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## FAX COVER SHEET

**To: Andrew B. Steinberg, Chief Counsel, FAA**

**Fax No:** (b) (2) High

**From: Steven M. Dunne  
Deputy General Counsel**

(b) (2) High

**Date: December 12, 2003**

**Pages, including cover sheet: 7**

**Comments: Andy -- Per your request at our meeting today, here is the exchange of letters with DOJ regarding interview procedures. If you have any questions, feel free to consult with Dan Levin or give Dan Marcus or me a call. Thanks. Steve**



Thomas H. Kean  
CHAIR

July 1, 2003

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EXECUTIVE DIRECTOR

Mr. Adam Ciongoli  
Counselor to the Attorney General  
Department of Justice  
Room 5115  
Tenth Street and Constitution Ave., NW  
Washington, DC 20530

Dear Adam:

As you know, we are very disappointed that the Administration has rejected our modified proposal with respect to the presence of agency representatives at interviews of federal employees conducted by the Commission. In response to your expressed concerns about executive privilege and sensitive sources and methods, the Commission had modified its initial position and had agreed to agency representatives being present at interviews of high-level officials and operations officers at foreign intelligence agencies.

For all other interviews, we continue to believe that our statutory mission of conducting a full and independent investigation into "the facts and circumstances relating to the terrorist attacks of September 11, 2001" would best be served by conducting interviews of fact witnesses without the potentially intimidating presence of an agency official, particularly a lawyer, supervisor, or more senior official. We note that the Administration itself recognizes that principle in many of the investigations it charts - notably the current outside inquiry into the shuttle disaster by the Columbia Accident Investigation Board, where no agency representatives are present at interviews. It is no less critical, we submit, that the American people have confidence in the integrity and independence of our factual investigation than it is in the case of the Columbia disaster.

We reject the notion that a different standard should apply because our Commission is a legislative branch entity or because of some notion that we are seeking "agency information." As in the case of any factual investigation, we will be asking in interviews for what the individual government employee knows about events relevant to our inquiry; we would be proceeding no differently were all our Commissioners, rather than just our Chairman, appointed by the President.

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Because it is important for us to proceed with interviews promptly, the Commission has decided not to prolong this debate on ground rules. We will accept the presence of an agency representative at our interviews of current federal employees, subject to the following understandings:

1. Only one agency representative per interview.
2. The agency representative may confer with the witness or discuss concerns with the Commission's interviewers, but may not correct or supplement answers by the witness or interfere with the conduct of the interview.
3. Interviews will be recorded unless the witness objects. Agency representatives will not urge witnesses to make such objections.
4. If Commissioners or staff conducting an interview believe that the presence of the agency representative is "chilling" or otherwise interfering with the interview, he or she may ask the agency representative to leave or reschedule the interview. The Commission also reserves the option, which we would expect to exercise sparingly, of requesting before an interview that the interview take place without an agency representative. If we do so, we will provide our reasons for so requesting.

We would appreciate your confirming these understandings in writing.

With best regards,

  
Philip Zelickow  
Executive Director

  
Daniel Marcus  
General Counsel

cc: Alberto R. Gonzales  
Counsel to the President

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U.S. Department of Justice

Washington, D.C. 20530

July 24, 2003

Philip Zelikow, Executive Director  
Daniel Marcus, General Counsel  
Steve Dunne, Deputy General Counsel  
National Commission on Terrorist Attacks  
Upon the United States  
301 7<sup>th</sup> Street SW, Room 5125  
Washington, D.C. 20407

Gentlemen:

I am responding to your July 1, 2003 letter to Adam Ciongoli concerning interviews of government employees. We share your interest in having the interviews proceed promptly and appreciate your efforts to work with us to reach an accommodation in this area. In response to the points set forth in your letter:

1. We agree that as a general matter there will be only one agency representative per interview. In rare instances where particular issues are implicated, we may notify you of our need to have a second representative present to deal with that particular issue.
2. Obviously, the agency representative's purpose is not to interfere with the conduct of the interview, but rather to represent important Executive Branch and national security interests. In that regard, the agency representative may, as appropriate, confer with the interviewee or discuss concerns raised by particular questions with the Commission's interviewers.
3. In a further effort at accommodation, we will depart from longstanding Executive Branch practice and accept your request for a presumption that interviews will be recorded if the interviewee does not object and if the government timely receives a copy of the recording. This agreement does not apply, however, to interviewees potentially related to the Moussaoui case, who are addressed in the separate agreement relating to that case. Moreover, in certain circumstances, which we expect will be rare, we reserve the right, consistent with established practice, to object to recording because of specific issues relating to that particular interview. We understand that in most instances the recording will be done by audio recording, but request that, where an interviewee favors transcription by a court reporter, this request be accommodated and a copy of the transcript be provided to the government. Copies of recordings or transcripts provided by you pursuant to this paragraph will remain the property of the Commission and will be lent to the government to be returned to the Commission before its termination date. Copies of recordings or transcripts provided to the government will be maintained at the Justice Department.

4. In the event you believe it would be inappropriate to have an agency representative present at any particular interview, we will certainly be prepared to discuss that with you.

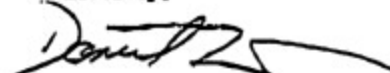
This agreement applies to all current employees and also applies to former employees who request that an agency representative be present during their interview. We have not yet reached agreement on how to handle interviews of former employees who do not request that an agency representative be present and would like to continue to discuss that subject with you.

We reserve, of course, any applicable privileges that may apply with respect to particular matters that may develop as the Commission's inquiry proceeds and we would expect that if any difficulties arise they will be resolved amicably and in accordance with applicable law and practice.

Please give me a call if you have any concerns about any part of this response. I appreciate the constructive manner in which you have addressed these important issues.

Thank you.

Sincerely,



Daniel Levin





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Philip D. Zelikow  
EXECUTIVE DIRECTOR

July 28, 2003

Daniel Levin, Esq.  
U.S. Department of Justice  
Washington, D.C. 20530

Dear Dan:

Thank you for your letter of July 24, responding to our July 1 letter to Adam Ciongoli, concerning interviews of government employees by the Commission. We appreciate your constructive efforts in this area, and we are glad to see that we have reached substantial agreement as to how such interviews will proceed. I am writing to state our understanding of a number of points in your letter.

On point 1, in those rare instances where you believe there is a need for a second government representative at an interview, we will be prepared to discuss with you whether such a second representative is necessary or appropriate.

Your restatement of point 2 is acceptable to us, so long as it is understood that the agency representative will not make substantive comments on the record without first discussing with our interviewers whether it is appropriate or necessary to do so.

On point 3, we recognize that in rare circumstances, you may object to recording an interview or ask that the interview be transcribed by a court reporter. We will be prepared to discuss with you those objections and requests and accommodate them if we can.

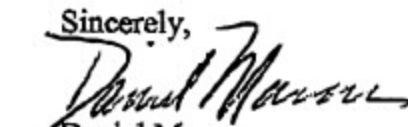
You state in your letter that "we have not yet reached agreement on how to handle interviews of former employees who do not request that an agency representative be present and would like to continue to discuss that subject with you." While we are always willing to discuss matters with you, we have fully considered this question and set forth our position clearly in our discussions with you. Where a former employee does not request that an agency representative be present at his or her interview, it would effectively negate that employee's decision and chill or distort the interview were we then to tell the employee that a copy of the recording of the interview would be made available to the government. Where we elect to record such an interview of a

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former employee, we therefore do not plan to provide the government with access to the recording.

We will be proceeding with our interviews based on these understandings.

Sincerely,



Daniel Marcus  
General Counsel