRESENTATIVES

IN THE NAME AND BY THE AUTHORITY OF THE
HOUSE OF REPRESENTATIVES, STATE OF TEXAS


TO: The Sergeant-At-Arms of the Texas House of Representatives and to any Peace Officer of the State
of Texas:

GREETINGS:

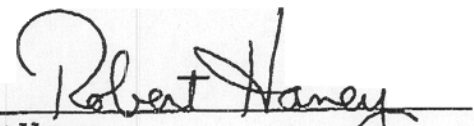
Pursuant to Art. 3, Sec. 10, Texas Constitution and in accordance with the Rule 2, Section 4(6) and Rule 5,
Section 8, Rules of the Texas House of Representatives, by order of the majority of the members of the
Texas House of Representatives present:

You are hereby directed to send for and arrest The Honorable Juan Escobar, Member of the Texas House of
Representatives, wherever he may be found, and to return that person to the Hall of the Texas House of
Representatives and there secure and retain that person.

Herein fail not. So ordered this 12th day of May, 2003.



Tom Craddick
Speaker, Texas House of Representatives

Attested by: 

Robert Haney
Chief Clerk, Texas House of Representatives



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

MAY 16 2003

The Honorable John Conyers, Jr.
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Conyers:

This responds to your letter, dated May 13, 2003, to the Attorney General, which expressed concern about press reports regarding the deployment of any federal law enforcement resources in connection with Texas State legislators who are working in Ardmore, Oklahoma. We understand that your letter also was addressed to the Department of Homeland Security, which will respond separately about matters within its jurisdiction.

We are not aware of any information pertinent to the Texas State legislators that would warrant action by federal law enforcement authorities, including those of the FBI. Accordingly, we have not deployed and have no plans to deploy our law enforcement resources in connection with this matter.

We hope that this information is helpful and that you will contact this office if you would like additional assistance regarding this or any other matter. We will send identical letters to the other Members who joined in your letter to us.

Sincerely,

A handwritten signature in black ink that reads "William E. Moschella".

William E. Moschella
Assistant Attorney General