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OVERSIGHT HEARING ON COUNTERTERRORISM

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OVERSIGHT HEARING ON COUNTERTERRORISM

THURSDAY, JUNE 6, 2002

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:34 a.m., in Room SH–216, Hart Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Kennedy, Biden, Kohl, Feinstein, Feingold, Schumer, Durbin, Cantwell, Edwards, Hatch, Grassley, Specter, Kyl, DeWine, Sessions, and Brownback.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Just so people understand what we are going to do here today, we are going to have two panels. Mr. Fine, good to have you here, too. The Director of the FBI and then the Inspector General Glenn Fine will testify. We will have questions there. Once this panel is finished, we will go off and take a break, and then we will do the second panel, which will be Ms. Rowley.

I would note that I have been reminded that there will be a vote around 11 o'clock. We will take a break at that time for about 10 minutes just to go and vote and come back.

Last week FBI Director Mueller and Attorney General Ashcroft made some extraordinary and, actually in the case of the Attorney General, unexpected announcements of changes in the organization of the FBI and the guidelines for its administration.

Now, the Congress and the administration share a common goal. The goal, of course, is ensuring the safety and security of our country. I look forward to hearing from the Department and the FBI why these changes are necessary, the changes they propose, to prevent future terrorist attacks. And they may be right, but this oversight Committee has both a duty and a responsibility to review these changes and their justification.

Ten days earlier, Inspector General Glenn Fine issued a critical report on the handling of visas of two 9/11 hijackers by the Immigration and Naturalization Service and made 24 recommendations to address deficiencies in INS practices and procedures. These suggestions, too, may be justified, and this oversight Committee has the job of examining whether identified deficiencies are being fixed.

At the same time, the American people have been barraged with new reports about the government's performance before the 9/11 attacks, including charges and countercharges of mistakes by the

FBI and the CIA, the handling of the Phoenix Electronic Communication, the critical letter from FBI Agent Coleen Rowley in the Minneapolis FBI office, and a report that the Attorney General turned down a proposal to increase the FBI counterterrorism budget by $58 million shortly before the 9/11 attacks.

Now, Director Mueller has confronted this mounting evidence, and he has candidly admitted what we all now realize—that today we can't say for sure whether the 9/11 attacks might have been stopped of all the dots had been connected and all the leads been followed. And I commend the Director for the candor of his recent statements. I don't want a return to the worst aspects of J. Edgar Hoover's FBI when no one at the FBI could admit or learn from mistakes and anyone who raised a question did so at his or her peril.

Now, the Judiciary Committee has always been the standing Committee of the Senate responsible for oversight of the Justice Department. We are accountable to the Senate and the American people for ensuring that the FBI, the INS, and other Department components are effectively organized with adequate resources, with proper leadership. This Committee considered the nominations of the FBI Director, the INS Commissioner, the Inspector General, and the Attorney General. We have a continuing responsibility to follow what they have done. We started hearings, oversight hearings, on June 20th. Now, more than ever, in the age of terrorist attacks on our shores, close oversight of the FBI and our other law enforcement and intelligence agencies is not an option. It is an imperative.

I wrote to the Attorney General and the Director on October 25 last year, as we enacted the USA PATRIOT Act, to ask what internal reviews they were conducting in connection with the events of September 11th. I told both the Attorney General and the Director to preserve any documents and information they had from before September 11th, especially those documents and information that had been overlooked prior to September 11th, and that they share with us important matters they uncover as they conduct an internal review of the events leading up to the tragedy of 9/11. I was disappointed to learn only this week that the Justice Department Inspector General conducted an inquiry into the FBI's Phoenix Electronic Communication as early as last October. This was the type of thing that I had asked the Attorney General to let us know about. I was concerned to read about it from the press and not to hear it from the Attorney General. So we are going to want to hear from Inspector General Fine about the circumstances and results of his earlier inquiry.

Even more disappointing was the Justice Department's failure to advise the Committee that its review of FBI guidelines after 9/11 had uncovered issues that called for revision. Instead, we are presented with a fait accompli reflecting no congressional input whatsoever. From his comments over the weekend, it seems that Chairman Sensenbrenner and our counterparts in the House Judiciary Committee were likewise surprised by the unilateral actions taken by the Attorney General in revising longstanding guidelines that have worked for decades.

I might say that Attorney Generals come and go. FBI Directors come and go. The members of this Senate Committee come and go. The Constitution of the United States stays the same. It has been the basic bulwark of our freedoms, and no matter what the short-term gains might be, no one in the Congress or in the administration can ignore the Constitution of the United States. To do so, we do it at our peril and we weaken the United States. We do not strengthen the United States.

After the AG's news conference last week, the Department did post 100 pages of new investigative regulations on its Web site. They may tell us these changes are relatively straightforward and reflect good common sense, that there is a need to change the guidelines that were followed in the Ford administration, the Carter administration, the Reagan administration, the first Bush administration, the Clinton administration, and suddenly with a stroke of the pen should be changed. Well, I understand the need to re-examine policies, but we should not throw out decades of wisdom just because of a bad week or two in the press. I agree with Chairman Sensenbrenner that, "These important safeguards of American privacy and freedom should not be significantly altered without careful consideration and a full explanation of the reasons for any changes."

Now, we have shown in Congress bipartisan work on the USA PATRIOT Act, the Aviation and Transportation Security Act, the Border Security and Visa Reform Act, and the Bioterrorism Preparedness Act. We showed that we can work with the administration. So I cannot understand why the Department of Justice continues to insist on acting unilaterally and, as Chairman Sensenbrenner pointed out, without consulting with the Congress. It just disrupts the overall effort.

The regulations on surveillance of Americans not suspected of any crime are there for a reason. They were intended to change the culture of the FBI—something all of us understand here in the Congress.

The regulations on the handling of confidential informants were also carefully crafted. Just last month, an FBI agent in Boston was convicted of Federal crimes based on his improper handling of Mob informants. Two men spent years in jail for a crime they did not commit. The FBI knew they did not commit it. And the FBI kept quiet while these two men spent year after year after year in jail. That is wrong.

Two weeks later, we are planning on simultaneously loosening both the Headquarters control and the rules for handling informants. These controls are there for a reason. They should not be changed simply to fit a press conference.

I do appreciate the Director's consultation with the leaders of the House and Senate Judiciary Committees and other Members of Congress before he announced Phase 2 of his reorganization last week. I look forward to hearing more steps on that. I believe the steps he has taken to refocus and redesign the operational structure of the FBI to prevent terrorist attacks are the right ones. And I want to commend the hard-working men and women of the Bureau and other agencies of the Department who are working tire-

lessly and conscientiously, in the best interests of the United States, to protect us.

No flow chart or press conference can fully reassure the American people that our Government institutions are up to the present challenges, particularly in light of daily revelations of new lapses.

The Director has outlined ten clear priorities for the FBI, and I agree with the Director that the Bureau cannot continue to devote scarce manpower and technical surveillance resources to cases that could easily be handled by State or local police. We don't have enough manpower to do the things that really protect us. State and local police are very good. Let them handle the local things.

An example is a report this week of an extensive, year-long Department of Justice and FBI investigation of the operators of a prostitution ring in New Orleans. I realize it comes as an enormous revelation to the American public that there might have been prostitutes in New Orleans. I mean, who knew? But according to press reports, FBI agents were listening to 90 calls a day and wiretaps that continued for months and amounted to more than 5,000 phone calls. The Department of Justice and the U.S. Attorney claimed it was a Federal case. Well, there are a whole lot of local laws in this. In fact, the local prosecutor said they wanted to worry about things of real importance and said they would pass up the list of all those wiretaps.

Now, Director Mueller's new priorities make clear that the FBI has more urgent things to do. I would encourage the Department of Justice to find more urgent things to do. Dealing effectively with counterterrorism is an important and immense task. We are not going to do it in only one branch of Government. We have got to work together. The Congress has to be involved.

This series of hearings is focused on problems and constructive solutions to those problems. Many of them are reflected in the FBI Reform Act, which we passed unanimously, Republicans and Democrats. Not an easy chore in this Committee, but we did it. These problems include the inadequacy of the FBI's information management and computer systems, security failures in the Hanssen case, the resistance of Bureau officials to admit mistakes and double standards in discipline. Senior FBI managers testified at these hearings. They laid out in detail what we need to do to get the FBI back on track, and I commend the Director in working with those and being very candid in his own responses.

So the Department of Justice, the FBI, this Committee, and others have to stay the course. We want to make the FBI the most effective tool we have in this country to protect us against terrorists because, unfortunately, we know the terrorists still want to strike at us.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman LEAHY. Senator Hatch?

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I want to commend you for holding this hearing on the oversight of the Department of Justice. The hearing raises many critical issues, and our

duties on this Committee of examining and finding solutions to the problems where needed could complement the investigation of the bipartisan, bicameral Intelligence Committee, on which several members of this Committee, including myself, happen to sit.

We have today before us Robert Mueller. He started the job as Director of the FBI one week prior to September 11th. At the time Bob Mueller stepped into the position of Director, the FBI was the subject of intense criticism and media coverage due to several high-profile embarrassments, such as the handling of the McVeigh documents, the belated discovery of the Hanssen spy case, and the troubled Wen Ho Lee investigation. Now, despite these problems, Director Mueller willingly and enthusiastically accepted the difficult challenge of reforming the FBI. It has to be overwhelming, as it is to lead any major organization, including the Justice Department. On September 11th, his challenges increased by several orders of magnitude.

But there was no question then and there is no question now that Bob Mueller is the right person to implement essential changes at the FBI. His extraordinary qualifications, integrity, and resilience make him the perfect fit for the job, especially in these trying times. Indeed, Director Mueller has demonstrated he has the ability to reform a troubled organization. In August 1998, the Clinton administration asked him to serve as interim U.S. Attorney for the Northern District of California at a time when the office was experiencing great institutional problems. In short order, Director Mueller turned the office around and rebuilt it into one of this Nation's best. When it comes to management of a Government office, Director Mueller's no-nonsense style has served him well. He has shown he has the ability to inspire others to do their best work for all of us American people.

While the FBI is composed of dedicated, hard-working agents who are some of the best in the world, we cannot let our respect for these accomplished men and women blind us to the fact that reforming the FBI—its structure and its culture—is a critical mission, one that is imperative to the safety of all Americans in the face of a continuing terrorist threat to our country. This is what Bob Mueller has begun at the FBI which we will hear about today in detail.

There is no question that there are significant issues concerning the specific steps the FBI took in its pre–9/11 investigation and analysis, particularly in Minneapolis and Phoenix. Special Agent Coleen Rowley has raised important issues relating to the FBI's handling of the Moussaoui investigation in Minneapolis. This Committee will not, and indeed cannot, shrink from its duty to examine these difficult and troublesome issues.

However, I want to emphasize that this inquiry should be forward-looking with an eye towards reforming the FBI, protecting the American public, and making sure that such an act never occurs again on our soil. A forward-looking examination will serve the American people far more than a typical Washington "gotcha" investigation of missed clues and political fodder. We cannot afford such an inquiry. As we all recognize on this Committee and on the Intelligence Committee, this is a serious matter. Our focus must remain on reforming the FBI and giving Director Mueller the support

and resources he needs to change the direction of this massive law enforcement agency. The American public deserves nothing less than the full and complete cooperation of this Committee to ensure that the FBI is reorganized and given the tools it needs to face the challenges of the future of our country.

Also, very seldom are mentioned the tremendous accomplishments of the FBI, the number of terrorist incidents all over the world that they have helped to interdict and stop over the intervening years, both before and after 9/11, some of which can't be mentioned.

I want to take time here to specifically commend Director Mueller for his handling of Special Agent Rowley's letter. While it would have been easy to play the typical Washington game of pass the buck and blame somebody else, Director Mueller has embraced Special Agent Rowley's letter and recognized that her observations underscore the need to implement his reorganization plan—one which aims at the heart of the issue—the FBI culture and possible structural roadblocks to effective law enforcement. To this end, Director Mueller has the confidence and the courage to welcome criticisms, to examine their merit, and to make sure that such criticisms are not simply swept under the rug, but are carefully and candidly weighed.

I think it is important to note that the new Director's recently announced reorganization proposal addresses some of the criticisms and problems identified through the pre–9/11 inquiry. First and foremost, Director Mueller's reorganization proposal fundamentally alters the FBI's mission. Director Mueller has proposed a new forward-thinking approach—one that is built on proactive detection and is aimed at preventing another deadly terrorist attack. To this end, Director Mueller has proposed a reorganization plan which will improve the FBI's analytic capacity; enhance its ability to gather, analyze, and dissemination intelligence concerning terrorists and racketeers; further its ability to share information internally and with other law enforcement and intelligence agencies; and decentralize those functions that need to be reallocated to the field while centralizing critical intelligence-gathering and analysis functions to support its overall mission of preventing crime before it occurs.

Director Mueller's recently announced comprehensive reorganization package comes on the heels of his initial reorganization of FBI Headquarters. As we all know, in late 2001, Director Mueller reorganized the FBI's Headquarters to reflect the changing priorities and direction of law enforcement by assigning four new Executive Assistant Directors to oversee counterintelligence and counterterrorism matters, criminal investigations, law enforcement services, and the administration of the FBI. He also created two new divisions to address computer-facilitated crimes and security, and four new offices to address information technology, intelligence, records management, and law enforcement coordination with State and local law enforcement partners. He couldn't have done that before the enactment of the PATRIOT Act, which this Committee played a significant role in doing. Finally, Director Mueller accelerated a major overhaul of the FBI's technology sys-

tem which will better enable it to gather, analyze, and share information and intelligence.

Like Director Mueller, Attorney General Ashcroft recognized the need for increased FBI oversight and reform as soon as he took office. And prior to September 11th, he enlisted the assistance of a number of independent reviewers. In March 2001, in response to the Hanssen case, Attorney General Ashcroft established an independent review board headed by William Webster to examine the FBI's security procedures. In July 2001, the Attorney General hired management consultants to study the FBI, and he expanded the jurisdiction of the Justice Department's Inspector General to include oversight over the FBI. We are very pleased to have Mr. Fine here with us today as well.

In the wake of September 11th, Attorney General Ashcroft worked closely with this Committee and Congress to ensure passage of the PATRIOT Act, which has provided the law enforcement community with additional tools and resources they did not have and which are necessary to attack terrorist organizations. And like Director Mueller, Attorney General Ashcroft took quick and affirmative steps to protect the American public and fight the war against terrorism. The Attorney General established 93 Anti–Terrorism Task Forces across the country which are working to integrate the communications and activities of local, State, and Federal law enforcement officers, something he could not have done before the PATRIOT Act. He created the Foreign Terrorist Tracking Task Force in order to assist the FBI, INS, Customs Service, and other Federal agencies in coordinating their efforts to bar from the United States aliens who are suspected of being involved in terrorist activities.

Last week, Attorney General Ashcroft announced amended investigative guidelines that will assist the FBI in conducting investigations capable of preventing terrorist attacks. These guideline changes support and, in fact, are critical to the FBI's reorganization plan.

Now, although I am pleased to learn that there is bipartisan support for these guideline revisions, I understand that concerns have been voiced about their scope. It seems obvious to me, however, that if we are serious about ensuring that the FBI can and does operate proactively, investigating future rather than merely past crimes, the Bureau must be given the ability to do things our Constitution permits like search the Internet, use commercial data-mining services, and visit public places. There is little question that the number one concern of all Americans is to make sure that we protect our country against terrorist attacks, not provide more rights to suspected terrorists than our Constitution requires. Our safety and security depend on striking the right balance.

Now, Director Mueller and Attorney General Ashcroft should be commended for the degree to which they have focused their cooperative attention on reforming their respective institutions. Both have instituted independent investigations, and both have been responsive to the inquiries of this Committee and the Joint Intelligence Committees. As a member of the Joint Intelligence Committee, I can assure you of that. Not only has the Director testified before this Committee, he has also briefed members of this Com-

mittee and made other senior FBI employees available to address various issues of concern, including those raised by the Phoenix memorandum and the Rowley letter. This is the first time in the past decade that the Director of the FBI and the Attorney General actually have a cooperative working relationship, as they should. The first time.

We will also hear today from the Honorable Glenn Fine, the Inspector General of the Justice Department, who is in the process of completing a number of investigations relating to subjects of this hearing. His conclusions will naturally be a valuable resource in this restructuring process, and I look forward to hearing from you, Mr. Fine, as well. I appreciate the work that you are trying to do.

There is no question we need to consider how to improve all components of the Department of Justice to best protect the American people. In our oversight role, we should not blindly accept proposed reforms, but instead ask tough questions to ensure that they will address the problems that exist. However, we cannot and we should not try to micromanage the Department of Justice. We will succeed in being a constructive and integral part of the reform process if, and only if, we work collaboratively with those in the Department of Justice, the FBI, and the INS—the Immigration and Naturalization Service. We all need to recognize that this is a process that will take time. At the same time, we must act as expeditiously as possible because the stakes are so high.

So I appreciate you, Mr. Chairman. I appreciate this hearing. I appreciate our witnesses who have agreed to testify today, and I look forward to working with you to help resolve any and all problems that we might have.

Chairman LEAHY. Director Mueller, the floor is yours. I know that you have eagerly awaited this opportunity to be here. But, no, we do appreciate it, everybody on both sides of the aisle appreciates it, and I think you heard from both Senator Hatch and I that the two of us appreciate your willingness to be available, as you have, to all of us with our questions. Please, go ahead, sir.

STATEMENT OF HON. ROBERT S. MUELLER, III, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. MUELLER. Thank you very much, Mr. Chairman and members of the Committee. It has been 9 months now since the attacks of September 11th——

Chairman LEAHY. Pull the microphone near you, would you, please, sir?

Mr. MUELLER. Surely. Is that better?

Chairman LEAHY. Yes.

Mr. MUELLER. Can everybody hear now?

Let me just say thank you again, Mr. Chairman, and let me start by saying it has been 9 months now since the attacks of 9/11, and when I came to the FBI just one week short of September 11th, I must say that I did not anticipate what lay around the corner. And in the span of a few short minutes, our country was changed forever. Terrorism had taken the lives of thousands, and our country looked to the FBI to find out who did this and to not let it happen again.

A massive investigation ensued, mobilizing, as only the FBI can, over 6,000 agents who poured themselves into the effort both here and broad, following up on some 500,000 leads.

All of these shreds of information we painstakingly uncovered led to figuring out who was responsible and how it was done. And I, as you also, Mr. Chairman, and others have expressed, am extraordinarily proud of the men and women of the FBI and of the CIA and of all of the agencies who made the sacrifices and did the work that ultimately led us to knowing who was responsible for these acts. And as we go through this process, their efforts should never be lost or go unrecognized in our haste to look back and see how we can do things better.

Just as we know on September 11th that we had to find out who was responsible for this, we also knew our charge had changed forever. An honest and comprehensive examination of the pre–September 11 FBI reflects an agency that must evolve and that must change if our mission, our priorities, our structure, our workforce, and our technologies are to revolve around the one central, paramount premise of preventing the next attack. The need for change was apparent even before September 11th. It has become more urgent since then.

Now, when we looked back, we saw things that we should have done better and things that we should have done differently. But we also saw things that were done well and things that we should do more of. But almost from day one we began to change.

At the end of last year, I described to Congress a new Headquarters structure, one designed to support, not hinder, the critically important work of our employees, particularly the Special Agents in the field. And since then, I have taken any number of steps to put in place what can be described as the tools of prevention and to put in place permanent solutions to the painful lessons of Robert Hanssen and the McVeigh documents. This Committee knows from prior hearings about much of this.

Let me just spend a moment talking about some of these new functions and organizations that we have put in place in the process of developing an FBI that is more focused on prevention.

As an example, we have a financial review group, which is dedicated to the financial transactions aspect of terrorism. And the Foreign Terrorist Tracking Task Force is exploiting new data-mining capabilities. The number of joint terrorism task forces across the country has expanded. A national joint terrorism task force now gives interagency coordination and information sharing new dimensions. We have document exploitation teams to maximize the intelligence value of the troves of documents being recovered overseas.

Interview teams are exploiting those individuals who have been detained by our military. Former Police Chief Louis Quiljas is now in place as the Assistant Director in Charge of Law Enforcement Coordination to better bring our partners to the table.

A College of Analytical Studies has been established at our Training Academy. New agent training has been revised to reflect the post–9/11 realities. And, last, as important, is that several FBI/CIA information-sharing and coordination initiatives have been implemented to increase our coordination and sharing of information. These include both changes at the top—Director Tenet and I meet

almost daily—to changes throughout the organization, ranging from daily exchanges of briefing materials, a joint daily terrorism threat matrix, more CIA personnel at the FBI, and more of our personnel at CIA.

Finally, as I think, Mr. Chairman, you pointed out, we have a new Security Division which is up and running, as well as a new Records Management Division. Both of those initiatives address those issues that arose in the course of the review of the Hanssen and McVeigh issues.

Even in the midst of the post–9/11 fervor, much more has been accomplished, but more needs to be done. In the last few weeks, I have presented for congressional consideration the next and arguably the most important phase of reorganizing the FBI. This reorganization proposal comes after consultation within the Bureau, with the Attorney General, with administration officials, with State and local law enforcement, and with Members of Congress.

I have provided a lengthy statement for the record which details the shifts in resources and the additional organizational changes I believe are imperative to fully support the complete transition to prevention. These changes, which include new resources, new analytical capability, and new technology, are critically important to supporting our new way of doing business.

Coupled with these changes are new, more focused priorities, again, outlined in that statement which I have provided to the Committee. And while we believe these changes to be a dramatic departure from the past, in the end our culture must change as well. And I believe Senator Grassley has it right when he says that there has to be a wholesale change in the culture away from reacting to crime to preventing new terrorist attacks. And with that, I think we all agree.

In the end, two things have come to symbolize that which we are changing: first, what did not happen to the Phoenix memo points squarely at the need for greater analytical capability and greater ability to share our information; and, second, the critical but welcome letter from Agent Rowley reinforces the need for a different approach, especially at Headquarters. What we are doing squarely addresses both of those concerns. And what we are proposing will help provide a more agile, flexible, and focused FBI that we need to meet that primary objective of preventing the next attack.

I might also add that what may be the most critical component in giving us a better capability to prevent the next attack is substantially increasing our capacity to both analyze and share information. The new Office of Intelligence is critically important to this, and that is why I wanted this office to be headed by a senior career CIA analyst who will instantly bring to us a wealth of experience and expertise and who will guide not only the FBI's analysts but also the 25 CIA analysts that Director Tenet has generously given to us to assist us in our efforts.

Let me just spend a moment talking about the urgency of these moves.

The world remains a very dangerous place. The information gleaned from Guantanamo and other captured Al–Qaeda officials reflects that disrupting is not dismantling and that the inherent vulnerabilities of a free society are well understood throughout the

terrorist community. Those who want to hurt us remain highly motivated, well funded, and spread out around the world. They and the other recognized international terrorist groups are as determined as ever. And while we and our CIA counterparts continue to identify, continue to arrest, continue to deport, and continue to otherwise address operatives and sympathizers around the world, there are still loose and dangerous alliances remaining around the globe. And we must take the long view and be prepared to mobilize whatever level of resources circumstances dictate. The restructuring I have proposed is critical to sustaining those efforts.

Now, let me briefly address the changes in the Attorney General guidelines. I know you mentioned that, Mr. Chairman, and I know they are a subject of interest to many of you. The changes are designed to increase the ability of our field agents to gather the intelligence we need to prevent terrorist attacks. To that end, they reduce some of the bureaucratic hurdles requiring Headquarters approval for certain steps, and in the provision that has gotten a great deal of attention, they permit FBI agents to go to public places where anyone else except FBI agents, including State and local police and non–Justice Department law enforcement agents, were always free to go.

Remember, though, that they may do so solely for the purpose of detecting and preventing terrorist activities, and there are strict limits on recordkeeping in such instances.

Now, information obtained from such visits may be retained unless it relates to potential criminal or terrorist activity, and I must say and emphasize, as an institution we are and must be and continue to be deeply committed to the protection of individuals' constitutional and statutory rights. Nothing in the amended guidelines changes that.

I would be happy to answer any questions. I know that some of you have questions relating to the handling of various cases and investigations. I have previously discussed those with members of the Committee in executive session and would be pleased to do so again. Because of the applicable legal rules and because of the sensitivity of ongoing investigations relating to our efforts to prevent terrorist attacks, I am obviously limited in what I can say about such matters in open session. I appreciate the Committee's agreement that we may continue to discuss such matters, those matters, in executive session.

Thank you, Mr. Chairman, for the opportunity to give a statement.

[The prepared statement of Mr. Mueller appears as a submission in the record.]

Chairman LEAHY. Thank you, Mr. Mueller, and thank you for being available to members of the Committee as you have.

Inspector General Fine, would you go ahead, sir? And we appreciate having you back here, as we always have on other occasions when you have been here.

STATEMENT OF GLENN A. FINE, INSPECTOR GENERAL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

Mr. FINE. Thank you. Mr. Chairman, Senator Hatch, and members of the Committee, I appreciate the opportunity to appear be-

fore the Committee to discuss the work of the Office of the Inspector General relating to counterterrorism issues in the Department of Justice.

At the outset, let me express my respect for the many employees in Department components like the FBI and the INS who serve on the front lines in our Nation's counterterrorism efforts. While the OIG has found significant deficiencies in FBI and INS operations over the years, this should in no way diminish the important contributions that thousands of employees at these agencies make on a daily basis.

Since the September 11th attacks, the OIG has redirected significant resources to examine programs and operations that relate to the Department's ability to detect and deter terrorism in the United States. This morning, I will highlight a few of the reviews that are discussed in greater detail in my written statement.

The OIG recently released a lengthy report that examined why the INS mailed forms notifying a Florida flight school that two September 11th terrorists had received approval to change their immigration status from visitors to students 6 months after the terrorist attacks.

The OIG found that the INS' adjudication of Mohamed Atta's and Marwan Alshehhi's change of status applications and its notification to the flight school were untimely and significantly flawed. First, the INS took more than 10 months to adjudicate the applications. As a result, they were not adjudicated until well after the two had finished their flight training course. Second, the INS adjudicator who approved their applications did so without adequate information, including the fact that Atta and Alshehhi had left the country two times after filing their applications, which meant that they had abandoned their request for a change of status. And, third, the notification forms were not sent to the Florida flight school for an additional 7 months because the INS failed to adequately supervise a contractor who processed the documents.

Atta's and Alshehhi's case highlights important weaknesses in the INS' handling of foreign students. Historically, the INS devoted insufficient attention to foreign students, and its current, paper-based tracking system is inaccurate and unreliable. SEVIS, the new Internet-based system the INS is developing, has the potential to dramatically improve the INS' monitoring of foreign students.

But unless the INS devotes sufficient resources and effort to implement and use SEVIS effectively, many problems will continue to exist. Our report offers 24 recommendations to help address the problems we have found.

We have also conducted five follow-up reviews after the September 11th attacks that examined the INS' efforts to address national security deficiencies that were highlighted in previous OIG inspections. These reviews examined the INS' progress in securing the Northern border, linking INS and FBI automated fingerprint identification systems, the Visa Waiver Program, addressing security concerns regarding the Transit Without Visa Program, and tracking non-immigrant overstays. In each of these follow-up reviews, we found that many of the security concerns we identified in our original reports continued to exist.

Let me now turn to OIG reviews in the FBI. The OIG has initiated a wide range of audits, inspections, and investigations in the FBI related to information technology, counterterrorism, and national security issues. I testified before this Committee in March of this year about the OIG report on the belated production of documents in the Oklahoma City bombing case. That review highlighted the significant weaknesses in the FBI's computer systems, which we found to be antiquated, inefficient, and badly in need of improvement. We concluded that the FBI's troubled information systems are likely to have a continuing negative impact on its ability to properly investigate crimes and analyze information throughout the FBI.

Following up on these findings, the OIG is currently reviewing whether the FBI is adequately managing the acquisition of its information technology systems. We are also reviewing in another audit how the FBI managed the counterterrorism funding it has received since 1995. As part of this review, we are evaluating the processes by which the FBI determines counterterrorism resource requirements, manages those resources, conducts threat assessments, and develops its strategic planning related to counterterrorism.

Another ongoing OIG review is examining the FBI's allocation of resources to investigate the varied crimes under its jurisdiction. Our objectives are to determine the types and numbers of cases the FBI investigates by office over time, assess performance measures for FBI casework, and determine if the mix of cases investigated by the FBI comports with FBI priorities.

Last week, the OIG initiated an investigation that will examine aspects of the FBI's handling of information and intelligence prior to the September 11th attacks. The investigation will focus on, among other things, how the FBI handled an electronic communication written by its Phoenix Division in July 2001 and issues raised in the May 21, 2002, letter to the FBI Director from Special Agent Coleen Rowley.

The OIG had conducted a preliminary inquiry in the fall of 2001 into the handling of the Phoenix EC at FBI Headquarters. We determined that the matter should be referred to the Senate and House Intelligence Committees Joint Inquiry, the congressional Committee that had been established to review the range of intelligence and law enforcement information related to the September 11th attacks. Our referral to the Joint Inquiry was based on our view that the Phoenix EC should be analyzed in the context of other information available to and handled by the FBI and other intelligence agencies prior to September 11th.

However, in light of recent events and several requests for the OIG to conduct a full review of how intelligence information was handled at the FBI prior to September 11th, including a specific request from Director Mueller, we have agreed to undertake a full investigation of the Phoenix EC, the issues raised by Special Agent Rowley's letter, and the FBI's handling of other intelligence information prior to the September 11th attacks.

Finally, I would like to briefly mention FBI whistleblower issues.

One of the most important changes the FBI can make as it looks to the future is to foster a culture in which employees are able to

raise deficiencies in programs and operations without fear of retaliation. In my statement, I describe the regulations that apply to FBI whistleblowers. The OIG supports protections for FBI whistleblowers as a way to improve agency operations. In the past, FBI whistleblowers have been the impetus for significant positive change in the FBI.

In sum, we believe that these important OIG reviews that we have conducted and are conducting within the FBI will provide useful information and analysis to the Department and Congress in conducting oversight of the FBI's critically important mission.

That concludes my statement, and I would be pleased to answer any questions.

[The prepared statement of Mr. Fine appears as a submission in the record.]

Chairman LEAHY. Thank you.

The memo to do the inquiry on the Phoenix electronic communication, you got that in September. Is that correct?

Mr. FINE. We received——

Chairman LEAHY. September 29th?

Mr. FINE. I believe it was September 28th we received the Phoenix EC from the FBI.

Chairman LEAHY. And you gave it to the joint Committee 2 weeks ago.

Mr. FINE. We gave the results of our preliminary inquiry I think May 22nd, correct.

Chairman LEAHY. About 6 months later, more than that.

Director Mueller, the Phoenix EC, or electronic communication, is classified, but let's just, referring just to what has been in the press accounts, make clear that this July 2001 document warned about radical Middle Eastern fundamentalists connected to terrorist groups, attending flight schools in this country, possibly for purposes of training for terror operations. The warning was certainly relevant to the profile of Zacarias Moussaoui, especially at the time when the Minneapolis field office and the Headquarters personnel were trying to complete a FISA application—FISA, again, for anybody who may be watching, is the special foreign intelligence court. They were trying to get an application to the FISA court for possible searches.

Now, obviously it is very apparent that the information in the Phoenix EC would have helped bolster the request for a FISA search on Moussaoui. You told us on May 8th at your last appearance before the Committee that the Phoenix memo was not used by agents who were investigating the Moussaoui case in Minnesota or at Headquarters.

But the Phoenix EC was just that, an electronic communication. It was uploaded onto the FBI's computer. It was sent to Headquarters on the FBI's computer system. I understand it was accessible both at Headquarters and in certain field offices on the FBI's automated case system, but it was not accessible in the Minneapolis field office. Is that correct?

Mr. MUELLER. I understand that that is correct.

Chairman LEAHY. Well, if this EC was fully accessible in the FBI's automated case system, did the agents at Headquarters do

what most of us are used to doing on a computer, do a routine search for key words, like aviation schools or pilot training?

Mr. MUELLER. Well, in response to the question as to whether or not the Phoenix EC was available to other offices around the country, my understanding is that it was not available to other offices around the country. It was, quite obviously, available to Headquarters. It was sent to Headquarters. And it was available to other offices to whom that EC was sent, New York, I believe, and perhaps one other office out West.

Chairman LEAHY. Well, let's just take those to which it is available, Headquarters. Did they do a search beyond just the name but things like aviation schools or pilot training?

Mr. MUELLER. It is my understanding that they did not.

Chairman LEAHY. That would have been helpful if they had, wouldn't it?

Mr. MUELLER. I believe it would have been helpful, and one of the things that I have stated on many occasions is that what I would hope to have in the future is the technology in the computer system that would better enable us to do exactly that type of search. It is very cumbersome, very difficult for a variety of reasons, given our technology, to do that kind of search now. My hope in the future is to have the kind of soundex searching capability that would give an agent the capability of pulling out any EC relating to aviation; and, beyond that, my hope is that we would have the capability of some form of artificial intelligence so we wouldn't have to make the query. The technology itself would alert us to those commonalities.

Chairman LEAHY. That, of course, is something that a number of us on this Committee have been urging the FBI to do for years, I mean, long before you came there. And I really think it is, as I have said at other hearings, very much of an Achilles heel that you can't do the kind of things that all of us are used to doing on our computers if we are looking for the best buy on an airplane ticket or something we want to purchase.

Now, the so-called Woods Procedures that were put into place April 15th—and thank you for having the procedures declassified. I don't know why they were classified in the first place, but I do appreciate you having them declassified so the Committee members here could have them. But that talks about processing FISA applications. It directs agents in the field to do an ACS computer search for targets to see if any other information pops up. And there is a requirement for Headquarters personnel to check the ACS system.

I would assume, am I correct, that that would be because Headquarters personnel are apt to have access to more information than a field agent might have? Is that correct?

Mr. MUELLER. I think it is to make certain that we cover both bases, that for purposes of the court, the court needs to know whether there are other outstanding investigations relating to those targets. And, consequently, it is important that the searches be done by the case agent who is most familiar with the facts of the case, but also more broadly in Headquarters to assure that nothing is overlooked.

Chairman LEAHY. In fact, the Woods Procedures tell the case agent to do that.

Mr. MUELLER. I am not intimately familiar with the Woods Procedures, but I believe that is the case.

Chairman LEAHY. Well, so if they don't do the search, either in the field or Headquarters, they actually violate the FBI's own procedures.

The reason I bring this up is that if we are talking about new procedures, I would hope that we are following the procedures that are already in place. I mean, this is a case where we are going to go back and forth whether there could have been a FISA application on Moussaoui, whether there could have been the kind of searches that, in hindsight, we all wish had been done. But yet all the information was there, and I think they could have gone to it.

Mr. MUELLER. Mr. Chairman, I think there is—the searches are done for the FISA under the Woods Procedures, as I understand it—and I would have to go back and review them and make certain, but go through and search the names to determine whether any of the names that are going to be the subject of the scrutiny in the FISA have turned up in any other investigation, as opposed to picking up a piece of information from an EC which relates, for instance, to flight schools. And what we have to do a better job of, both technologically and with the analytical capability that I am suggesting that we are establishing, is to pull out pieces of information from an EC that may relate to flight schools and be able to put that together with other pieces from other investigations, not just focusing on the targets and the names of the individuals who are the subject of the scrutiny, which I believe, if I am not mistaken, the Woods Procedures are in part directed towards.

Chairman LEAHY. Well, in fact, it would make just common sense that it is going to be a lot more than just the names. I mean, it is the type of things they are doing, method of operation and so forth, that could be very, very important. People can change names very easily. What they are trying to accomplish, though, is what we are interested in. Is that not correct?

Mr. MUELLER. That is correct.

Chairman LEAHY. And you have talked in your reorganization of forming flying squads to coordinate national and international terrorism investigations. The Attorney General has announced new FBI investigative guidelines to allow field offices more discretion to open these terrorism cases without Headquarters approval—in fact, be able to keep them open for as much as year before they are reviewed at Headquarters.

Were you involved in crafting these new guidelines?

Mr. MUELLER. Well, I know we in the FBI, we had individuals who consulted with and participated in discussions with the Department of Justice, yes.

Chairman LEAHY. Did you sign off on them?

Mr. MUELLER. I was aware of the guidelines, yes.

Chairman LEAHY. Senator Grassley and I wrote to the Attorney General asking that he personally guarantee whistleblower protection for Special Agent Rowley. I will let Senator Grassley speak for himself how he felt about the response. I think he was disappointed by it.

Can you personally assure this Committee, unequivocally, there will be no retaliation of any kind against either Coleen Rowley or Kenneth Williams or any FBI employee because they provide information to the Congress or the Inspector General or any supervisory FBI official about counterterrorism efforts?

Mr. MUELLER. Absolutely. I issued a memorandum on November 7th reaffirming the protections that are afforded to whistleblowers in which I indicated I will not tolerate reprisals or intimidation by any Bureau employee against those who make protected disclosures, nor will I tolerate attempts to prevent employees from making such disclosures.

In every case where there is even an intimation that one is concerned about whistleblower protections, I immediately alert Mr. Fine and send it over so that there is an independent review and independent assurance that the person will have the protections warranted.

When I go around the country and talk to the various offices, one of the things I say is that the good news always comes to the top. What does not come to the top is the bad news. What does not come to the top are those things that need to be changed. What I need to know are those things that are broken that need to be fixed. And throughout those discussions in the field offices or with individuals, I have reiterated I want people around me who will tell me what is happening. I want people in the field to tell me what is happening. I cannot get out to talk to every one of the 11,000 agents or the 27,000 total employees, but I need to know what is happening throughout the field. And I encourage, welcome the criticism, the insight, the suggestions, whether it be from within the organization or from without the organization.

Chairman LEAHY. And the reason I ask, of course, Mr. Director, is that the FBI is currently exempted from the Whistleblower Protection Act, so we have to rely on your assurance. And I accept your assurance.

Senator Hatch?

Senator HATCH. Thank you, Senator Leahy.

Mr. Mueller, as I understand it, the PATRIOT Act has worked quite well so far, but there is one area where you are having difficulties, and that is FISA requests where currently to get a warrant there is a requirement of proof of association with a foreign power. Am I right on that?

Mr. MUELLER. There is a requirement under the FISA statute that we demonstrate a belief that the person who is under scrutiny and for whom we wish to obtain court-ordered interception is an "agent of a foreign power." And that has been defined as including an individual who is associated with a terrorist group.

Senator HATCH. How many of these approximately 20 terrorists that we have been very concerned about that participated in the September 11th matter, for how many of those could you have gotten a warrant?

Mr. MUELLER. Well, prior to September 11th, the 20 hijackers, it would have been very difficult because we had—I mean, looking at it, trying to go back, we had very little information as to any one of the individuals being associated with——

Senator HATCH. A foreign power.

Mr. MUELLER.—a particular terrorist group. One of the issues in the Moussaoui set of circumstances was whether or not the evidence was sufficient to show that Mr. Moussaoui was associated with any particular terrorist group.

If you talk to the agents—and I know we have had Ken Williams and other agents up briefing the Congress—I believe the agents will tell you that one of the problems they have in this area, which we believe Congress ought to look at, is the requirement that we tie a particular terrorist to a recognized terrorist group.

Senator HATCH. Or foreign power.

Mr. MUELLER. Or the foreign power, agent of a foreign power.

Senator HATCH. I think that you probably would have had a difficult time showing that any of them were agents of a foreign power.

Mr. MUELLER. A terrorist group, a defined—and it is a loose definition. A terrorist group has been defined as an agent of a foreign power.

Our problem comes in trying to show that a particular individual is connected to a specific, defined—in a variety of ways—terrorist group. Once we get a connection with Al–Qaeda, for instance, even though it is not a foreign power, Al–Qaeda is a sufficiently distinct group so that we can get the FISA that we need. But we have problems where you have a lone wolf, for instance, who may be out there who we think is a threat, but we have difficulty tying to any particular defined terrorist group.

Senator HATCH. Well, if we try to change that, I assume we will have civil liberties groups and persons that will be very much against making that change.

Mr. MUELLER. I can't speak to that, Senator, but I do think that is something that we need to look at and that Congress should take a look at.

Senator HATCH. It is my understanding that Senators Schumer and Kyl have just introduced a bill——

Mr. MUELLER. I heard yesterday that there was a bill, and I have not had a chance to review it.

Senator HATCH. I have real concerns that some terrorist groups have been able to hide and operate in this country under the cloak of political and religious institutions. We have seen that. This is obviously a very sensitive issue, and I have two questions relating to this topic, as one who has championed both religious freedom and protecting, you know, our First Amendment rights. Under the old guidelines, were there any situations where the FBI was unable to pursue legitimate investigations because of a fear that investigating criminal activity occurring under the guise of political and religious activity?

Mr. MUELLER. Yes, I am led to believe that that is the case.

Senator HATCH. Can you provide us any examples of how such institutions were able to facilitate terrorist activities?

Mr. MUELLER. I would have to go back and query the field with specific examples, but in my general discussions and general briefings, the understanding of the agents was that you needed predication to start a preliminary inquiry, predication to the extent that somebody was contemplating criminal acts, and after that there

were a limited number of options that you had that you could follow in the course of that investigation.

What the guidelines change does is open up the possibilities that the agent can utilize once the agent has determined that there is information pertaining to terrorists or terrorism activity.

Senator HATCH. The prior investigative guidelines were adopted in response to significant FBI abuses, according to some, that occurred several decades ago. Now, some have raised concerns that the new guidelines the Department has put forth may infringe on civil liberties. In public statements, however, you and Attorney General Ashcroft have emphasized that the new investigative guidelines are necessary to prevent and detect terrorism and other crimes before they occur, which is what the FBI is bring criticized for, for not having done—being great after the crimes occur but not so good before in the prevention area before they occur.

Now, you have also indicated that these guidelines will preserve and prohibit any action which would impact our constitutional freedoms and statutory protections.

Now, would you explain to us how the new guidelines will assist law enforcement officers in detecting and preventing crime while at the same time preserving our civil liberties?

Mr. MUELLER. One of, I think, the best examples is the use of the Internet. Just about every 12-year-old, not just law enforcement individuals in other agencies, could go onto the Internet and determine whether or not there are Web sites that have an address manufacturing explosives, encouraging persons to commit violent acts against the United States, encouraging people to sign up to commit violent acts against the United States.

What the guidelines do is free the agents to go and do that preliminary analysis without believing that it is contrary to the guidelines, and it covers most specifically in the terrorism area. And that freedom is critically important for us to keep abreast of what terrorists are doing, utilizing the modern means of communication.

Senator HATCH. On the issue of profiling, which, of course, is a very sensitive issue, can you say one way or the other whether fear of being accused of improper "racial profiling" may have caused law enforcement agents to be reticent in investigating claims or approving investigations into certain suspects? How does the FBI define racial profiling? And has this definition changed in any way since September 11th? And I am very much aware of the fact that the Phoenix memo and the Rowley letter includes suspicions of terrorist activity that were based in part on ethnicity.

Mr. MUELLER. I think I have seen indications of concerns about taking certain action because that action may be perceived as profiling. The Bureau is against, has been and will be against any form of profiling. The new guidelines address individuals, not members of a particular group, not members of a particular political persuasion or anything along those lines. The new guidelines look at individuals and groups of individuals who may be—and the changes—who may be contemplating terrorist activity.

Senator HATCH. Whether or not they are religious activities.

Mr. MUELLER. Whether or not it is religious, whether or not it relates to any particular religion, whether or not it relates to any particular country.

Senator HATCH. Let me first state, Director Mueller, you have publicly commented on both the Agent Rowley letter and the Phoenix memo, suggesting that their contents underscore the need to reorganize the FBI, both structurally and culturally.

Now, can you specifically address how your proposed reorganization plan addresses the particular issues raised by Special Agent Rowley in the FBI's handling of the Phoenix memo?

Mr. MUELLER. I think at base both the Phoenix EC and the Rowley memo point out a deficiency that I spoke to when I was before this Committee on May 8th, and that is, our ability to gather intelligence information, snippets of information from a variety of various investigations around the country, and pull them together, analyze them, coordinate that analysis with the CIA or the DIA or NSA or other agencies who may also have snippets of information, and then be better able to disseminate the results of that analysis back to the field so that appropriate action can be taken.

I have said before that the procedures should have been in place so that the Phoenix memorandum went to the CIA and that the Phoenix memorandum was made available to those in Minneapolis and the determination as to whether or not they had sufficient evidence to have the FISA application approved.

What we have done since then is taken a variety of steps to assure that information like that comes up higher in the organization, that it is disseminated across the various organizations. For instance, I get a briefing book every day. It is about an inch, inch and a half thick. And most of this, the distillation of that goes to the CIA. I am briefed by the CIA every day on what the CIA has.

The procedures in place on the FISA have changed somewhat. To the extent that there are concerns in the field about whether or not we have sufficient information, if there is a belief that we do not have sufficient information, it goes to the new head of the Counterterrorism Division and ultimately to me. I get briefed every day on the status of our FISA applications to determine whether or not we are being aggressive enough, whether or not there is other information out there to determine whether or not we should go forward.

What would be helpful, what we need is augmentation of our analytical program because there are torrents of information coming in daily, and also the augmentation of our technology to which I have spoken at some length.

Senator HATCH. Thank you.

Mr. Chairman, my time is up. I happen to be also on the Joint Intelligence Committee that is meeting at the same time, so I will have to try and alternate between the two meetings. I hope you will forgive me for that.

Chairman LEAHY. What we are going to do is go now to Senator Kennedy. We will then go to Senator Grassley. And when the vote occurs, once whoever is asking questions finishes the questions, we will then recess so we can all vote and then come back quickly thereafter.

Senator Kennedy?

STATEMENT OF HON. EDWARD M. KENNEDY, A U.S. SENATOR FROM THE STATE OF MASSACHUSETTS

Senator KENNEDY. Thank you. Thank you very much, Mr. Chairman. Thank you, Mr. Mueller, for being here this morning.

Obviously, no challenge we face today is more important than dealing effectively with the terrorist threat facing the Nation, and reform of the FBI is an essential part of meeting that challenge.

In relationship to the September 11th attacks, the FBI has been criticized for failing to act on the information it had and to coordinate effectively with other agencies. To your credit, you have acknowledged the existence of serious problems and have committed yourself to addressing them. I am sure you agree that we must do so in a way that preserves the basic constitutional rights that are at the heart of our democracy.

On September 11th, the Justice Department arrested and detained more than 1,200 Arab and Muslim immigrants. Yesterday, the Justice Department unilaterally announced it will require tens of thousands of Muslim and Arab visa holders—students, workers, researchers, and tourists—to register with the Government and be fingerprinted and photographed. INS inspectors will apply secret criteria and their own discretion in deciding which visa holders will be subject to this registration requirement.

I know the FBI has been recruiting as agents U.S. citizens who are Arabs or Muslims. Their service is critically important to our fight against terrorism. I am very concerned, however, that the Justice Department's post–September 11th policies with respect to Muslims and Arabs will seriously undermine your recruitment efforts. In particular, I am troubled by the visa holder registration policy announced yesterday. Your agency is expending valuable time and resources to recruit these U.S. citizens in our Arab and Muslim communities at the same time the Justice Department is photographing, fingerprinting, and registering their law-abiding siblings and cousins visiting the United States.

So what impact do you think these policies will have on the Arab and Muslim communities in the U.S. if you are holding job fairs in the morning and fingerprinting them in the afternoon?

Mr. MUELLER. Senator, if I might, going back to what we had done in the wake of September 11th in the course of the investigation, immediately after September 11th, we understood that the first thing we had to address was whether or not there was a second wave of terrorists out there who may conduct the same or similar terrorist attacks. And immediately what we did was to determine everything we could about the 19 hijackers, how they got their tickets, where they lived, where they went to flight schools, and immediately came up with individuals who had information about them whom we wanted to interview.

In the course of those interviews, we would find that a number of individuals of all religions, from a number of different countries, would fall into one of three categories:

One, there may be an individual who is a subject of Federal, State, or local charges and had not been arrested, and we would detain them; there would be an individual perhaps who was out of status with Immigration and would be detained by Immigration;

and then there was, third, a handful of individuals who were detained pursuant to material witness warrants issued by judges.

We were not looking for individuals of any particular religion, from any particular country. Each one of those individuals detained was interviewed because we had predication to do those interviews.

Now, turning to the initiative announced by the Attorney General yesterday, my understanding is that there is a mandate from Congress to institute entry and exit precautions. My understanding is that what was announced yesterday is in part responsive to that, and——

Senator KENNEDY. Well, I would like to go over it. I was very involved in that legislation on border security as well as immigration, and I would like your references on that legislation. And if you are relying on it, I would like to know specifically what that authority is in there.

We looked through it last night again in anticipation of this kind of response, and I would like to get that information from the Department at another time.

Mr. MUELLER. I am not familiar with it myself, but we will provide that, Senator. But I will say, if I could, that it is critically important that we do a better job of—we are a very open country, and we want to stay a very open country. But we have to do a better job of knowing who is coming in our borders, where they are within the United States when they are here, and when they leave. And that is one of the areas that we just have to do a heck of a lot better job at, and I believe the proposals yesterday address that concern.

Senator KENNEDY. Well, one of the most important proposals which we passed with bipartisan support stated that the CIA was to share information with the FBI in granting these visas, which they never did in the circumstances before. It also stated that they have commonality in terms of their computers, using biometric information. We are working on that and want to work with the administration on it. However, what the Department did yesterday, relying on that legislation is something of concern to me.

Isn't it true that after September 11th, none of the 1,200 or more Arab and Muslim detainees that were held were charged with any terrorist crimes or even certified under the PATRIOT Act as persons suspected of involvement in terrorist activity? I understand the FBI is still conducting clearances in a small number of these cases, but hasn't the overwhelming majority been positively cleared by your agency of any involvement in the September attacks? In fact, weren't these detainees only charged with technical and minor immigration violations?

Mr. MUELLER. Well, I think that the violations cut across the board. There were some that were charged, I believe, with——

Senator KENNEDY. I am referring to charges with terrorism as distinct from immigration violations. I think I am correct if I say that they have not been associated with the terrorist acts.

Mr. MUELLER. Well, a specific terrorist charge of somebody who was going to or had committed a terrorist act, no. But there are a number of persons who have been charged with facilitating either the hijackers or lying about their association with the hijackers or other terrorists.

Senator KENNEDY. You understand that in order to get the visa, extensive review and investigation has to be done. That should be the result of FBI and CIA information and investigation before the individual is even granted the visa. And when we have follow up procedures after they come to this country providing biometric information so we know that that person is here, and when there is discretion obviously, even on the entry officer, about how they are going to treat it we have a significant amount of information.

So now you have added this additional layer of fingerprinting. We are trying to understand the basis for that since there has already been an investigation of these individuals for visas in the first place.

The question is, as I think you mentioned this morning with regards to focusing the attention on taxing the agency's resources. Is the round-up and detention and now the registration of vast numbers of Arabs and Muslims an effective investigative technique or is it wasting law enforcement resources? It has been apparent to many people that the problem hasn't been so much the collection of information. It has been in the analysis of information by the agency. And we see in response to that kind of gap a great deal of increased outreach for information which, in a number of instances, seriously threatens Americans' rights and liberties. I don't know whether—my time is running down—whether you want to make some brief comment about it.

You were very clear in your confirmation hearing about these rights and values and you made a very powerful statement which I believe is your view, but I——

Mr. MUELLER. And it is still my view. I still believe that we have to protect the freedoms that we have in this country that are guaranteed by the Constitution, or all the work we do to protect it will be for naught. But there are things that we can do well within the Constitution that will assist us in identifying those amongst our midst who wish to kill Americans. And to the extent that within the Constitution we have greater capacity to address the threat against the American public, we are asking Congress to, with us, help us meet that challenge.

Senator KENNEDY. Let me pursue one final area—the changes in the FBI guidelines on the use of confidential informants. You know, very well, the terrible scandal with the Boston FBI office that led to the important changes in how the FBI is going to handle these confidential informants. These reforms were adopted only 2 years ago, and it is critical that they not be watered down. I know you are very familiar with the corresponding steps that were taken so that we do not have these kinds of abuses in the future. And now there is certainly a good deal of concern, up our way, about whether we are going to be opening Pandora's box on this. I know you are very familiar both with the challenge that we had up in Boston and the change in the rules and also the current changes.

Could you comment about how you think that these current changes here will not re-open up the door to the kinds of abuses that we have seen in the recent past?

Mr. MUELLER. I am familiar with the circumstances of what happened in Boston, and it was not a good chapter in the Bureau, and that is an understatement.

I participated in the development of and change in the informant guidelines to address the situation that you have up in Boston. The minor modifications that have been suggested to those guidelines in my mind do not in any way undercut the efficacy of those guidelines in addressing the kind of circumstance that happened up in Boston. But, also, within the organization we have to implement procedures, particularly in our inspection process, so that we just don't go out and look at paper but we look at what is represented by the paper. Too often our inspection process failed, and our inspection process should have picked up something like that, and it did not in the past. So we have the guidelines, and we are looking at and will look at our inspection process to determine how we can do a better job in assuring that this kind of circumstance does not happen again.

Senator KENNEDY. I want to thank you very much for your appearance here and for your response.

[The prepared statement of Senator Kennedy appears as a submission in the record.]

Chairman LEAHY. Senator Grassley?

Senator GRASSLEY. Thank you, Mr. Chairman. And thank you, Director, for coming——

Chairman LEAHY. If the Senator would withhold just a moment, I have a number of items I would place in the record at the appropriate point.

[The information appears as a submission in the record.]

Chairman LEAHY. Senator Grassley?

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Once again, thank you, Director Mueller, for coming to discuss a lot of important issues we have before us: the failure of the FBI to recognize warning signs of terrorist attacks; the cultural problems that hinder FBI's ability to be a top-notch agency preventing terrorism; a new reorganization plan that has some problems; last but not least, later on, as we will this afternoon, to hear Coleen Rowley who is one of the reasons that we are here.

Special Agent Rowley, as we all know, has come forward on major problems with the FBI's handling of terrorists, specifically the Moussaoui case, and spotlighted some general flaws in the culture. Her courage, patriotism, and integrity will help the FBI improve even if the revelations are painful or embarrassing. In fact, I think she already has helped the FBI, and I think you have indicated that to some extent.

I want to note, Director Mueller, as maybe you have said so publicly, that when you thanked Agent Rowley last week in your news conference, it was the first time I have ever heard any agency head, not just an FBI head, publicly acknowledge even the existence of a whistleblower, let alone thank that person. So I commend you for doing that.

Along the lines of this issue that Senator Leahy has already addressed but as the author of the Whistleblower Protection Act and cosponsor of an FBI reform act with Senator Leahy—by the way, which contains essential protections for FBI whistleblowers, hope-

fully along the lines of things that Mr. Fine would approve of—I appreciate your assurances that Coleen Rowley will not be retaliated against in any fashion because of her letter to you or her testimony before Congress. And I say "any fashion" because whistleblowers are often sent to out-of-the-way posts or given less than desirable work or given no work at all, as I found in the case of the Defense Department, where people just give up and quit. And I trust that your assurances will extend to any form of retaliation.

Before you say yes or no to that, I was really depressed with the Attorney General on Sam Donaldson's program when he had to be asked three times if she would be protected, and finally he said she would not be dismissed. The issue isn't dismissal. Very few whistleblowers are dismissed. They are retaliated against in ways that are very difficult to prove. And we have got to have people like the Attorney General saying that whistleblowers are going to be protected according to law.

I would like your response.

Mr. MUELLER. I absolutely believe the Attorney General believes that, and I reiterate the assurances I gave to Senator Leahy. My own view is that when there is an allegation of retaliation, we, the FBI, should not be the institution that looks into it. I would like Mr. Fine to look into it and evaluate it and see if there is any veracity to it.

But in terms of putting out the message that I want people to tell me what is happening wrong, what is wrong in the organization, the institution, I want the suggestions, I have tried to do that. But I will reiterate, as I said before, the assurances that I gave in response to the question put to me by Chairman Leahy.

Senator GRASSLEY. I don't think Coleen Rowley has got any concern, but I am not concerned just about her because down the road Congress has to depend upon that form of information, as you are willing to say you are willing to depend upon it.

Mr. MUELLER. I do, too. I mean, I need that information myself. I understand. I want that information so that I can change what is wrong in the institution.

Senator GRASSLEY. So it is not a case just of protecting to protect an individual economically or professionally. It is to keep an avenue of information open. Thank you.

I would like to ask you about what some people see as redundancy and more bureaucracy at Headquarters or maybe in the organization generally. You mentioned the National Joint Terrorism Task Force in part for information sharing, but you have already set up an Office of Law Enforcement Coordination. I certainly have concerns about sufficient information sharing and coordination, so it is a problem you have to deal with. But it also seems to me that the first line of responsibility for accomplishing information sharing and coordination should be the Special Agents-in–Charge that we should hold them accountable.

In addition to these new offices that you have set up, you have formed the Office of Intelligence for Analysis. You will create flying squads. You already have the Strategic Information Operation Center to coordinate for emergencies, and there has been a Counterterrorism Center with staff from the FBI and CIA, and maybe I am missing some other new or existing groups, but I am

going to stop there. But I agree with some of these, especially the Office of Intelligence.

So three questions. Can you explain to me what each of these groups—and please don't go into tremendous detail to take up too much time, but what they will do or are doing? And can you explain how they won't be duplicating each other's work? What groups will coordinate information sharing within the FBI and other agencies? And, three, what responsibilities then do you see the Special Agents-in–Charge for information sharing and coordination? And could you start with three?

Mr. MUELLER. I will start with three. The Special Agents-in–Charge are supervising in each of our divisions the Joint Terrorism Task Forces. On those task forces, there are other Federal agencies and other State and local agencies in that region. We each day push out information to them to be shared in that vehicle, and that is a very important vehicle to share information at the local level.

What we have to do a better job of at Headquarters is taking the information that comes in from our agents in the field and acting on that information, whether it be action through the Coast Guard, action through the FAA, action through other agencies, but also have those other agencies with the ability to plumb their databases.

The Joint Terrorism Task Force at Headquarters replicates what we did in Salt Lake City. In Salt Lake City, we had a fused Intelligence Center where you had one set of computers with an Intranet, so if a question came in from a Utah State trooper, about an individual, immediately that would be put on one of the sets of computers to each of the representatives of the CIA, the DEA, the Immigration Service, and they would go to their own computer and look in their databases and pull up that information and put it out immediately to the person who needed to get that response.

That is what we did in SIOC, as you point out, the Strategic Information Operations Center, in the wake of September 11th. But since we have run through all those leads, we have dropped back down and have not put that back up. We are doing that. That is the Joint Terrorism Task Force back at Headquarters. And that is critically important to our ability to share information and gather information from the various agencies.

The Office of Intelligence is the analytical piece that we were lacking in the past to bring in the shreds of information, coordinate that information with the CIA or other entities, and make certain that we are looking and establishing the patterns that need to be addressed, and then develop—after that we have to develop a way of addressing those patterns, whether it be flight schools or crop dusters or threats on reservoirs or what have you. And so it is important to get the intelligence in to the Office of Intelligence, develop those patterns, evaluate the threats, evaluate the credibility, and then pass it on to people who will act on that intelligence to protect the country.

Senator GRASSLEY. I want to talk about your allocation of resources, and I am following what I believe is my understanding of your reorganization plan, and I guess I start with the premise that maybe it doesn't go far enough in moving agents into counterterrorism. With the number I have seen, it seems to me

that it would be 25 percent or less of the FBI agents will actually be working counterterrorism when reorganization is done.

You say the FBI is the lead agency for counterterrorism, and I believe that, and everyone knows that preventing future attacks is our number one priority. It is even the number one focus on the top ten list in your testimony today.

But what sort of reaction do you have about this priority of stopping terrorists when less than 25 percent of the FBI total numbers of agents are working on that? Could a reasonable person infer from this that car thieves, gangs, kidnappers pose more of a danger than terrorists because of the number of agents working those crimes? We have the Drug Engagement Administration, for example, to do more narcotics that you plan to get rid of. State and local police can handle many bank robberies. We have inspectors general on Government fraud. We have the EPA's Criminal Division for environmental crimes, and we have Customs and Secret Service.

I think it is coming to the point where Congress is at fault for some of this and maybe giving too much responsibility to the FBI. That will have to be addressed not by you but by us. But Congress may need to cap money for new agents until the FBI can get serious about terrorism and get rid of jurisdictional duplications with other agencies. If the FBI needs additional agents for counterterrorism, then at that point we can provide them. So could you tell me if you are done moving agents to counterterrorism or you are going to move more? And if you are not, how will you react to a congressional proposal to narrow the FBI's jurisdiction so it can truly concentrate on the mission of preventing terrorism?

Mr. MUELLER. Let me just say, since September 11th I have had several conferences with the SACs, Special Agents-in–Charge, to determine what kind of shift in resources was necessary to address counterterrorism. My statement at the outset is—and was to them—that counterterrorism comes first. If you have a threat within your division, if you have a lead that must be pursued, that comes first before any other program.

Now, I go to them and say, Okay, in your particular division what additional resources do you need to address counterterrorism? And the SACs, each of the SACs would come back to me: I need 10 or I need 15 or I need 20. And I go back and say, Okay, your division is unique. San Francisco is a little bit different than Des Moines in terms of what is necessary. What programs should we take those agents from?

We looked at it from an overview to see what is necessary for national strategies and made the recommendation that we ought to shift these resources at this time permanently to address counterterrorism needs.

Now, this is a work in progress. I don't know. Three months down the road, we may need in some division additional resources because something has popped up. Part of my program is to be more flexible and agile because, as I have seen these problems pop up in a particular community, we need the resources to address them for a week or 2 weeks or a month, and I don't want to permanently put the resources there. If we need Pashto translators in a particular place, we will push them in to resolve a particular threat, and then they will go back to their home station. So we

want to be more flexible in sending the resources where they are needed across the country.

In terms of ultimately where we will fall out as to what we need in terms of agent manpower to address terrorism, I do not know where we will be 3 months or 6 months down the road. What I need to see and make certain is that we are addressing every piece of information, every lead that potentially could lead us to preventing another terrorist attack, and each of the SACs, I believe, understands that.

Senator GRASSLEY. What about the jurisdiction part of my question? I don't think you touched on that.

Mr. MUELLER. I am always willing to look at the jurisdictional aspects of the FBI. In the course of looking at the programs that are going to be affected by the shift of resources, I have talked with the DEA, for instance, and we ought to eliminate in the narcotics arena those cases where we overlap, cartel cases with DEA, for instance.

On the other hand, in particular parts of the country public corruption is intertwined with narcotics trafficking, and in my mind, we should not leave the field when it comes to public corruption that may be intertwined with narcotics trafficking.

So what I have tried to do is look at particular areas and see what makes sense in terms of other agencies picking up the responsibility, but not leaving the field where we have particular priorities.

Senator GRASSLEY. Thank you.

Chairman LEAHY. At this point the vote has begun. We will recess and, when we come back, recognize Senator Kohl and then Senator Specter. This will give a chance for everybody to take a quick break. Thank you.

We stand in recess.

[Recess 11:11 to 11:41 a.m.]

Chairman LEAHY. I thank the Senators for coming back, and we are going to go to Senator Kohl. Just so you know, before we finish, Mr. Director, I am going to ask you a question about how the proposal of the President is going to make about a homeland defense agency, how that affects your jurisdiction. But, Senator Kohl, go ahead, please.

STATEMENT OF HON. HERBERT KOHL, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KOHL. Thank you. Director Mueller, the Washington Post this past Sunday ran a front-page story on the complete absence of pre-boarding screening for passengers on chartered aircraft. Today, anyone with a high enough credit limit can charter a 747, bring whomever they want on board, bring whatever they want on board, including weapons, and repeat the horrific events of September 11th.

Now, after much, much prodding from my office, I understand that the Transportation Security Agency is about to issue a regulation requiring those passengers who charter very large aircraft over 95,000 pounds takeoff weight, or about the size of a DC–9, to undergo pre-boarding screening just as a passenger on a commercial airline would.

Now, I am glad that they are considering taking at least this step, but I want to ask you a few questions about regulation of charter aircraft from the perspective of the administration official, which you say you are—and you are—most responsible for preventing another terrorism attack on this Nation.

Do you believe that we are at so little risk of a terrorist attack using a chartered aircraft as a weapon that we do not need any screening of chartered aircraft passengers and their carry-on luggage on chartered planes smaller than DC–9s? For example, a fully fueled 91,000-pound Gulfstream 5 has significantly more explosive power than the largest conventional bombs used today by the U.S. military. In other words, even under the new TSA regulations being proposed, we are making available to terrorists still a bomb bigger than anything that we dropped on Afghanistan.

As the lead Government official in charge of preventing terrorism, are you prepared to make sure that this threat posed by chartered jets less than 95,000 pounds is addressed? I understand TSA writes these regulations, but I am asking you to take responsibility for this or to make a public statement if you cannot address the problem that the administration is keeping you from addressing this issue.

Mr. MUELLER. I can't say the latter because the administration certainly is not keeping me from addressing the issue, Senator. It is an issue that has been raised ever since the events of September 11th and discussions with Homeland Security. And I know the administration is concerned about and has undertaken steps to address that which would be a concern in the wake of what happened on September 11th, not only private jets or chartered jets but also other forms of jets that are shipping not passengers but merchandise or freight and the like. And there has been an ongoing discussion and efforts made to address the security concerns across the broadband of other aircraft that could be considered a risk.

I am not familiar with the details. I am not familiar with the regulations for the Transportation——

Senator KOHL. I appreciate what you are saying, and I want you to know that we have talked to Sen. Mineta, Mr. McGaw, Ms. Garvey, Sec. Rumsfeld, as well as the President, and we have not gotten a good answer. And you are not giving me a good answer.

Now, you say that you and the FBI have a particular special responsibility today, and that is to prevent another terrorist attack. I am bringing to you a clear and present danger, which I do not think you would deny, that chartered aircraft today can be obtained by virtually anybody. They can board these aircraft without any screening.

Now, I am sure you understand the implications of that. Are you prepared to say that you will address it? And if people in the administration just say bug off, you will announce that?

Mr. MUELLER. I absolutely am prepared to address it. I have in the past had discussions, not specifically addressing it, but, yes, I am prepared to address it, and I will follow up on it and will be back to your office.

Senator KOHL. In the very near future?

Mr. MUELLER. Yes, sir.

Senator KOHL. I do appreciate that.

Mr. Mueller, the FBI has requested a tremendous increase in this budget and its staffing, as we know. You argue that the war on terrorism requires more and better equipped agents. For fiscal year 2003, the administration's proposal for the FBI budget is $4.3 billion. That is $700 to $800 million more than this fiscal year and more than double the FBI's budget from 10 years ago.

In terms of personnel, the FBI has almost 2,000 more authorized positions for fiscal year 2003 than this year and 6,000 more than 10 years ago. And yet it appears that the FBI had information and enough resources at its disposal to possibly unravel the terrorist plot before September 11th. The Phoenix memo, the Minneapolis involvement, and the CIA's information were available, but the pieces were never put together in a way that might have prevented the attack. Had the FBI been totally alert and had the FBI used its current capabilities to the best of its ability, there was at least a very good chance that the terrorist plot could have been uncovered.

Unless and until the resources that you have at your disposal are used effectively, I am sure you would agree it won't matter much how much money or how much personnel we throw at the problem. Instead, we will just be headed for a bigger bureaucracy that is by definition more unwieldy and less able to respond.

Mr. Mueller, is money really the solution or even part of the solution to your problems? Aren't you worried that you will be spending so much time reorganizing and spending money that you won't use your current resources smarter but end up instead creating a more bloated bureaucracy?

Mr. MUELLER. Well, the request I have to Congress is to redirect resources, agents to address counterterrorism. And that is done after looking at our organization and how it could be better focused to address the problem at hand, number one.

Secondly, the money that has been given to us in substantial part will address two of our problems—two of the problems that came to light in the events prior to September 11th. Number one is technology. And, yes, we have not done a good job in the past taking the money that Congress has given to us and put it into the appropriate technology.

I have brought in and am in the process of bringing in individuals from outside who will help us to utilize the moneys that Congress has given us to upgrade the technology in ways that actually will do it and accomplish what we need to do.

Secondly, the analytical capability. I have a plan to upgrade our analytical capability. I briefed this Committee and Congress on the various aspects of that plan to upgrade our analytical capability. And I do believe that those are resources directed specifically at the problem we have to address, and it is incumbent upon me to get the analysts who are well educated, who are well trained, who have the various language skills, who have the background to do that analytical capability that we have not had in the past.

What we have, we have excellent, superb investigators who do a terrific job in gathering the information and gathering the information so that it can be translated into further action. What we need is the analytical capability, the technological capability to maxi-

mize the capabilities of those agents that are out there doing the day-in, day-out investigations.

Senator KOHL. All right. Well, as a follow-up to the question, in the final report after Ruby Ridge investigation of 1995, one of the recommendations that this Committee made was the creation of an FBI civil oversight board. this group would act like the one that oversees the CIA and other intelligence organizations. The board would be appointed by the President and would be capable of objective criticism of the activities of Federal law enforcement and also receptive to external criticism. But it would be dedicated to strong and effective Federal law enforcement, obviously.

Our concern then is the same that we have today. there is no way, Mr. Mueller, to measure the success or the failure of the FBI. And while we respect changes that you are making to the organization, we will likely not be able to objectively evaluate its performance. Can you comment on why an oversight board was never created and whether you believe one could be constructively created today?

Mr. MUELLER. This is the first I have heard about the possibility of an oversight board. I will tell you that I am bringing persons from the outside, from business, for instance, to bring in separate views. I have an individual named Wilson Lowry who I am bringing in from a long time with IBM who was with Lou Gerstner when he turned around IBM, who is coming in as a special assistant to help us get through the changes that we need to get through.

I also have persons that I look to on the outside to give me a view, respected persons in the community, principally the intelligence community because this is the area where we need help as to what to do.

I would be happy to consider the implications of some form of review board down the road.

Senator KOHL. My time is up, but I would simply comment that you appear to be saying that having people take a look at what you are doing from another perspective more distant than the everyday involvement is not a bad idea.

Mr. MUELLER. I think it is a very good idea.

Senator KOHL. And it might be a good thing for the FBI to have that kind of an oversight Committee or board to look to. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Kohl.

Going in the rotation, Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SEANTOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

Thank you, Director Mueller, for coming in on a public hearing and making Agent Rowley available. I believe that the public hearings are indispensable if we are to have effective oversight. I think otherwise it is like a tree falling in the forest. If nobody hears it, there is no sound.

When this Committee did oversight on Ruby Ridge in this room, I think it was very effective, and it is my hope that with the talents

that we have on this Committee we can be of assistance to the FBI and the CIA.

My own professional judgment is that it wasn't a matter of connecting the dots before 9/11. I think there was a virtual blueprint. I think had all of it been put together or leads followed that could have been put together, I think there was a distinct possibility of preventing 9/11.

I want to cover with you four subjects. In the absence of an opening statement, I want to review a number of items and then ask you to comment after I have covered the four of them, because if we get into dialogue I will never get beyond one or two.

The Rowley letter states that in determining probable cause, she was looking for a 51-percent likelihood that the U.S. Attorney's office was looking at 75 to 80 percent. Now, even a 51-percent standard is not correct. You don't have to have more likely than not or a preponderance of the evidence, and that was made explicit by Justice Rehnquist in *Gates v. Illinois*. So we have got to take a look at what is going on on these FISA applications as to whether you are looking for more than you have to.

Then this letter from Agent Rowley refers to FBI Headquarters questioning whether this Zacarias Moussaoui was the same as the one that they knew about. Zacarias Moussaoui is not exactly a common name like John Smith. And when the Minneapolis office went back to Paris and had the phone books checked—they could only get the Paris book—there was only one in there. But according to Agent Rowley, there continued to be resistance.

So what I think we have to do and pursue these in other hearings in detail is what is your Bureau looking for on probable cause. It seems to me you have a vastly inflated standard.

Then there is the question of the Phoenix memorandum. When you appeared in this room on July 31st, you and I had an extensive discussion about what had been done in the past by way of oversight and the obligation for the Director to be forthcoming on oversight. And when that Phoenix memorandum was turned over to the Inspector General on September 28th—and I am going to give you a chance to comment on this in just a minute—I think it should have been turned over to this Committee. If we had known about the Phoenix memorandum, we could have made some pretty good suggestions to you.

Now, the investigation wasn't finished until mid–December, and then it was turned over to the Intelligence Committees, but they didn't start to function until mid–February.

Then we have the issue as to your interview yesterday published on the front page of the Washington Post today. And you are quoted here as saying, "Our biggest problem is we have people we think are terrorists. They are supporters of Al–Qaeda." And you are keeping them under surveillance.

I am troubled by this for two reasons. One is putting people under surveillance is right up to the edge of problemsome. It isn't quite intimidation because you can conduct a really good surveillance without having people know about it. But it is troublesome to have surveillance unless there is really a good reason for doing so.

And then when you say, "We think these people are terrorists. They are supporters of Al–Qaeda," I am wondering if we ought not to take a look at a definition of prohibited conduct. Crimes are defined by the Congress, and if these people are really menaces and threats—and you say you don't have sufficient resources to follow them all, and I can understand that—we really ought to get the details from you as to what you are worried about. There is a lot of experience on this panel of ex-prosecutors, people who were investigators. We may need to define a different category of crime depending on what evidence you have.

Then, Director Mueller, I am concerned about what goes on in your office with respect to how much you can keep track of. On the Sunday show "Face the Nation," you were asked a question about a chart, whether there was some chart that was referred to in Newsweek, and this is what Newsweek said about it: "To bolster their case, FBI officials have now prepared a detailed chart showing how agents could have uncovered the terrorist plot if they had learned about Almidhar and Alhazmi sooner. Given the frequent contacts with at least five of the other hijackers, there is no question we could have tied all 19 hijackers together," the officials said.

My staff called Mr. Michael Isikoff to ask him if there really was a chart and to ask him if we could see it. He declined, and that is his right. And I am going to take steps to see if the Committee would issue an invitation to see the chart. I am not talking about a subpoena. I am talking about a chart. But there are two things which trouble me here. One is: Was there a chart which showed a composite picture, as reported here? And, secondly, if there was one, I believe you, Director Mueller, when you say you didn't know about a chart. But is this kind of information getting through to you?

Let me ask you for your comments, if I may, to start on the issue of why you didn't turn over the Phoenix memorandum to this Committee and why, when you had been asked about it, you never told the Committee that you had turned the memorandum—or the memorandum had been turned over to the Inspector General.

Mr. MUELLER. Well, my understanding from the early days was that Congress had determined that the Intelligence Committee was going to do the retrospective——

Senator SPECTER. Well, that is not true. That is not true. It didn't happen until mid–February. This is an ongoing standing Committee. And we were emphatic on your confirmation hearings, and, of course, you and I discussed this privately. And you committed on the record to respect the oversight of this Committee on matters of importance. We didn't anticipate the Phoenix memo.

Mr. MUELLER. We did have that dialogue, Senator, and it is still in my mind. And my thoughts during that period of time, as I have said on a number of occasions, were directed at doing the investigation, trying to prevent the second wave of attack, in fact, if there was going to be a wave of attack, with the expectation that there would be a retrospective down the road and the expectation that we would turn everything over to that Committee.

Senator SPECTER. I respect that and I agree with it. And I took a public position there ought not to be an inquiry immediately after

9/11 because the most important thing was to allow the intelligence agencies to regroup and stop another attack.

But that doesn't go to the issue of turning over the Phoenix memo at least to the Chairman and ranking member. Had they seen it, had we seen it, we might have had some—we would have had some very good suggestions for you.

Mr. MUELLER. I understand, Senator.

Senator SPECTER. How about the chart?

Mr. MUELLER. Well, with regard to the—my understanding at the time that I answered on the Sunday show, I did not know of a document that met that description. What I have come to find out is that there is a PowerPoint presentation that was prepared by an individual who had used the newer technology, the database-mining technology that we are now using, to show how, if we had had that database-mining technology in place at the time, we perhaps could have tied the individuals together.

It is not a chart. It is a series of slides showing how this new technology would have worked.

Senator BIDEN. Senator Specter, would you yield for a point of clarification? What did the Director mean when he said, "I understand." You asked him a question. He said, "I understand." I didn't know what the answer—what that means.

Senator SPECTER. Well, I would be glad to answer that question for you, Senator Biden, but I will defer to the witness.

Senator BIDEN. What do you mean by "I understand"?

Senator SPECTER. By the way, this is on his time, Mr. Chairman.

Senator BIDEN. I am just curious what he means.

Chairman LEAHY. I intend to be——

Mr. MUELLER. In response to which question, Senator?

Senator BIDEN. The question the Senator asked you is: Why did you not submit the memo to this Committee? He gave his explanation of what he thought the Committee would do, and you said, "I understand." But I thought the question was: Why did you not submit this memo?

Mr. MUELLER. Because I believe that the retrospective would be done by the Intelligence Committee, and I thought I had indicated that.

Chairman LEAHY. Senator Specter?

Senator SPECTER. Well, on that point, this is the oversight Committee of the FBI. You came here for confirmation. You made the commitments to this Committee, and they weren't constituted until mid–February. And one of the things which really troubles me is that we haven't had a look at this a lot sooner.

But with respect to a slide, if it wasn't a chart—and I think they are indistinguishable, technically—is it true, as the report says here, that this detailed chart—strike "chart" and put "slide"—showing how agents could have uncovered the terrorist plot if they had put these pieces together, is that so?

Mr. MUELLER. I would have to go back and—it is a slide presentation. It is not one chart. It is a series of charts, as I understand it, that shows how the technology could have been used to associate these particular individuals together.

Senator SPECTER. Okay. But the composite would have led you to a possibility of preventing 9/11?

Mr. MUELLER. I am not certain, Senator.

Chairman LEAHY. Well, if it might be helpful at all to the Committee, one of the things that we requested when we had our meeting with David Frasca—we have a list of things we requested. Number 11 on it is the JTTF chart or chronology or PowerPoint presentation. We have been told that parts of it are law enforcement-sensitive. My response is that it could be then looked at in closed session. In fact, I would be happy to do it and designate one member from this side, have Senator Hatch designate one member from his side. But I happen to agree with Senator Specter it is something we should look at.

Senator SPECTER. Well, in conclusion, had the Foreign Intelligence Surveillance Act warrant been issued for Moussaoui and what we now know by 20/20 hindsight, it would have uncovered a wealth of information had that been done in August when Agent Rowley submitted it. And we have gone through these Foreign Intelligence Surveillance Act problems in detail on Wen Ho Lee. We have been on notice as to what went on. Attorney General Reno testified at great length about her turning down the Foreign Intelligence Surveillance Act warrant application. So we have been on notice as to what should have been done.

Had that warrant been issued, the follow-up then on Moussaoui would have been a virtual gold mine. But the point is that all of this is prologue. What we all have to try to do is to see to it that the mechanism is now in place so that if you had this composite information, it could have been prevented.

The media is always asking who is going to take the blame and who is going to be the fall guy. We have no interest in that. And this Committee is going to back you up, Director Mueller. Notwithstanding the fact that one prominent publication called for your resignation, we are going to back you up. You are just on the job, and we are not delighted with the number of things you have done, but you are the Director. And if we were to get a new Director, it would take weeks, confirmation a long time, and you are experienced. But we have got to put these pieces together.

Thank you, Mr. Chairman.

Mr. MUELLER. I have tried to address, I believe, some of your concerns, Senator. For instance, on the FISAs, I agree that there are issues relating to FISAs. And as I indicated before, we have changed the procedure. I get briefed on the FISAs every day.

We should look back to determine what there were in terms of problems, pre-existing 9/11. We are moving in a variety of ways to assure that we address those problems and that this does not happen again. And the proposal that I have before this Committee and before Congress as a whole is an effort to make certain that we better the FBI, give the FBI agents the tools they need, particularly in terms of pulling together the various pieces of information so that we do not—so that we can prevent any future attack.

Senator SPECTER. I would like your comments in writing, Director Mueller, as to the standard 51 percent, 75 to 80 percent, and I have already discussed with the Chairman the activity of pursuing this FISA matter, because we need to get down into the details of it and to lend the oversight and our own experience on these matters, which is considerable.

Mr. MUELLER. Thank you, Senator.

Chairman LEAHY. Thank you. I think on these questions of other Directors, the Director has the confidence of this Committee on both sides of the aisle. And we will continue asking the questions. This Committee has an oversight responsibility which we will carry out, entirely different than other Committees. It is unique and it is an obligation we have to the Senate, it is an obligation to the American people.

The Senator from California, Senator Feinstein.

STATEMENT OF HON. DIANNE FEINSTEIN, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator FEINSTEIN. Thanks very much, Mr. Chairman.

Mr. Mueller, I suspect there are times you wish you were on the West Coast, as I do.

[Laughter.]

Mr. MUELLER. San Francisco was a lovely city.

Senator FEINSTEIN. This is a hard place.

I want to just say a couple of things personally. I think you have come into a very hard job at a very hard time. I can't imagine a worse time. I have had occasion now to review your plans for reorganization, I think three times. I want you to know that I am here to support you. I do support you. I think your efforts to change the culture and the organization are very commendable.

I may not agree with every specific, but that is irrelevant. I want to see that the American people are protected, obviously, consonant with our civil liberties. And I was very heartened to hear what you had to say along those lines.

I also want to thank the Chairman because I think he is exercising the oversight, and I have been reading some of the testimony that goes back to the 1970s when there was real reason to be concerned. There wasn't the level of oversight that there is today. There wasn't the level of press inquiry that there is today. We held an oversight hearing I think less than a month ago, thanks to the Chairman, and this may be a bit rugged on you, but I think it carries out our responsibilities.

I would like to ask for an answer to my letter that I wrote to you on May 7th with a substantial number of questions having to do with the Phoenix memo. I have not gotten that answer yet.

Mr. MUELLER. I thought that had come up last night or would be there with you today.

It is going through a final review. It should be up there today or tomorrow.

Senator FEINSTEIN. Thank you very much. I will look forward to that.

I wanted to concentrate my questions in two areas. One is the FISA procedure, and the second is regional authority versus flying squad. Let me take the FISA area.

It has come to my attention that in at least one major case that I won't specify, the warrant never left the FBI. It never went to the Department of Justice. It never went to the OIPR where the attorneys are. I have read Mr. Freeh's memo of April the 15th which changed the FISA process, I think based on problems that prior FISA warrant requests had that were egregious, let me say, and

so he wrote a memorandum that was very complicated, very difficult, I think, to carry out.

There are different impressions of what you intend with respect to the FISA process. One is that applications would be automatically routed to Dale Watson and to you for further review and consideration. I would like you to lay out for this oversight Committee the specific process that you are going to use with respect to the processing of a FISA warrant.

Mr. MUELLER. Well, let me just go back to what they call, I think, the Woods changes that are reflected, I believe—and I am not certain of the date, but Mr. Freeh's memorandum—that relate to assuring the accuracy of the document that is going to be presented to the court. And the difficulty we have here is we have got one FISA court situated in Washington, but the persons who are drafting the affidavits and have the information from the investigations are out in the field. And so that is appropriate to assure that there is a certification from the agent in the field as to the accuracy of the document before it goes to the court.

With regard to the FISA process, what we have done since relatively shortly after September 11th, whenever there are issues relating to FISAs relating to terrorism, that are on terrorism, I get briefed on that every morning. I have given directions to Pat D'Amuro, who I put in charge of the Counterterrorism Division, that if there is an issue there of turning down a FISA and not sending it across the street, then I want to be involved in the decisionmaking process.

Senator FEINSTEIN. Stop. By across the street, do you mean to the Department of Justice?

Mr. MUELLER. Department of Justice, yes.

Senator FEINSTEIN. To OIPR?

Mr. MUELLER. OIPR.

Senator FEINSTEIN. Will every FISA warrant go to the OIPR?

Mr. MUELLER. If we believe that we have met the criteria of probable cause, yes. But what——

Senator FEINSTEIN. And you will assess that personally in every warrant?

Mr. MUELLER. No, most of them go through. If there is one in which the field says we believe you have probable cause, and somebody at Headquarters is saying, no, I do not think you do, then I will be involved in that discussion. And the way I am currently alerted to that discussion is I have in my briefing book every day a piece of paper that gives me the status of those FISAs that are related to terrorism. And there are occasions where I have seen that there has been a hang-up for some reason or another, and I have given direction to let's get beyond that, do this investigation. There are other cases in which in the course of the daily briefing I will say we ought to go FISA on this, not criminal.

And so, to the extent that the FISA process is perceived to have been held up by persons at the unit or section chief level, I want to make certain that that is not the case and that it gets the high-level review in those particular instances where it is appropriate.

Senator FEINSTEIN. Stop here for just a second. To what extent would foreign intelligence be incorporated in the warrant?

Mr. MUELLER. To the extent that we have information from the CIA, or some other agency, it should be incorporated in the warrant. There are no prohibitions to us using that, and more than often we use that kind of information.

What I have to do a better job at is integrating our information with information at the CIA so that we have that information to put it into that FISA application to get that warrant.

Senator FEINSTEIN. Well, this is an important point. So what you are saying is that if there is foreign intelligence connecting an individual, let us say to al Qaeda, that should be included in the FISA warrant for probable cause?

Mr. MUELLER. Absolutely, absolutely, absolutely.

Senator FEINSTEIN. Because there are instances where I understand it has not been?

Mr. MUELLER. There may well be, but it should be. To the extent any piece of—regardless of where that piece of information resides, whichever agency, and it could be, as you well know, there are a number of separate intelligence agencies in the Government. I do not care where it is, it should be utilized where appropriate to provide the basis for obtaining the FISA warrant.

Senator FEINSTEIN. So just quickly go back, so you will receive notice of every warrant. If the warrant is normally being processed, it will go to OIPR, and if it is not, you will personally review it; is that——

Mr. MUELLER. If there is a dispute as to whether or not there is probable cause. What often happens in this case is you will have somebody who is familiar with the FISA Court talking with the agent who is drafting it and saying, "Look, we need a little bit more here, we need a little bit more there." There are occasions, since September 11th where there has been somewhat of a dispute as to whether or not we had enough, and those are the occasions when I will weigh in and push it forward. And to the extent it is necessary to discuss it with OIPR I or persons close to me have had those discussions also.

Senator FEINSTEIN. Right. Now, as one who sat through both the Waco and the Ruby Ridge hearings here, I think it may well be that a false impression was given, and that is that because we were concerned, or some of us were concerned in the instance of a major event such as Ruby Ridge or Waco, the central administration did not take sufficient responsibility, but too much was placed on the SAC, and I have felt as I have watched this since that time, that that may well have had a chilling effect on regional offices' enthusiasm to move ahead in a vigorous way in certain cases.

Having said that, I would be interested if you would spell out where your flying squad makes some of these determinations as to when an investigation would ensue and how much authority the regional head has in your 56 offices to really now say, "Okay, we have got this information about so-and-so. It is time we take a good look." You know, assign people and go ahead and take that look.

Mr. MUELLER. Let me talk about two things. In terms of the role of Headquarters versus the field in counterterrorism, we are an agency that has been built up with 56 separate field offices addressing crimes that from the beginning have generally been generated out of the conditions in a particular city or a state. When

you look at the war on terrorism, we have to protect the Nation. We have to take pieces of information from Boston or Florida or San Francisco, and utilize those pieces of information in a predictive way, and there has got to be somebody accountable for getting that information together and then taking action on it, and it cannot be the SAC of a particular office. And so Headquarters has to have a management and supervision role to assure that the national program is maintained and that we are, as they say, tying the dots together.

The flying squads will be individuals at Headquarters who develop an expertise in say, al Qaeda, and if you have a case such as Richard Reid up in Boston—you will recall he is the individual who was on the plane from Paris to Miami and had explosives in his shoes, and the very vigilant flight attendant saw it, and he was arrested and taken to Boston. Well, that particular case has information in it relating to al Qaeda with regard to Reid. They are putting together the facts for that particular case, and the flying squads, had I had them in place, would have had maybe two individuals that would go up and support that prosecution, that further investigation. They would bring expertise to the field. They would be under the control and reporting to the Special Agent-in–Charge, who is in charge of that particular investigation. And once the Reid prosecution or investigation is over, they would bring back to Headquarters that expertise, that experience that they learned there. So it is to supplement, on the one hand, the agents in the field doing the job they do in terms of their investigations, and on the other hand be a resource for the field in terms of expertise that can be made available to the field.

Senator FEINSTEIN. Does the Agent-in–Charge have to have Washington approval to institute one of these terrorist investigations?

Mr. MUELLER. Prior to the change in the guidelines of last week, yes. The change to the guidelines last week give the authority to the Special Agent-in-Charge to initiate the investigation. There is a reporting requirement. It has to be reported back, so that we know what particular investigation is being initiated and we can put investigation in Boston together with perhaps an investigation in San Francisco or Los Angeles.

Senator FEINSTEIN. Thanks, Mr. Mueller. My time is up.

Thanks, The Chairman.

Senator BIDEN. [Presiding] Senator Kyl.

STATEMENT OF HON. JON KYL, A U.S. SENATOR FROM THE STATE OF ARIZONA

Senator KYL. Thank you, Mr. Chairman.

Mr. Fine and Director Mueller, thank you very much for being here today.

Mr. Fine, I am sorry you have not been afforded the opportunity the say much beyond your opening statement, but I appreciate your being here.

Director Mueller, you have spent a lot of time with us in the last two or three weeks. We are asking you to help us fight the war on terror. We are also trying to get a lot of information from you, and I appreciate—you are probably burning the candle at both ends,

and I very much appreciate both what you do and what the dedicated people at the FBI do.

I want to give you an opportunity to clarify something and perhaps add a little bit to it myself, relating to the Chairman's opening statement in which he questioned the restructuring that you announced, the restructuring of the FBI and related changes in the FBI.

It seems to me that that kind of criticism is inconsistent at best, and I would like to set the record straight to the extent I can. On the one hand people tend to criticize the FBI for not acting or not acting quickly enough to correct deficiencies that you found when you came on board roughly a week before September 11th. And then on the other hand you get criticized for initiating the reforms. Sometimes it is not actually criticism, as the Chairman said. He said, "Maybe these reforms are right. They may be right. But the process was wrong because we were not consulted, we the Congress. Senators love to be consulted."

Now it seems to me there are two things wrong with that. First is we were consulted. I counted up how many hours I spent with you two weeks ago that you had to spend up here, on Tuesday, Wednesday and Thursday afternoon. It was over 11 hours that I spent and I left a couple of those meetings early. You had to be there for the entire time. As a member of the Intelligence Committee, then the next day the Judiciary Committee, and then the next day you afforded the opportunity for all Senators to brief you and ask you any questions—excuse me—for you to brief them on these restructuring changes and ask any questions. Somebody said, "How much time do you have?" You responded, "I have all the time you need." And after about 2–1/2 hours, as I said, I left the meeting, you were still there. It was beginning to wind down, but everybody had a full opportunity to ask questions. And then there was the actual announcement.

Now, you also said that you did not want to announce the changes at that time because you wanted to consult with the appropriators, and I have verified you did in fact consult, both with House and Senate appropriators. So I think the first point is that there has been a full opportunity for members of the Senate to talk to you about these recommendations that you told us about two weeks ago. And secondly, it does not seem to me that when you talk about restructuring the FBI and reassigning the agents and creating this team that you just talked about and making other internal changes, that this is the stuff of legislation. For us to be micromanaging it is rather the stuff of management that we expect you to do. We have an oversight role, but not a micro management role, and I do not think we can ask you to expeditiously reform the agency on one hand and at the same time be upset that you do not tell us everything you are going to do far in advance or seek our preapproval of it.

And I want to conclude this point by saying that if you did, I would object anyway because has a sorry record in this regard. It is understandable because there are a hundred of us. There is one of you, although you have got a big agency to get your arms around. But for years—and I have the record here—I chaired this Terrorism Subcommittee, and Senator Feinstein was my ranking

member; she is now Chairman—I count over 20 hearings that we held on the subject of terrorism going back to 1997, and we had your predecessor, Louis Freeh, testify on at least two or three of those occasions. He asked us over and over again for authority, that Senator Feinstein and I put in amendments and in legislation, and amendments to the CJS appropriations bill. Could we get our colleagues to pass it? No. After September 11th, miraculously everybody was the parent of these wonderful ideas and is now taking credit. Fine. But it takes something like September 11th, unfortunately, to get a cumbersome body like Congress, frequently, to act when it is the least bit controversial. And some of these things were controversial because civil liberties groups and others were concerned about whether or not they went too far. Well, after September 11th, we realized we had not gone far enough.

So, I frankly, without going into more detail, want to compliment you for acting, and in the brief amount of time I may have left, ask you two questions.

One, I would like to specifically elicit your views—and if you would pass this on to the Attorney General, his views, about the legislation that Senator Schumer and I introduced yesterday that would make one small but very important amendment to the FISA warrant definition of "foreign agent" the solve the problem that you have identified, that a lone actor out there, a person that you cannot necessarily tie down as a member of the al Qaeda organization or Hezbollah or some other group, or working directly on behalf of a specific foreign government. All you would have to do is prove that that person was a foreign individual and you have probable cause to believe that they are involved in terrorism.

If you want to comment any further on that right now, fine. Otherwise, I would very much like to get the Department of Justice's and the FBI's recommendations with respect to whether we should proceed with that legislation.

Mr. MUELLER. I understand it was put in maybe yesterday or the day before?

Senator KYL. Yes.

Mr. MUELLER. And as I indicated before, this is a problem, and we are looking for solutions to address this problem and I know the Department will have the formal opinion on that, but we are looking for a solution for this problem.

Senator KYL. Great. I appreciate that. I would also like to raise one other point. I am very concerned about leaks and the effect that they may have on your work and the work of your agents. When we had Agent Williams here a couple of weeks ago and talked about the Phoenix memo, there was some discussion in any event about the effect of the leaking of that particular memorandum on possible investigations, and without getting into details that themselves would compromise investigations, I would like to have you at least remind us of the problems that can be created in ongoing investigations when material like that is leaked.

Mr. MUELLER. Well, it has an adverse effect on the investigation from the perspective of informants, persons willing to come forward. It may well alert subjects of the investigation to scrutiny. Although names are not mentioned, there may be other identifying data that is released that may put the person on alert that the

Government is looking at them. And consequently that type of information, if out in the public, could undercut and adversely affect the ability to do the job.

Senator KYL. I just urge my colleagues, as part of the Intelligence Committee investigation and also to the extent that this Judiciary Committee has oversight of the FBI and the Department of Justice, that we have an obligation not to make your job or the CIA's or other intelligence agencies' jobs more difficult.

Finally, in some of those sessions we also heard from agents in the field that even some of the reforms that we had instituted in the USA PATRIOT Act, while very well meaning and very helpful, were not necessarily working out exactly as we had hoped, and that there may be a need to—and I think the word was to—tweak some of those changes or some of those reforms, so that now that you have or your agents have experience with them in the field and know exactly how they are working or not working, that we will have a chance to make some additional changes.

And I would simply ask that as a part of your internal reorganization process and so on, that you elicit views of those in the field and come up recommendations that might be useful to you, present them. I think this is the proper Committee to present them to, and I know that Chairman and others on the Committee will then want to perhaps hold hearings, but in other ways act expeditiously to try to effect those additional reforms. Can you do that as well?

Mr. MUELLER. Yes. We are looking at ways to tweak the PATRIOT Act. The PATRIOT Act has been exceptionally helpful already, but there are areas in which we think the provisions of that act could be tweaked to assist us.

Senator KYL. I might just add in closing that I think it was the CIA Director who testified that with respect to our laws and our procedures and the methodology that intelligence and law enforcement agencies interested United States use, and his words were, the terrorists have gone to school on us. What do you take his description there to mean?

Mr. MUELLER. The terrorists that we deal with are—many of them spent time in the United States. They understand our freedoms. They understand our liberties. And they are not at all unwilling to utilize that knowledge to their benefit. They have gone to school on not only what they have learned in the United States, what they pick up on our newspapers, what they pick up on the Internet, and are skilled at identifying loopholes and ways that they could operate more effectively and efficiently. And to the extent that we publicize how we do things, it feeds the information that they have to enable them, or better enable them to launch attacks against us.

Senator KYL. And I just make the final point, Mr. Chairman, that while it is important for the American people to understand generally how we work and it is also important to protect some of the ways in which our law enforcement and intelligence agencies work, so that we do not signal to those who would do us harm, every way in which we may try to thwart them. We have to have some capabilities that they simply are not aware of, or they are smart enough to figure out ways to get around it.

Again, Mr. Chairman, I want to thank both of our witnesses here and particularly the good people at the FBI for all the hard work they are doing.

Thank you, sir.

Chairman LEAHY. Thank you. While Senator Kyl is still here, he apparently made a comment while I was out of the room, suggested I was critical of you, Director Mueller, for not consulting with Congress on your reorganization. He perhaps did not have a chance to hear my opening statement in which I praised for consulting with both Republicans and Democrats about your efforts at reorganization and praised what you have done on your efforts for reorganization, as I have on the floor of the Senate and as I have to the press on numerous occasions. I did express, of course, the fact that I was surprised at the new revised guidelines of the Attorney General, basically quoting what the Republican Chairman of the House Judiciary Committee, Congressman Sensenbrenner said, that he was surprised at the lack of consultation on those guidelines, that he had heard of them only two hours before they were announced. I have yet to have any consultation on them, although I have read the 100 pages in the website.

But just so the Senator from Arizona—and I am sure he did not want to misstate my position—but I will restate it. As I said earlier in the hearing, I commend the Director, as both Senator Hatch and I did in our opening statements for his consulting with us, and expressed my support of the reorganization plan and our intention to work with him to help implement it.

Senator KYL. I appreciate the Chairman's clarification.

Chairman LEAHY. I knew you would.

Senator Feingold.

STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. Mr. Chairman, let me first thank you for your leadership and for holding the hearing on these important issues, and Director Mueller, Mr. Fine, welcome and thank you for joining us here today.

Before I get into my questions, Mr. Chairman, I do want to express my deep concern about something you have mentioned: the revised Attorney General guidelines that expand the FBI's domestic surveillance authority. I fear what these revised guidelines might mean for law-abiding citizens who rightfully expect privacy in their daily lives and in their political associations.

One sad chapter in our country's history, unfortunately, is the period when certain groups were unconstitutionally targeted for surveillance by investigators because of their race or because they held certain political views. I do not want the history of our present day to note that our citizens' basic rights of political expression were chilled by their government.

The Judiciary Committee has a critical responsibility to exercise oversight of the Justice Department's activities, especially when these activities implicate fundamental freedoms guaranteed by our Constitution. So, Mr. Chairman, I urge this Committee to hold separate hearings on these revised guidelines once we have had more time to analyze the changes and assess their effect.

Director Mueller, I am not going to spend all of my time on the guidelines, but I do want to clarify a couple of things. You were asked earlier today in a question from Senator Leahy about this, and I am not sure I understood your answer. Did you personally review and approve the revised guidelines before they were announced by the Attorney General?

Mr. MUELLER. I am not certain that there was any approval process, formal approval process. I know I was kept apprised of the ongoing discussions leading to the finalization of these guidelines.

Senator FEINGOLD. Did you personally review them?

Mr. MUELLER. I reviewed—well, I had discussions with persons in the Bureau who were involved in that process. Did I actually take and look at the guidelines before they were announced? No, but I had known and been briefed on the changes in the guidelines.

Senator FEINGOLD. With regard to the issue of the guidelines, is it not true that under the FBI's separate guidelines for foreign intelligence and international terrorism investigations, which have not yet been modified, that this kind of surveillance of, let us say, political meetings or religious services, can be done without a suspicion of criminal activity?

Mr. MUELLER. I would have to check. Off the top of my head, I have not looked at that and am not that familiar with that portion of those guidelines.

Senator FEINGOLD. Well, is there any evidence that the previous guidelines for domestic surveillance, with the restrictions that have now been lifted, inhibited the FBI investigation that might have prevented the September 11 attacks?

Mr. MUELLER. I am aware of anecdotal evidence with regard to, say, using websites, for instance, using the databases that we would have liked to have used previously, yes. The one thing I want to make clear is that my understanding of the previous guidelines required certain predication for initiating a certain series of steps that agents were allowed to undertake. It never said you could not go into a public place, but it was read to mean you could not go into a public place because there was not specific authority given——

Senator FEINGOLD. Well, I am not sure about that, because what I am trying to point out here is that the FBI had authority in investigating international terrorism to do this kind of surveillance, as I understand it, under the current law and current procedure. So I do not understand why this additional——

Mr. MUELLER. This is a separate set of——

Senator FEINGOLD.—guideline is needed.

Mr. MUELLER.—separate set of guidelines that address the—and the interaction of the two guidelines, I am not certain it is always the same, but these guidelines, the ones that were changed, the general criminal guidelines, did not have the same provisions as the international guidelines.

Senator FEINGOLD. What I am suggesting, though, is that the international ones did give you sufficient authority to do what you wanted to do here, and I am not sure what is the basis or predicate for these new domestic guidelines, but I will be happy to follow up with you on that.

Mr. MUELLER. I will have to go back and look at that.

Senator FEINGOLD. Director, we have talked a little bit today about the fact that the administration asked for and Congress passed the USA PATRIOT Act last fall. The Justice Department told Congress at that time that it needed more expansive powers to conduct surveillance and wire taps and other searches and seizures in order to protect our nation from future terrorist attack, and I do recognize that we live in a different world with different threats. Nonetheless, I voted against the so-called PATRIOT Act because I thought it went too far.

Now, as we have heard today, the Justice Department seeks to expand the FBI's ability to conduct investigations and surveillance even more as set forth in these Attorney General guidelines that we are talking about. But, I think Congress is first entitled to know how the extra powers already granted to the Department and the FBI have been utilized. Senator Kyl questioned you about it, and you indicated it had been quite useful.

I would like you to tell us, Director Mueller, how the FBI has used the new powers granted by the PATRIOT Act. For example, how many wire taps have been authorized? How many requests to seize records have been approved and executed?

Mr. MUELLER. Off the top of my head, I do not have those figures. We can get you those figures.

I can tell you that there are two provisions that have been exceptionally useful. One is the changing of the language for the FISA from having to show a primary purpose, that the investigation or the request for the FISA was for the primary purpose of a foreign intelligence goal, to a significant purpose. That has enabled us to utilize the FISA capability in ways that we had not been able to use it before.

The second area that I think has been helpful is removing the bar to the CIA obtaining grand jury testimony and testimony that may have arisen out of a grand jury proceeding that in the past had been—we had been barred from providing to the CIA. Those two provisions have helped us, I believe, tremendously.

Senator FEINGOLD. I am intrigued by that answer, and I thank you for that, but that second provision you mentioned I do not think raised a lot of concerns among civil libertarians. What I will be especially interested in is to what extent the more controversial provisions have provided any benefits.

So I would ask you and the Department to provide the Congress with a full and comprehensive report about the use of the powers granted by the PATRIOT Act. I think we are entitled to that in any event, but when you are asking for more powers, surely we have a right to know what has been done with the new powers. An important way to ensure that a proper balance is struck between civil liberties and national security is obviously to monitor and review these powers, and I really feel we need this before some of these further powers can be examined.

I would like to continue my questioning by turning to the subject of the FBI's performance prior to September 11 and how it handled the Phoenix memo. I have been very troubled to hear some of my colleagues and Justice Department officials quoted in the press saying that they believe concerns of being accused of racial profiling led the FBI to not act on the Phoenix memo. I think it

is a distortion to say that acting on the memo would have resulted in racial profiling. That memo contains specific information about specific individuals.

I think there has been a serious misunderstanding of racial profiling and what it means. Indeed, I think these claims may very well be a distortion, maybe even a deliberate distortion, to distract attention from real mistakes or to cast aspersions on responsible and still necessary efforts to eliminate racial profiling in our country, which both the President and the Attorney General have said is illegal or should be made clearly illegal. Under any version of a ban on racial profiling, when law enforcement has legitimate reason to believe that specific individuals may commit a criminal act, obviously, law enforcement may take whatever action is necessary.

Director Mueller, you do not believe that concerns about being accused of racial profiling were a fact on in the failure to act on the Phoenix memo pre–9/11 or to connect it to the Moussaoui investigation, do you?

Mr. MUELLER. I have seen one indication that a person who was involved in the process articulated that as a possible concern.

Senator FEINGOLD. Do you think that was a legitimate reaction by that person?

Mr. MUELLER. I am not going to second-guess because I cannot put myself in that context. All I can say is that that person said that it may be—it was a concern to that individual.

Senator FEINGOLD. Well, I am troubled to hear that and I was hoping for a different answer. I was hoping for you to say that, clearly, what was needed there was not some sort of an exception from a rule against racial profiling. Do you believe that having FBI agents contact flight schools and ask whether any students had exhibited suspicious behavior, for example, maybe they expressed interest in flying but no interest in take-offs or landings——

Mr. MUELLER. No.

Senator FEINGOLD.—is racial profiling?

Mr. MUELLER. No. No.

Senator FEINGOLD. Well, this is a critical——

Mr. MUELLER. No, I am not. All I am saying, Senator, is that there was one person who had articulated that. Do I believe that—if the question is, do I believe that that was a valid concern, no.

Senator FEINGOLD. Good. That is what I wanted to hear and I think it is critical for you and for the Attorney General and everyone else to make it clear. What we can gain out of this whole disaster is a clear understanding of what is the difference between racial profiling, using a criterion like that as the only or main criterion, versus the very legitimate and important work that you are trying to do to follow up legitimate leads. Even though some people want to make 9/11 the excuse to not deal with racial profiling, I am hoping that the opposite will occur—that the public and all law enforcement people will come to realize that there is a big difference between illegitimate racial profiling and following up on legitimate leads. I appreciate your final answer there, because we need to fend off these claims that the inability to engage in racial profiling somehow had anything significant to do with what happened on 9/11. I thank you very much.

Chairman LEAHY. Is that all?

Senator FEINGOLD. Is there time left? I thought I saw a red light there.

Chairman LEAHY. You did.

Senator FEINGOLD. I would love more.

Chairman LEAHY. The problem is, you would think sitting this close to the dais, you could see them, but the way the lights are there, it is almost impossible. I do appreciate members who have tried to stay, at least by Senate standards, within the time.

Senator DeWine?

STATEMENT OF HON. MIKE DEWINE, A U.S. SENATOR FROM THE STATE OF OHIO

Senator DEWINE. Thank you, Mr. Chairman.

Mr. Director, thank you for staying with us through this long testimony today. This Committee will have the opportunity in an hour or so to hear Agent Rowley testify, and we have already had the chance to read a redacted portion of his letter and also to read her testimony. I would like to make a couple of comments about that and then I would like to ask you a couple of questions about that.

One of the issues that I think we really cannot get into today is the whole issue of probable cause as far as the facts. That is just not something that we can explore as thoroughly as it would need to be explored to make any determination, whether each one of us in our own mind thought there was probable cause there. But I would like to make a comment.

It seems to me that all the decisions, or the decisions that are made in regard to probable cause at the FBI, at the Justice Department, ultimately come back to two things. One is the statute, but then, also, how that statute is interpreted by the FISA court.

I remember when I was a county prosecutor that the police would come in and want a search warrant. We were not dealing with anything of any magnitude such as this, but we were dealing with what we thought were important things. And I would tell them "Judge So-and–So will not accept it," and that was my answer. That is not enough. I was guided by the Constitution, but I was also, frankly, guided by what I knew the judge I dealt with everyday would accept or would not accept.

I just think that something that we need to keep in mind as we judge whether or not there is probable cause here, is that it is important for us at some point to look at how the FISA law is actually being interpreted and, therefore, what impact it has on the people at the FBI and how Agent Rowley's, the people who she has to kick it up the line to.

While we are talking about FISA, let me also make a comment, if I could, and ask for your brief comment about something else, and that is Senator Kyl and Senator Schumer's bill which would change the FISA law. There is an interesting article in, I believe, today's Wall Street Journal that quotes Philip Heymann, who served as President Clinton's Deputy Attorney General. He said that that legislation does not go far enough and he is quoted as saying that the authorities should be able to monitor non–U.S. persons based on a reasonable suspicion that they are engaged in terrorism, not the higher probable cause standard, as the amendment proposes.

I think that is something that we at least ought to look at. We are not dealing with U.S. citizens. We are not dealing with legal aliens. We are dealing with non–U.S. persons and it seems to me that if we had reasonable suspicion that they were engaged in terrorism or about to be engaged in terrorism, most Americans, I think, would think that we should grant that search warrant.

I do not know if you want to comment on that or not. If you want to just pass, I will accept either answer.

Mr. MUELLER. I think it is something we definitely ought to look at with the Department and evaluate whether this is the proposal that we should back.

Senator DEWINE. I will accept that answer and I think it is something that we ought to at least look at. I think we need to understand how FISA really works in the real world. We also need to understand exactly or have a debate about where we think we should be, what we should be doing in the world we live in today in regard, not to U.S. citizens, but in regard to people who are not U.S. citizens and people who are not legal U.S. aliens.

Let me move to another portion of Agent Rowley's letter, though, which I find to be the most important, and I think most interesting. I suspect that this letter, this testimony could have been written by thousands of FBI agents because, really, there is a tremendous amount of frustration there about the bureaucracy that the individual agent has to deal with.

You inherited a great organization, but also a great bureaucracy, and with that comes all the problems of a very entrenched bureaucracy. And as you try to reshape this bureaucracy into a lean machine that can go after the terrorists, to me, that is your biggest challenge. Agent Rowley is very specific. She talks about, and again, I think this could have been written by any number of your 11,000 agents: administration—lift some of the administrative burden from the line field supervisor; culture—transition from a risk-averse to a proactive atmosphere by changing our evaluation process; inspection—performance evaluation; technology—something you and I have talked about many, many times—continued technology upgrades, integration projects. And it goes on and on and on.

To me, your biggest challenge is how you are going to do that. I am going to give you a chance to answer, but let me ask you two other related questions, and they are related.

That is, how are you going to carry out what you have stated as one of your objectives—to encourage and reward people who deal with counterterrorism, people who go into the FBI, who work counterterrorism every day. How does that become the thing that is rewarded just as much as somebody else who is not doing counterterrorism?

And how do you reward those who are involved in internal security? The reports that I have read, the people who I have talked to have indicated to me that internal security within the FBI has been looked at, frankly, as something that is maybe important, but that is not how you advance. That is not how you move up the line. How do you emphasize those two things and how do you deal with the culture problem?

Mr. MUELLER. Let me start with the last two and then go to the former, and that is counterterrorism, counterintelligence. You start with new agents, explaining with the new agents what the mission of the Bureau is and what the two priorities of the Bureau are, number one, counterterrorism, number two, counterintelligence, and you include it starting with the new agents, promoting persons up in the ranks who have had the experience in counterintelligence and counterterrorism is critically important to turning that around. Finally, the third thing is put leaders in charge of those particular divisions who are dynamic, who can explain how important the work is and how interesting the work is.

And as to the last, I have got leaders now in the Counterintelligence and Counterterrorism Sections that I think are dynamic, that people will look to as leaders in the future and will also, at the same time, understand that this is the critical mission of the Bureau. The Bureau has been terrific. Once you say, this is the hill, we have got to go take it, the agents have been terrific in lining behind that particular mission as articulated and getting the job done. They did it in the wake of September 11. They will do it in terms of the prevention side.

The bureaucracy is frustrating.

Senator DEWINE. Your agents are frustrated. That is what I see. They are frustrated and there are so many good people out there who are doing so many good things, and that is what——

Mr. MUELLER. I am as frustrated often as they are. Part of it is the technology. We have not had the improvement in technology that allows us the horizontal information sharing. When I sign off on a memo, there are a bunch of people, there are eight people that sign off before me. It is a paper-driven organization that has established regimens that we have to look at from top to bottom, but we have to do it in the context of the new technology.

I will give you an example of—there are things that occur that persuade people they do not want to be supervisors. One is doing file reviews. We do file reviews now. An agent has 100 files. Somebody goes and pulls those 100 files down, puts them on a desk, and you go through that file one by one and put in notations. Why would one want to be a supervisor when you have that kind of paperwork to do, when you have the computer capability and capacity to do it on a screen in ten minutes?

So much of it is tied in with the new technology, but with the new technology has to come new procedures, new lessening of the bureaucratic approvals and a view of doing things quickly, expedited, getting the job done with the assistance of the technology.

When you look at the relationship between Headquarters and the field, it is critically important in counterterrorism and counterintelligence, in my mind, to have persons that are respected at Headquarters who are heading up those particular divisions—it is true in criminal also—so that when people come back to the field for advice, when people come back to the field to get something accomplished, they have got somebody there who has done it before, has done it maybe 20 times before, and is as aggressive, if not more aggressive, than the people in the field.

And so it is people, it is technology, and it is changing the procedures and that is what we are attempting to do.

Senator DEWINE. Thank you very much. Good luck.

Chairman LEAHY. Thank you. I do appreciate the questions. I appreciate Senator DeWine's comments on FISA and Senator Feinstein's questions on the process. We have heard from Coleen Rowley that supervisors at FBI Headquarters made changes to the Minneapolis agent's affidavit, she said, to set up for failure.

The New York Times also reported another Headquarters agent was basically banned from the FISA court by the judge based on his affidavits. Senator Specter has raised questions of this. He and I talked during the break about perhaps sitting down with Judge Lambert and the FISA court to find out what is going on. I worry about having a secret body of case law developing in a secret court system and not having any Congressional oversight. I am trying to dig out all the facts that go before that, but the legal reasoning, and I am concerned about that and we certainly would invite any Senator who would like to be involved in that, we will go into how the FISA court works, what the reasoning is behind it, because there has not been, until recently.

Senator Schumer has shown the patience for which he is renowned.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Thank you, Mr. Chairman. I appreciate it. In Brooklyn, I am one of the most patient people, you should know.

Chairman LEAHY. In Brooklyn, yes.

[Laughter.]

Senator SCHUMER. In any case, I want to thank you for having these hearings. I think they are needed, they are timely and extremely appropriate, and anybody who, I think, thinks we should not have hearings like this will change their mind after watching how it is done today and how you have conducted it.

I also want to thank you, Mr. Mueller. This is not an easy job. I can see it on your face. You look a little different than you did when you were here first and sworn in——

Mr. MUELLER. I hope not.

[Laughter.]

Senator SCHUMER.—but I think all of us respect that you are doing your darn best here and it is not an easy circumstance.

I would just like to make one point to you and maybe you can convey this to the Attorney General—I have myself—before I get into my questions, and that is this. We are dealing with, since 9/11, there have been so many changes in society, but there has been none that are probably more important in the future than reexamining the age-old balance between security and freedom. If you read the Founding Fathers in the Federalist Papers, that was one of the things that concerned them most. If there were ever a time and place where the Founding Fathers wanted debate, wanted discussion, wanted a variety of input, I think it is in that area where freedom and security, with a push and pull between freedom and security, which any democratic society has to deal with.

I have found just too often an aversion to that in the Justice Department, and I think in the FBI, as well, although not necessarily to you, and I know the Justice Department can control some of the

things you say and do. We would have been so much better off in areas like military tribunals and what happened at Guantanamo and some of these other things if there had actually been debate, and I think you know that if you came to this Congress and we debated it, the result would not be doctrinaire. There are people who are doctrinaire on the hard right who want to just remove everything and there are just as many on the hard left who say, do not change a thing. But I think the consensus of this Committee is somewhere balanced in the middle and I think we came out with a good product with the PATRIOT Act as a result of that consensus.

I would just wish to convey the message that I think it would work out better for the Justice Department, for the FBI, and for the American people if there were more debate before we came to a conclusion, not just, you know, at 10:00 a.m., the Attorney General and you have a press conference and say, here is what we are doing when it comes to these very sensitive, very important issues where we do have to recalibrate and readjust. I think that would be better for everybody. What we have found when it has not happened, again, there has been sort of back-tracking because it is always better to do that.

I would like to talk about a few issues, ask you some questions on a few issues here. The first is the computers, which, as you know, has been something I have cared about for a while. When I heard what you said earlier, it seemed to me that at least before 9/11, the FBI computer system was less sophisticated than the computer I bought my seventh grader for about $1,400, so let me get that straight again.

In the trenches, in the Minneapolis office or somewhere else, before 9/11, if they punched in the word "aviation" or "flight school," not a name because you said it was different for a name, could they get every EC report that mentioned "aviation" and "flight school"?

Mr. MUELLER. It is my, and I am not sufficiently expertise in our computer systems, it is my—if you put in "airline," you may well be able to pick up those—well, actually, can you excuse me just a second?

Senator SCHUMER. Sure.

[The witness conferred with staff.]

Mr. MUELLER. This gets into the technology. I do not believe it can be done because I do not believe there is full-text retrieval, number one. And secondly, there was a system in place at the time of blocking certain cases from searches, not necessarily from Headquarters but searches from around the country as a part and parcel of the security provisions, so that there are certain—for instance, the Phoenix EC, if the Phoenix EC was uploaded on the computer, there are only a limited number of people that could see it. A limited number of people would be able to do the search of it to pull up "flight school."

Senator SCHUMER. That is a different issue, but was the technology there that if you punched in certain words, that you can see every report that mentioned those?

Mr. MUELLER. I do not believe that is the case, but I am not sufficiently technologically astute to be able to say that with assuredness.

Senator SCHUMER. Right.

Mr. MUELLER. The one thing I do know is that you have to put in the specific—if I put in "Mueller," it has to be M-u-e-l-l-e-r. It will come up M-u-e-l-l-e-r. What we will not pull up is M-u-l-l-e-r, M-i-l-l-e-r, or other variations of it.

Senator SCHUMER. That is a little different. I mean, every day, every one of us goes on our computer and does searches of certain words.

Mr. MUELLER. We may have had——

Senator SCHUMER. It is not very difficult to do, and I guess what I would ask you is, how was it? I mean, I think this is important for——

Mr. MUELLER. I think we are way behind the curve. I have said it from the first day——

Senator SCHUMER. But how was it we were so far behind the curve that it was almost laughable? What was wrong? That is not something dealing with information sharing—well, maybe it is. Maybe it deals with turf in its most fundamental way. But it just makes my jaw drop to think that on 9/11 or on 9/10, the kind of technology that is available to most school kids, and certainly to every small business in this country, was not available to the FBI.

Mr. MUELLER. I do not want to go too much in a retrospective. One thing I will say, one of the, I think, one of the contributing factors over the years is the belief the FBI can do anything, that we have computer specialists, we have scientists, we have all of that. But when it comes to certain areas where there is expertise outside the FBI, we need to do a better job bringing that expertise into the FBI to utilize the funds that are given to us by Congress to get a product that will——

Senator SCHUMER. I understand. I am trying to do this because I am trying to figure out the culture, because I think lots of the problems we have are just sort of simple—simple, I guess, is overstating it, but are things there should be no debate about, no ideological debate or anything else. Can you just elaborate a little. Why was it so hide-a-bound? Why was the agency so—that they did not have a computer system, given they knew they had, I do not know how many agents then, probably close to the same amount now, 10,000, 11,000 agents, and they knew that no individual could coordinate all this, but they did not get a rudimentary computer system to allow it to be coordinated.

You know, when we talk about analysis, you have talked about it, you are right, but the word "analysis" these days is analogous to computer because you need to separate in your individual searches the wheat from the chaff, and it does not take a great expert to figure that out.

I am trying to figure out what went wrong then, because that will give us some of the answer to how you correct it for the future.

Mr. MUELLER. I will tell you one anecdote. When I first came in and did a tour of the building, in the FBI, there is a computer room downstairs right behind where you get your badges and the like, and I walk in. It is a big room, and half the room has servers. Well, servers have gotten a lot smaller, so there is a lot of room over there. On the other side of the room, there were a number of different computer systems. There were Sun Microsystems, there

were Apples, there were Compaqs, there were Dells, and I said, what is this? The response was, every division had a separate computer system until a year or two ago.

Yes, that is reflective of the computerization of the Bureau, but many companies are the same way. I am interviewing now for CIO and I will talk about their experiences in going into Fortune 500 companies and it will be the same thing, the stovepipes, the various systems, and the necessity of getting a common architecture and a platform for the organization.

Senator SCHUMER. Okay. My guess is, those companies are not doing too well. I would not hire the CIO from one of those.

[Laughter.]

Mr. MUELLER. I need one of the CIOs who has taken one of those and brought them into the 21st century.

Senator SCHUMER. Does every agent now and every employee who needs it have access to e-mail and the Internet?

Mr. MUELLER. They have access to the internal e-mail. We have a classified system and, consequently, to have e-mail outside the FBI you need to have a separate computer. Many do, but not all.

Senator SCHUMER. Another area I am concerned about, what is our progress in terms of hiring people who speak Arabic, hiring people who speak Urdu and Farsi? This is something that we have been trying to get the FBI to do for a very long time. Can we translate every needed interception in those languages into English quickly?

Mr. MUELLER. In real time with regard to terrorism cases, yes, and that is the emphasis and the priority, to assure that we have anything that touches on terrorism, that we have real-time translations. Now, it may be in certain instances 24 or 36 hours for a particular—for some reason, but that is where we have got the emphasis. We have hired—I would have to get you exact figures, but well over 100 additional specialists in the last four to five months.

Senator SCHUMER. By the way, just going back to the computer system, is it considerably better now, or it is just—when Senator Specter asked the questions, I know you are on the way to improving it.

Mr. MUELLER. Yes.

Senator SCHUMER. But right now, could Agent Smith in the Minneapolis office punch in the word "aviation" and get all the EC reports?

Mr. MUELLER. We are laying the groundwork. We have the new——

Senator SCHUMER. You are not there yet?

Mr. MUELLER. No. We have the hard drives. We have the software packages, the operating systems, we have the LANs and we have the WANs, which is the foundation that we had to put in. We do not have the data warehousing. We do not have the software applications that we need to do the kind of searching that is necessary.

Senator SCHUMER. How long will it take until we are up to snuff?

Mr. MUELLER. Well, when I came in, I said I wanted it done in a year and I have been, for a variety of reasons, been much more involved now in the inner workings of getting it and I cannot get what I would want in a year. Probably two years, but we will have

varying stages of capabilities as we go through this two- to three-year period.

Senator SCHUMER. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, Senator.

Senator Sessions?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you.

Chairman LEAHY. I thank you for your patience and your attention to this hearing.

Senator SESSIONS. Thank you. I will follow up a little bit on Senator Schumer's remarks, but I would want to mention that with regard to your revised guidelines, as I see them, there is nothing close to a violation of constitutional rights as the courts have interpreted and certainly nothing that violates statutory rights, and it is within your power, is it not, to alter those guidelines as you have done so?

Mr. MUELLER. I believe it is within the power of the Attorney General, yes.

Senator SESSIONS. I would just say it leaves it up to us. If people in this Senate or Congress are not happy with it, we can offer legislation that could alter those guidelines, but I do not think there would be much support for it. Some can complain about it, but I believe you are doing the right thing. You are taking some steps that will help your investigative power. It is not in violation of the Constitution or statute, and a bill to overrule what you did would not get ten votes.

Let me ask this. You have been talking about the computer systems. As you have been a United States Attorney and dealt with a lot of Federal agencies, it strikes me that the last refuge of a bureaucratic person who has made an error is to claim the computer problem, and I am serious about this question.

The Arizona memorandum that came up, as I understand it, according to the Los Angeles Times, it was sent off by a clerk to somebody. It did not reach the head person in the section. In the future, Mr. Mueller, would not you expect a memorandum concerning such a serious subject, so thoughtfully put together by an agent in the field, to go to that supervisor within minutes, within hours of being received, and be personally reviewed by that person?

Mr. MUELLER. Let me just start by saying that——

Senator SESSIONS. Computer or no computer.

Mr. MUELLER. Computer or no computer. A computer is part of the issue, but there are other issues that had to be addressed and that is the procedures in the section and those were changed shortly after September 11 to assure that a unit supervisor reviewed each and every one of these electronic communications that comes in before they were deemed to have been completed.

We also put into place a circumstance where items that come in that relate conceivable terrorist threats or terrorist activity are included in briefing papers that are provided to me daily so that those tidbits of information not only come up to the Unit Chief and the Section Chief and the Head of the Counterterrorism Division, but also to me.

The other way we have changed things is that there is now a joint CIA–FBI threat matrix so that during the night, any threats that come in, any pieces of information about flight persons and persons at flight schools will be put into the threat matrix that is looked at the following day by George Tenet and myself and, ultimately, the President.

Senator SESSIONS. Well, you were in office seven days when this attack occurred. You were not there when the memorandums were received either from Minnesota or Arizona. Certainly, it is not your direct responsibility. You cannot be held responsible for something that occurred before you took office. But I guess I know you are loyal to your troops and the people out there in the field, and I believe in the FBI. I have tremendous respect for it. But do you not think that was not an acceptable system, computer or no computer, that somebody should have picked up on, let us say, the Arizona memorandum and/or the Minnesota memorandum and that a central person should have been reviewing that and should have at least been able to raise questions about the possibility of those two bits of information that could have given indication of a terrorist plan?

Mr. MUELLER. The procedures in place were inadequate.

Senator SESSIONS. I hope that you will feel free to say that. I know you are a good Marine and a good loyal prosecutor, but I think the Director should be quite direct about errors that occur and that procedures are being inadequate.

Do you now, in this new plan, do you have an individual or close group of individuals who will be personally reviewing critical information and, for example, if the Phoenix memorandum or Special Agent Rowley's memorandum came forward, would even you see that under the present circumstances in short order?

Mr. MUELLER. The salient portions of that memo, I would see. I have a new Chief of the Counterterrorism Division, a guy named Pat D'Amuro, who I brought down from New York, who was head of the Joint Terrorism Task Force for a number of years and is an expert in al Qaeda who is heading it up. I have got a new deputy and I have new section chiefs throughout. We have changed the personnel, expanded the personnel, realigned the assignments, and are in the process of continuously doing that, particularly with hoping to get approval for the reorganization so that exactly that type of piece of information is not overlooked.

The way we are doing it now is by extensive briefing all the way up the line. But we need to put into place the individuals that will make this as part of the day in, day out review. Part of it also is to bring in the expertise of the CIA who has a different expertise than our investigative agents in terms of being able to look at things and put pieces into a larger analytical composite so that we could provide a product to the decision makers but also take action on that product, and that is part of the reorganization that I proposed to Congress.

Senator SESSIONS. I like the reorganization. I salute you for it. I believe it is going to open up the FBI. I believe it will vastly enhance your ability to spot and act on terrorist information. This is a quantum leap forward. There is no doubt about that.

So you are telling me that you are confident now that agents in the field will promptly send in any reports of entities, FD–302s, they will come straight in and that somebody will be reading those with some experience and authority immediately upon receipt?

Mr. MUELLER. Well, we are not where I want to be. Congress has given us a number of additional analytical slots. Hiring up for those slots, getting the type of qualified analytical personnel that you want and having them trained will take a period of time. We have had persons helping out——

Senator SESSIONS. But let me say this. I do not believe it takes that long to read the Phoenix memorandum or the Minnesota memorandum. Somebody can read key documents when they are coming in. If they are not, then you have a gap in there and we may not act when a pattern occurs.

Mr. MUELLER. We have changed the procedures to make certain that that happens, but we have more to do in terms of expanding on our analytical capability and that is what I have proposed to Congress.

Senator SESSIONS. You know, I remember trying a case, a pretty significant corruption case, and we had a wonderful FBI agent on the stand and the defense lawyer was attempting to discredit her, and had her say that all FBI agents are Special Agents, and he said, "So it is not so special, is it?" And she looked him right in the eye and she said, "I think it is." I think being a Special Agent in the FBI is a great thing and I do not want to have anything I say misconstrued as undermining the integrity and the work ethic and ability and skill of our agents.

But I have, as I think you have seen, because you more than anybody that has ever held this office, I suppose, have been in the field trying hundreds of cases and know how the FBI works. That does not mean we cannot make it better.

I think Agent Rowley, her complaints were driven by a high opinion of the FBI, a high goal for what she would like to see occur and I appreciate you working on it.

Let me ask this. With regard to the Moussaoui search warrant, you early on in the matter responded in defense of the decision that there was not sufficient probable cause. Let me ask you, had you at that time personally reviewed all the documents or were you relying on the advice of others?

Mr. MUELLER. I was relying on what I was told in the briefing. I had not parsed the documents.

Senator SESSIONS. Well, I do not think there is a person in the FBI that is better capable of determining whether probable cause exists or not than you. You tried some of the most important cases in the country. You know what probable cause is and I am glad you are there.

But do you think those people that oftentimes say no to probable cause realize, and have they lost sight of the fact that they are not the judge, that they are not the Department of Justice, that they are advocates for national security and they ought to look at it in a positive light, and that if they believe it is important for the security of America, maybe they ought to take it to the judge and see what the judge says? Do they understand that sufficiently?

Mr. MUELLER. I do think they do, but I do believe we need education in the FISA, not just at Headquarters but also in the field, as to what probable cause means, how you can determine, get the facts to satisfy that standard, and there is more than we can do to educate not only persons throughout Headquarters but also in the field and we are undertaking that.

Chairman LEAHY. And I might add, we are going to do some education of the Committee, too, on the whole FISA issue. Senator Biden and I and others have been talking about that and we will. Thank you.

Senator SESSIONS. Could I ask one yes or no question? My time is out.

Chairman LEAHY. Only because you are such a nice guy. Go ahead.

Senator SESSIONS. Thank you, Mr. Chairman.

Do you now believe that it was a correct decision or have you had a chance to review the documents personally?

Mr. MUELLER. I have not parsed it and there are a number of facts that may bear on that decision and I have identified the sequence of facts that went into that determination.

Senator SESSIONS. I think it was a close call.

Chairman LEAHY. Trust me, the Director is probably going to get another opportunity to talk about that later on.

Senator Durbin?

STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DURBIN. Thank you, Mr. Chairman, and thank you, Director Mueller and Mr. Fine, for joining us today.

Let me echo the comments of Senator Sessions about the feelings we all have about the men and women of the FBI. We have talked a lot about the management shortcomings, technology shortcomings, but when it comes to dedicated professionalism, there are no shortcomings. These are men and women who are dedicated to the safety of America. Many of them risk their lives every single day for us, and it bears repeating by all of us on this Committee that nothing we say will detract from that.

Secondly, let me tell you that I continue to stand in your corner. You have been in the center of a maelstrom here, but I think that your honest, open, and candid answers and your commitment to reform have put you in the position in my mind exactly where you should be, leading this effort at the FBI, leading this effort to reform the FBI.

I also want to say to the Chairman of the Committee that I thank him for this hearing and I think we cannot allow the fog of war to stop us from a frank discussion of security shortcomings in America. Your leadership in calling this hearing, I think, is highlighting things that we need to do to make America safer, and in that regard, I think we are meeting our obligation to the American people.

Chairman LEAHY. Thank you.

Senator DURBIN. Director Mueller, you have proposed an ambitious reorganization of the FBI, dramatic changes in criminal law, reallocation of thousands of law enforcement professionals. You

have really suggested to us that we need to overhaul the FBI. Overhauling the engine of a car is no small task, but overhauling an engine of a car while it is moving may be impossible, and that is what I want to get to here, when we talk about how we are going to achieve some of the goals that you have set out.

We are at a time where America needs the very best in defending our nation against terrorist threats, but we have been told that FBI computers cannot even access key words today. Yesterday, it came to light that the Department of Justice is going to implement, based on a 1952 law, the fingerprinting and photographing of those visiting the United States on visas. The range of possible numbers that could be affected by this, I have read from 100,000 to 35 million, somewhere in between, but it is a massive undertaking in terms of the collection of this data.

I think it raises an important question as to whether or not the FBI can achieve this with the INS, collecting, processing, and transferring millions of pieces of information without establishing first that both of those agencies have the technical capacity to do that, as well as the management skills and personnel to collect it, evaluate it, and transfer it where it is necessary.

Let me say that I have read Mr. Fine's report to this Committee and I am going to ask him if he would comment on this. You looked at two specific areas where the FBI and the INS were given instructions by Congress to start merging their collection of data and you found in both instances, over a long period of time, serious shortcomings.

The automated I–94 system, that goes back to the 1996 Act related to illegal immigration reform. It directed the INS to develop an automated entry and exit control system that would collect a record for every alien departing the United States and automatically match the departure records with the record of arrival. Mr. Fine, you tell us that four and five years later, there is no clear evidence the system is meeting its intended goals. It really suggests to us that given four or five years, they have been unable to come up with the most basic information Congress instructed them to do five or six years ago.

And then you go on to say, in the area of fingerprints—this appears to me to be a two- or three-year undertaking—the merging of the INS and the FBI fingerprints, you looked at the progress that has been made so that those records can be merged and used and here is what you say. "The primary finding of our follow-up review, similar to prior reports' conclusions, was the Department and its components have moved slowly toward integrating the fingerprint systems that the full integration calls for and remains years away," your language, "years away."

I want to ask both of you, Director Mueller, the new idea of collecting millions of pieces of data, fingerprints, photographs, and information about people coming into the United States and making it of some value to protecting America, raises a serious question about when that might happen under the best of circumstances. If we are still over a year away from the most basic computer technology at the FBI and we have seen repeated shortcomings in efforts to modernize fingerprinting and collection of data between the INS and the FBI, we can stop here and not get into the racial

profiling argument. We can ask the most basic question: Are you up to the job that was announced yesterday?

Mr. MUELLER. I understand the pilot programs with regard to the INS and our IAFIS, our fingerprints. I do believe the work that we do on our fingerprints, the systems that we have in IAFIS are much more advanced than, say, the computer capabilities of the computer system at an agent's desk. How that IAFIS or fingerprint system could handle this additional load, I am not certain, and that is something we would have to get back to you on.

Senator DURBIN. Mr. Fine, what is your opinion?

Mr. FINE. I believe that both the INS and the FBI have had real problems in moving forward with information technology and they have suffered from a lack of attention, a lack of dedication to moving it forward, and a lack of persistent follow-up. We have seen in our analysis of varied systems that they are behind schedule, that they often do not meet their intended purposes, and that they are not coming in according to the benchmarks that you would establish for those systems. So through the history of our analysis of both the FBI and the INS, both of them are behind the times in information technology.

Senator DURBIN. So a new program that would introduce hundreds of thousands of fingerprints, photographs, and additional pieces of critical data to be gathered by the INS and FBI, processed and evaluated and transferred, seems to me to be a pipe dream, or at least so far in the future that we really ought to get down to basics before we start expanding the collection of data.

Mr. FINE. We have not analyzed that aspect of it and that program, but they have had a difficult time assimilating and accumulating that kind of information and getting it to the right people, both in the INS and the FBI, at the right time, in a timely way. That is one of the significant problems we found in our reviews of both the INS and the FBI.

Senator DURBIN. Director Mueller, the last time you testified, we talked briefly about the Phoenix memo, and, of course, it pointed out at least Agent Williams' belief that there were suspected individual terrorist or at least suspected individuals involved in flight training in Phoenix, Arizona, and he brought that through a routine memo, I might add, to the attention of the Headquarters at the FBI.

Had the FBI developed any other information linking suspicious individuals or suspected terrorists with aviation training schools before September 11?

Mr. MUELLER. There are a number of items that I think have come up, and I cannot be exhaustive because we are turning over hundreds of thousands of documents to the Intelligence Committee. There was in 1998 an FBI pilot, I believe, indicated in a report that I think stayed in Oklahoma City that he had witnessed individuals from the Mid–East who appeared to be either using planes or obtaining flight training and that could be used for terrorist purposes.

There was back in 1995, I guess it is, out of the Philippines the report about the use of airplanes in this particular way, although not necessarily about flight schools.

Senator DURBIN. But anything more contemporaneous with September 11, 2001, where there was information collected where there were suspicions of people attending flight training schools or aviation departments at colleges and universities that raised a question as to whether there was a terrorist connection?

Mr. MUELLER. The most contemporaneous would be Moussaoui, quite obviously, right before September 11. But with Moussaoui, with the Williams EC, with the Oklahoma City observation, those are the three that I am aware of. There may be others out there, but I am not aware of them.

Senator DURBIN. Could I ask you to look into that, please, to verify that? I think that is an important issue that has been raised in some press reports that I would like to hear directly from you.

I guess the question that leads me to is do you believe, Director Mueller, that based on all the information that has come to light, particularly over the last several weeks as we have delved into all these memos and all this conversation, that we were forewarned as a nation and that we should have taken additional steps to protect ourselves before the September 11 attack?

Mr. MUELLER. There are things that we could have done better beforehand and I think on each occasion that I appeared before this Committee, I have indicated there are things that we should have done differently to ensure that pieces of information were followed up on in ways that they should have been followed up on and ways that we are now following up on them.

I hesitate to speculate because I have just a piece of the puzzle, also. What the Intelligence Committee is doing is looking not just at the FBI, but at the CIA and other agencies that had pieces of the puzzle. So I am hesitant to speculate as to what would have happened if.

Senator DURBIN. Thank you very much. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. Originally, we would have broken at this time, but we have two Senators remaining, Senator Cantwell and Senator Biden. Gentlemen, I would ask you—this will take probably about another 20, 25 minutes to wrap up everything in one last wrap-up, one simple question at the end—do you want to take a break? Do you want to——

Mr. MUELLER. I would like to go right on through and wrap it up.

Mr. FINE. Same here.

Chairman LEAHY. You want that "get out of jail free" card, is that it?

[Laughter.]

Chairman LEAHY. I should probably use a different—I was playing Monopoly with a grandchild. I probably should use a different——

Mr. MUELLER. Yes. I would not say "get out of jail free."

[Laughter.]

Chairman LEAHY. I understand. Wrong hearing. Wrong witness.

Senator Cantwell?

STATEMENT OF HON. MARIA CANTWELL, A U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator CANTWELL. Thank you, Mr. Chairman, and thank you, Director Mueller, for being here, and Mr. Fine. I certainly appreciate your attention to this hearing and the details that you have put forth so far and the work that both of you have done within the agency. The one fact that amazes me about all of this is that you took your position on September 4 of 2001. We should not forget that because some of the issues that we are dealing with here are very complex and arose long before you were confirmed as director of the FBI.

Having said that, I hope you will indulge me in what I think is the basic thinking of my constituents. My State probably has more wired home users than any other. At least 53 percent of the public has Internet access. And what does not square with them is the fact that they can have access to the paragraph that is available from the Phoenix memo and they can read the Rowley memo. The Phoenix memo says "Phoenix believes that the FBI should accumulate a list of civil aviation, universities and colleges around the country," that the field offices with these types of schools should evaluate them, and that the FBI should discuss this matter with other elements of the U.S. intelligence community.

And then they read in the Rowley memo and learn that in all of their conversations and correspondence, FBI Headquarters personnel never disclosed to the Minneapolis agents that the Phoenix Division had only approximately three weeks earlier warned of al Qaeda operatives in flight schools. They read the memo that goes on to talk about how the Moussaoui information was never shared, either.

So a great number of my constituents have written to me, having read both of these memos and information. And what it looks like to them is that the right hand does not know what the left hand is doing. And then they hear the unveiling of the new guidelines by the FBI in which new measures, possibly for searching U.S. citizens are unveiled. And as one Seattle paper said it, and I think said it very well, this looks more like eavesdropping than house cleaning. I think that is what really has the American public concerned. Where is the house cleaning?

My first question is, as it relates to the individuals that were involved in not approving the Moussaoui warrant at FBI Headquarters. Are they still in those positions and are they still responsible for that kind of decision making?

Mr. MUELLER. There are a number of people that were involved in various reviews of the two or three documents, or more documents when it comes to the Moussaoui operation. Some of them are gone. Some of them are still there. I have asked the Inspector General to review the conduct of anyone involved in the handling of those particular memoranda to determine whether or not there should be some action taken against them.

I also brought in new leadership to the Counterterrorism Division and I have told the leadership to get the best people in here, and we have not only put in new leadership but we are pulling in Section Chiefs and Unit Chiefs from around the country to assure that what happened before will not happen again.

Senator CANTWELL. So were those individuals removed or reassigned as a part of some disciplinary action?

Mr. MUELLER. No, because in my belief, before disciplinary action is taken, the Inspector General ought to look at that conduct and determine whether or not disciplinary action is appropriate.

Senator CANTWELL. So where——

Mr. MUELLER. Each of the individuals who are involved in this ought to have a right to express what motivated them, what was their thinking, what was available to them to do the job before the ultimate determination is made, and I have asked the IG to go forward and do that.

Senator CANTWELL. Agent Rowley also said in her memo she was not looking for a witch hunt, but that she was concerned that these individuals were allowed to stay in their positions, and what is worse, in her words, occupy critical positions in the FBI's SIOC command post center after September 11. Is that the case?

Mr. MUELLER. I am not certain as to the particular individual or individuals she is referring to. Some of the individuals who were in the Terrorism Division, yes. I mean, we had 6,000 agents after September 14 working on the investigation. Most in Headquarters were working in SIOC. So it may well be that those persons were working in SIOC.

Senator CANTWELL. Was there a memo or an e-mail, either internal in the FBI or, maybe to the Attorney General, maybe to the White House, that talked about and analyzed this information management and analysis failure? Was there any memo like that where you discussed internally the shortcomings of how information was available but was not analyzed?

Mr. MUELLER. You mean with regard to what happened before September 11, or are you talking about generally?

Senator CANTWELL. Post–September 11. To my constituents, it seems like the information was all there. Why was it not put together? Has there been a memo about the shortcomings?

Mr. MUELLER. Well, in terms of there have been discussions, tons of memoranda as to our technological shortcomings. In terms of specifically addressing each of the pieces of information that have arisen over the months, not that I am aware of, not a particular memorandum. The Inspector General did a brief memorandum with regard to what was happening with the Phoenix EC, but beyond that, I do not believe that there has been a retrospective done. Our understanding was that the retrospective was going to be done not just with the FBI, but with looking at the intelligence community and the FBI as a whole by the Intelligence Committee, and that is what we had anticipated would happen.

Senator CANTWELL. So you do not know of any memos that were written to the Attorney General or to the White House discussing this information analysis failure?

Mr. MUELLER. No, I am not aware of such a memo.

Senator CANTWELL. Do you not think that putting together a document like that would have been a key component to understanding how to move forward on the reorganization?

Mr. MUELLER. Well, there are certain——

Senator CANTWELL. If you will allow me, what you are going to do is exacerbate the problem. We are going to have over more infor-

mation collected under the new guidelines. Our fundamental problem before Sept. 11 was that at the end of the funnel of information we were not processing it correctly, and we are now only going to widen that funnel and put more information into it. So if we have not analyzed the shortcomings prior to Sept. 11 or listed the key points besides technology——

Mr. MUELLER. Well, I think I know enough about what we did not do well before September 11 to make a judgment as to what we need to change to do it better, which is the basis for what I have suggested that I want Congress to approve. My understanding is that there will be a lengthy—there will not be a memo, but you will have, in the Intelligence Committee, each of the witnesses come in and there will be an extensive exegesis of what should have been done, should have happened before September 11.

For my purposes in turning around the agency, I think I know enough about what was lacking to be able to make decisions on where we should go.

Senator CANTWELL. But you may not know enough about the culture and why the culture in the intelligence community is not responding. I guess my primary concern is, if I could say it most specifically, on this chart, of the reorganization effort you are now saying one of the key elements of the reorganization is creation of an Office of Intelligence——

Mr. MUELLER. Yes.

Senator CANTWELL. That is the wrong word. It should be an Office of Information Management and Analysis, because that is really where the failure was. You had all the information. It was not processed. It was not analyzed. It was not disseminated. It was not shared across agency line in a way that was helpful.

So instead of showing the American public or saying to the American public, here is our problem: We are not sure the right hand knows what the left hand is doing. Instead you are saying we need to do more eavesdropping. We have to convince people that we are going to put new processes in place to prevent more terrorist attacks, and so the fact that we have not had that thorough analysis about the culture and what you need to change there, is of concern.

I see my time is up, but I did have one more question, if I could. I do not know if we are going to have a second round, Mr. Chairman. I know we want to get to the next witness.

Chairman LEAHY. All right.

Senator CANTWELL. This question is about the new FBI guidelines. Several of my colleagues have also raised questions about them. I have read the Attorney General's comments about how he believes that we need to make sure that, the agency fights for and respects the civil liberties of individuals.

If the agency is expressing this level of concern and interest in making sure that we have the protection of the civil liberties of individuals, why not look at something—like what the private sector does on the issue of privacy. In the private sector if they want to change their culture, and they want to make sure that privacy is protected, even though they have rules in place, they create a privacy officer. Why not create a Director of Privacy and Civil Liberties Accountability within the FBI, to the person that makes sure

that the culture and the organization is adhering to the policies that protect those individual civil liberties. Not from a response from an IG saying, have we broken the law, but within the interna cultural process?

Mr. MUELLER. Well, I will tell you that I try to reach out to other opinions articulated, whether it be the ACLU or the privacy groups that have particular concerns. I did in my previous positions. I will continue to do it in the future so that I get the input before we make—as we go along making decisions, and I would be happy to consider, let me just put it that way, what you are suggesting.

Senator CANTWELL. I have read I do not know how many editorials where people have said, this is the group. This body, this organization is going to have the oversight on the FBI and to make sure that these abuses do not occur—I am sure we will have more hearings on this subject.

Chairman LEAHY. We are.

Senator CANTWELL. I am sure we will have listings and accountabilities of how many warrants were issued and a variety of things. But if the FBI is serious about those new guidelines and serious about protecting civil liberties, then having someone in the agency whose main job is to help that culture understand those civil liberties seems to me to be a wise investment.

Chairman LEAHY. Thank you. Thank you, Senator Cantwell.

We will go to Senator Edwards and Senator Biden. Then we are going to have a vote actually occur just about that time and we will finish this panel. I would note that the record will be kept open for those that have questions and the next panel would then begin at a quarter of 3:00. Senator Edwards?

STATEMENT OF HON. JOHN EDWARDS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator EDWARDS. Thank you very much, Mr. Chairman. Good afternoon, Mr. Director.

When the FBI initially rejected the FISA application for Minneapolis, my understanding is it is because the General Counsel at the FBI believed there was not sufficient legal basis to pursue it at that time. Is that basically correct?

Mr. MUELLER. I have not—there is an ongoing investigation into who said what, when, during that. At one point in time, I was briefed to believe that there was the individual, and I am not certain who the individual was, I am not certain it was the General Counsel, but a lawyer in that shop who believed that there was insufficient probable cause.

Senator EDWARDS. I did not mean to get hung up on who the particular person was, but a lawyer within the General Counsel's Office?

Mr. MUELLER. I believe that is the case.

Senator EDWARDS. Okay. Did that office of lawyers have available to them at that time the Phoenix memo?

Mr. MUELLER. I do not believe so.

Senator EDWARDS. In your opinion, had they had the Phoenix memo available to them at that time, from your own experience and your own training as a lawyer, do you believe the FISA application would have been approved?

Mr. MUELLER. I am hesitant to render an opinion because I have not parsed it. I have not sat down and looked at the facts. I have not looked at the evolution of each of the iterations of the document and I am hesitant to do that without having done it myself.

Senator EDWARDS. Do you know generally, though, what information was available to the lawyers within the office at that time?

Mr. MUELLER. I know some of it generally, but not with specificity. For instance, so much would depend on the information that perhaps came from overseas that might be specific in a particular way or fit in with another fact that could give probable cause. I have not gone through and done what I would do as a prosecutor to determine whether or not there is probable cause or not in the document.

Senator EDWARDS. Do you know what the lawyers within the General Counsel's Office believe the impact on their opinion would have been had they had the Phoenix memo?

Mr. MUELLER. I do not. I have heard at some point in time that one lawyer expressed a view that if he or she had had the Phoenix memo, it would have made a difference.

Senator EDWARDS. And that was a lawyer within the General Counsel's Office, as you understand it?

Mr. MUELLER. I believe that is the case. I believe that is the case.

Senator EDWARDS. If a FISA had been gotten before September 11, and I am sure you have seen there are press accounts today about—I am not asking you to confirm this, but there are press accounts today about connections between Moussaoui and three of the terrorists, do you think that FISA and the information that would have been gotten from it could have disrupted what happened on September 11, and then—please notice the word I am using. I am not saying prevent, I am asking disrupted.

Mr. MUELLER. Again, I have done some speculating in the past. I prefer not to speculate as to what might have happened. I am not familiar with all the intricacies of what was on the computer, what other pieces of information might have been found in his personal effects, and it is not only in Minneapolis but it is also apparently in Oklahoma City, and I have not done the analysis to determine whether or not if you put them all together there are steps that could have been taken that would have enabled us to disrupt that which happened on September 11.

Senator EDWARDS. Based upon the information that you do have, do you believe that information could have disrupted the operation?

Mr. MUELLER. I do not believe it is likely that it would have.

Senator EDWARDS. And there is some of the information that you have not yet looked at, I gather——

Mr. MUELLER. That is true, and the other point of it is there may be information in other agencies.

Senator EDWARDS. Sure.

Mr. MUELLER. In other words, I do think it is important to look back and see how we interfaced with the CIA, what information was made available and when it was made available in order to reach the conclusions that you are asking us to reach, and my understanding is that is the exercise that the Intelligence Committee is going through.

Senator EDWARDS. Last fall, toward the end of last year, actually, I asked for a briefing on the Moussaoui investigation, the Moussaoui situation, and there was a briefing that took place in January with Mr. Frasca, David Frasca, and Spike Bowman, who are, as you know, two senior FBI officials. Based upon that briefing, I actually felt reassured about the vigor with which the Moussaoui investigation had been conducted.

There are some things that have come to light since that time that I was not told about, we were not told about, at the time, and I just want to ask you about three of those, if I can.

First is that neither Mr. Frasca or Mr. Bowman mentioned the existence of the Phoenix memo. Second, they did not mention any direct or indirect links between Moussaoui and three of the September 11 hijackers. And third, they did not mention to me, or to us, because the briefing actually took place through staff, they did not mention that the Minneapolis office had some serious concerns about the handling of the Moussaoui matter by FBI Headquarters here in Washington. Did you follow those three things?

Mr. MUELLER. I believe so.

Senator EDWARDS. Okay. At the time of the briefing, which was on January 15, were the briefers, Mr. Frasca and Mr. Bowman, aware of those three things?

Mr. MUELLER. I am not certain to what extent they were aware of the Phoenix EC. I do not believe that they—I am not certain what you are referring to when you talk about the links of Moussaoui to three of the hijackers myself, so I rather doubt that they were aware of that at that time. And I believe that they may well have been aware about the Minnesota, the Minneapolis concerns, but I do not know that for sure.

Senator EDWARDS. Do you know whether the Phoenix memo, in fact, was addressed to Mr. Frasca?

Mr. MUELLER. I believe it was.

Senator EDWARDS. Okay.

Mr. MUELLER. Let me, if I could, just check for a moment to make certain that I am right on that.

Senator EDWARDS. Sure. I think you are right.

[The witness conferred with staff.]

Mr. MUELLER. Yes, it was.

Senator EDWARDS. Okay. So Mr. Frasca got the Phoenix memo. He was in the briefing. You indicated that you believe they knew about the concerns.

Mr. MUELLER. It may well have been addressed to Mr. Frasca. I am not certain that he had ever reviewed it.

Senator EDWARDS. Okay. Let me ask you a follow-up question.

Mr. MUELLER. Mr. Fine can, perhaps. He did the investigation.

Senator EDWARDS. If he knows the answer, go ahead.

Mr. FINE. I believe the answer is that while it was addressed to him, he says that he did not receive it at the time, but in the fall of last year, he was aware of it, so that was before the briefing.

Senator EDWARDS. Which would mean that by the time of this briefing in January, he would have been aware of the Phoenix memo, would have been aware, Mr. Director, based upon your testimony, aware of the Minneapolis Field Office's concerns. And the third area I asked about, or——

Mr. MUELLER. Well, I would presume, but I cannot speak for him on that.

Senator EDWARDS. Did you know it at that time, in January?

Mr. MUELLER. About what?

Senator EDWARDS. About the Minneapolis office concerns?

Mr. MUELLER. I knew there was an issue with regard to probable cause to show that Mr. Moussaoui was an agent of a foreign power. I knew that there was that issue. How that played out in terms of the—I am not certain when I learned about the discussions back and forth. I knew at least by January that there was that issue.

Senator EDWARDS. Let me ask you this. Assuming for purposes of this question, since some of this you do not know about personally, and in fairness to you, I am asking you about other people, if some or all of that information was available to Mr. Frasca and Mr. Bowman and they were here for the purpose of briefing us about the Moussaoui case, the Moussaoui investigation, what had been done, what had not been done, do you think it was appropriate for them not to tell us about those things?

Mr. MUELLER. I always think it is appropriate for FBI briefers to be open and candid whenever they come up to the Hill and brief. I do not know whether they at that point tied in. The question has come up, if you had had the Oklahoma, or the Phoenix EC in hand, would that have changed the view as to whether or not you would have gotten a FISA warrant. I am not certain they had that in the back of their mind when they were doing the briefing.

But absolutely, I believe—I believe when they came up that they tried to be honest and straightforward. I do not think they were hiding anything at all, and I expect FBI agents when they come to brief you or other Senators or others on the Hill to be absolutely straightforward and honest.

Senator EDWARDS. Do you——

Mr. MUELLER. I have no reason to believe that they were not trying to do it on that occasion.

Senator EDWARDS. Do you know why they did not tell us about any of those things?

Mr. MUELLER. I do not know.

Senator EDWARDS. Let me do one other thing very quickly, because I know my time is about up and Senator Biden has been kind enough to let me go, and I appreciate that very much, Senator.

Quickly, about the new guidelines, I think the rationale for it makes sense to me, that if people can go to religious services, regular folks can go to a religious service, FBI agents ought to be able to do the same thing. That makes some sense. On the other hand, of course, your agents have some powers that regular folks do not have and I think our concern is to make sure that there are safeguards in place to make sure that there are no abuses that occur.

I actually have no doubt about your personal commitment to that. When the Attorney General was here, though, six months ago, he said, and I am quoting him now, "To those who scare peace-loving people with phantoms of lost liberty, my message is this. Your tactics only aid terrorists."

My concern is to make sure that these guidelines, which I think on their face make a great deal of sense, actually, that they are not

abused, that we do not have individual agents out around the country conducting their own ad hoc personal vendettas against people for who knows what reason. And I do think that we strongly support what you all are doing to make sure that our people are protected. But at the same time, as you stated earlier, we believe those liberties need to be protected at the same time.

Can you tell me whether, from your perspective, you draw a line between political discussion that we may, you and I both may strongly disagree with, and what people would characterize as terrorist activity or terrorist support activity?

Mr. MUELLER. I think I can use examples of going over the edge, and that is if there is discussion about harming other individuals, killing people, undertaking some form of terrorist attacks, that clearly would fall in the range of what it states here, for the purpose of detecting or preventing terrorist activities. We can disagree politically often, and that certainly would not fall in that category, and the category is fairly narrow with regard to going to public places for the purpose of detecting and preventing terrorist activities.

Senator EDWARDS. I will just mention this in closing. We have had some discussion with you and with your staff about making some of the information, big-picture information about the use of FISAs, trends, the extent to which they are being used, available to the American people without in any way interfering with the investigations and the fight against terrorism that you all are engaged in. I hope we can continue that because I think it is an important issue. I think you would agree with me, actually, that it is a good thing for the American people to have whatever information we can make available to them without inhibiting what it is you are trying to do, so we will continue to work on that with you. Thank you, Mr. Director.

Mr. MUELLER. Thank you, sir.

Senator EDWARDS. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Senator Biden, who gets the award as the second most patient person at this hearing.

STATEMENT OF HON. JOSEPH R. BIDEN, JR, A U.S. SENATOR FROM THE STATE OF DELAWARE

Senator BIDEN. Thank you, Mr. Chairman. One of the good things about not being Chairman of this Committee anymore, I do not have to turn the lights off like you do.

[Laughter.]

Senator BIDEN. Your patience and your physical constitutions are admirable and I thank you. You may be pleased to know I am going to not focus so much on the memos. I will come back on that. But one of the things that does concern me here is you are only a piece of the puzzle and we are not—we talk about connecting the dots. I am not sure this government, us included, are connecting the dots on law enforcement here. Let me be more precise with you.

You are necessarily reorganizing the FBI. What you move, the pieces you move, affect other pieces. DEA is significantly affected. The COPS program, which this administration is eliminating, is deeply affected. The Homeland Defense Office, which you are about

to eliminate, I guess—I do not know what the hell we are doing—is about to be changed.

Now, in fairness to the President, in fairness to the President, this is all new. I wish we would not all—I think this is a place and a time where a good dose of humility is in order for Senators, for Presidents, for Directors of the FBI, for everybody, because understand, everybody should understand, you move one piece, it is affecting every other piece in this puzzle, every other piece in this puzzle. And so even if you get it 100 percent right, if you do the perfect job, you may inadvertently by what you do impact negatively on what are we all about. We are about the public safety of individuals.

I have been on this Committee for 30 years. I used to be the Chairman of this Committee. I have been the head of the Crime Subcommittee and the Drug Subcommittee and the oversight of the FBI for over 20 years. There have been a lot of changes that have taken place. The bottom line is, whether or not my mother gets killed by a terrorist or my mother gets killed by a drug lord or my mother gets killed by a junkie or my mother gets killed by a bank robber in the parking lot of the supermarket, it does not matter. She is dead. She is dead.

The single biggest problem we have facing America every single day is the drug problem. This causes 68 percent of all the violent crime in America, relates directly to drugs. More people are killed in drug-related occurrences than have occurred in all of the terrorist acts combined, not even close. Now, that does not mean we should not focus on terrorism. What I am trying to get a handle on here is whether we are doing this on the fly or we are doing this really intelligently, so I want to ask you a few questions.

Was the FBI consulted on what the President is going to announce tonight? Were you consulted? The President says thus far, there is a—what we are talking about here is there is going to be a new Homeland Defense Office, not the old one, a new one. We are doing this again. Were you consulted on the details of this new office? Will the FBI gain or lose jurisdiction as a result of this new office?

Mr. MUELLER. Respectfully, Senator, I do not believe it appropriate for me to disclose discussions I might have had with the President.

Senator BIDEN. I think that is malarkey. That is not legitimate. I am not asking you what he said. I am asking you, were you consulted?

Mr. MUELLER. Senator, I believe that I should not be forthcoming with regard to consultations with the President. I believe the President is entitled to the advice from a number of people and I do not believe that it would be appropriate for me to get into it.

Senator BIDEN. With all due respect, fortunately, I am not the Chairman of this Committee because I would not accept that answer. You are in this Committee. I am not asking you—there is no executive privilege here. I am asking you whether you were consulted. That is all I am asking you. If you cannot tell us if you were consulted before the President of the United States is about to announce a total reorganization of the entire homeland defense effort, you cannot tell us whether or not your jurisdiction is going to be

changed, you cannot tell us whether or not there will be a synthesis of intelligence from the White House sources, including all of these agencies, how are we going to——

Mr. MUELLER. I think the President is entitled to make whatever announcement the President is going to make tonight and I would be happy to come back tomorrow after the President has made his announcement and discuss it. But I do not believe that it is appropriate for me to, because of the coincidence of this hearing today, to get into discussions that the President may have had with regard to whatever he is going to announce tonight.

Senator BIDEN. I am not even asking you. Has he spoken to you about this?

Mr. MUELLER. Again, Senator——

Senator BIDEN. I think this is ridiculous. That is all right. I will move off this.

Chairman LEAHY. And there will be order in the Committee.

Senator BIDEN. I will move off this. This is one of the reasons why there is this pall that sort of hangs over the office and this whole question about what we do about homeland defense. You cannot sit here and say whether or not you have been consulted about a reorganization, I find astounding, but let me move on to another issue, the reorganization of the FBI.

How many agents are currently assigned—by the way, you all stayed, and you are right. As the author of the Violent Crime Control Act to put 100,000 cops on the street, and I wrote that myself, I want you to understand that I congratulate the FBI on their work. In your budget submission to Congress, you noted that the FBI's Violent Crime and Major Offenders Program is partially responsible for the fact that the crime rate has declined an average of seven percent per year from the beginning toward the end of the 1990s.

Now, we have some things that are happening out there. There is a demographic shift. Those folks, 37 million of them in the crime-committing years, are about to get into the system. We have a new demographic bulge. The only thing you know about crime and I know about crime, and I have been doing it as long as you have, is that when you get to be 35 or 40, you commit fewer violent crimes because you cannot jump the chain-link fence when the cop is chasing you, and the only other—for real. We do not know a whole lot more about these things.

And we also know that the crime-committing years are those kids who think they are invincible and not at all vulnerable between the ages of 12 and 18. There is a direct correlation between how many of them are out there and the crime that exists, violent crime that exists. Now, we are about to get a bulge in violent crime based on past track record because we have this new cadre of young people, the baby boomlet that is out there. We also have the emergence of new threats and we have all the other things we know about.

Now, totally, can you tell me how many FBI agents are currently assigned to your Violent Crime Section?

Mr. MUELLER. I would have to get you the figures. I do not have them off the top of my head.

Senator BIDEN. Do you know, Mr. Fine?

Mr. FINE. No, I do not, Senator.

Senator BIDEN. I can tell you. There are approximately 1,800 of them. Now, do you know what percentage, anyway, are going to be shifted out of violent crime?

Mr. MUELLER. I believe that we are shifting approximately 59 agents out of violent crime.

Senator BIDEN. How will this——

Mr. MUELLER. Not approximately. I think it is 59 agents in the proposal.

Senator BIDEN. It is. How will this shift be felt in your field offices? Do you have any sense of what that means in terms of man hours used that now will not be available to deal with violent crime?

Mr. MUELLER. Yes. The process we went through to determine whether or not, or what programs will be affected by the shift of resources to counterterrorism was to go to the agents in the field, the Special Agents-in–Charge, and say, okay, where can you pull people back from task forces? And my belief is those 59 bodies that will come off of violent crime will be where we have 12 bodies, or not bodies, where we have 12 individuals, Special Agents working on a task force addressing violent crime, we will now have nine or ten, and that will be across the country, so I think it will be a minimum impact in particular divisions. But I have also told the SACs that if there is a particular crisis or a particular threat in a city, then they should use their discretion to take others off of other programs to address that violent crime problem.

Senator BIDEN. Keep in mind, I am not being critical of your decision because you are the only guy that can do the terrorism side of this. You have got to do this. I am trying to make sure we understand what is going to be left out there.

Can you tell me what specific functions—have you categorically made judgments about local functions that have overlapped? For example, FBI agents have handled interstate car theft. FBI agents have handled bank robberies. FBI have handled things that are local concurrent jurisdiction, but we have looked to the FBI to do them. Have you made any categorical judgments about things you are not going to be in on anymore because you have to shift your resources to deal with terrorism?

Mr. MUELLER. I have made judgments. I do not know whether you would call them categorical judgments, but——

Senator BIDEN. Well, I mean categories of——

Mr. MUELLER. Categories, yes.

Senator BIDEN. I am sorry.

Mr. MUELLER. In bank robberies, I think we ought to stay in multi-county bank robberies. I have met with IACP, for instance, and they believe that we ought to stay there because we provide a service that they cannot replicate or we would not do one-note bank robberies in the future. They can handle those. Armed bank robberies, we probably will stay in those, when it comes to narcotics.

The areas that I would like to withdraw from are those where we overlap with DEA, particularly in the cartel cases, but not do it abruptly. When we have agents that are involved, intimately involved in investigation of one of the cartels, we ought to withdraw

slowly from that. We ought to probably no longer be doing cases such as marijuana cases, stand-alone methamphetamine cases, the Ecstacy cases where the State and locals can do those cases. But by the same token, we ought to be flexible in a particular area where they need our resources, where DEA is not there, be flexible to address the crime on the local level.

Senator BIDEN. I appreciate that. I know my time is up, but there is one area maybe I will submit in writing, but 400 FBI agents are coming off of drug cases into counterterrorism. Again, I do not think you have any choice but to do that. Did you discuss that, since it has happened already? Did you discuss that with the Director of the DEA?

Mr. MUELLER. Well, it has not happened because the proposal——

Senator BIDEN. Let me put it this way, you are formally proposing it.

Mr. MUELLER. Yes. I did discuss it——

Senator BIDEN. Did you discuss that with DEA?

Mr. MUELLER. I have discussed it, yes.

Senator BIDEN. And what was the response of the DEA, unless that is executive privilege, too? Are they telling you that they are going to need more money?

Mr. MUELLER. No, sir.

Senator BIDEN. Do you think they need more agents? I mean, what do you think is going to happen?

Mr. MUELLER. What I discussed with Mr. Hutchinson, was the process whereby we would assure that nothing falls through the cracks as we reassign these individuals. Now, my understanding is that he believes in the short term he can undertake that, but I also believe that he will be looking for additional resources down the road.

Senator BIDEN. Just so you know, you have 400 agents, roughly $100 million. You have been aiding the DEA. You have been doing a great job. You are going to be gone from that. They are going to end up $100 million short in terms of resources. They are the resources you are contributing now to the drug war, about $100 million.

I hope that as we put this all together, and I will be back to this a lot, Mr. Chairman, and it is not the Director's responsibility, but there is more than one piece to this puzzle. We will not have served our communities well if we have focused more on anti-terrorism, reduced the total number of cops that are on the street, impacted by a $100 million reduction in the anti-drug effort, moved in a way where we find that we are going to have additional responsibilities taken from you or added to you through this new Homeland Defense Office.

You cannot do the whole job with the same amount of money and the same number of people. You cannot re-slice the pie, I would respectfully suggest. You need a much bigger pie, a much bigger pie, and I am here to tell you you will get my support to make the pie bigger for the FBI and I hope someone in the administration is listening, that there is more than one piece of this pie.

I would conclude by saying, Mr. Chairman, that when you were out, the Senator from Arizona talked about how he had held all

these hearings and so on, which he did in the Terrorism Subcommittee, and we did not pass any of that stuff, and he said that——

Chairman LEAHY. Actually, we did pass it. It went over the House of Representatives——

Senator BIDEN. I agree. Well, that is what I was about to say——

Chairman LEAHY.—and the public analysis——

Senator BIDEN. And then civil libertarians were opposed to it. Right after 1994, and you can ask the Attorney General this because I got a call when he introduced the PATRIOT Act, he said, "Joe, I am introducing the Act basically as you wrote it in 1994." It was defeated then not by any liberal. It was defeated then by the folks who worried that we would have the Minuteman would get in trouble, by the Mr. Barrs of the world who were worried about the right wing, not anything else. That has nothing to do with you all, but just to set the record straight.

Almost the same thing that got passed, the PATRIOT Act, was introduced by me in 1994 and it was the right wing that defeated it. You guys tried to help get it passed, including the wire tape changes and the rest, so——

Chairman LEAHY. Good, because we have a vote on. I would note that we have corrected a number of Senator Kyl's earlier statements, but the point is, we did pass a piece of legislation out of here which then passed it out of not only this Committee but the Senate and it died in the Republican-controlled House, I mean, for those who think there is something critical.

Director, I just want to correct one thing. You said it was a coincidence that the announcements were on the date of your discussion here, your hearing here, the announcement the President is going to make. You said it is a coincidence it happens to be today. The press is already reporting from the White House that it was purposely done today. I am not sure why. I do not understand these things.

I would hope not done to distract from this hearing because this hearing, I think, has been an extremely good one. I think the questions asked by both Republicans and Democratic Senators have been very good. I think you and Mr. Fine have given very good answers. I know you are not going to answer—I happen to disagree with you. I happen to agree with Senator Biden on the executive privilege. But just so you know what the questions are that you are going to be asked after the President's announcement.

In a way, I feel a little bit sorry for Governor Ridge, who I think is a great guy. I have the highest regard for him, like you, a former Marine.

Mr. MUELLER. I actually think he was in the Army, but I may be wrong.

Chairman LEAHY. Whoops. I have higher regard for the former Marines, and you know the reason why, having been the father of a former Marine.

Mr. MUELLER. I am standing defending Tom Ridge.

Chairman LEAHY. But I do have very high regard for Governor Ridge. I served here when he was in the House. I feel somewhat sorry for him, though, because he is put in an impossible position where he has no line authority, no budget, no confirmed status, all

of the things that many of us have said would be a problem. We have been told for eight months that that is no problem. Now, apparently, the White House has realized that a lot of people up here in both parties told them it is.

I am going to want to know whether the agency will be operational, will be able to conduct or direct an investigation, will be able to collect information in this country. Will your foreign terrorism tracking task force be transferred to this new agency? Will all the investigations on terrorism be reported to this new agency or will it be along the lines of what you have talked about? What about all the information you collect in this country on terrorism? Will all that be given to the new Homeland Security Office?

You said, Mr. Director, that you would be willing to come up here and talk to us about this. You can be guaranteed you will be given that invite because there are only so many times one can reinvent the wheel on this. As you have heard some strong support for some of your reorganization plan, I do not want every time somebody raises questions of past mistakes that the White House is going to announce some kind of a new reorganization so we can just talk about that.

What I want to do is fight terrorism. I do not want to be moving organizational charts around. I know you want to fight terrorism. But those are the things that we have to do. We have to look at real issues. Right now, the Radical Fundamentalist Union to which the Phoenix EC was staffed 100 percent by agents who have been at FBI Headquarters for under a year. I mean, these are the kinds of things we should be looking at.

Senator BIDEN. Mr. Chairman?

Chairman LEAHY. And so I appreciate it. I will be anxious to turn on my computer tomorrow and read the transcript of whatever is announced tonight, but just so you understand, there are still going to be a lot of questions. All we want to know is, who is doing the job? Who is doing the job? Who is making sure that we do not have another major screw-up like we saw with the memos prior to September 11? We just want to protect Americans against terrorism. I do not care who gets the credit for it. I just want Americans to be protected.

Senator BIDEN. Mr. Chairman, may I just have 30 seconds? I realize I was confrontational with you because you surprised the hell out of me. You have come and suggested a whole new reorganization to us and the President is going to announce a reorganization tonight and you cannot tell us whether or not the reorganization you are asking us to consider has been vetted and has been discussed with and coordinated with the other one.

That is the reason for my frustration. I just assumed you were going to answer my question. It is nothing about you, nothing about you, but I hope to the Lord that after you are submitting to us a reorganization and the President announces today he is submitting this most significant reorganization, I think they said, in 50 years or 100 or something, that you all had talked.

Chairman LEAHY. And we will stand in recess until 3:15. Thank you.

[Recess.]

AFTERNOON SESSION [3:19 p.m.]

Chairman LEAHY. I am just going to need a little bit of cooperation so I can see.

I do want to welcome Special Agent Coleen M. Rowley of the FBI. She has been an FBI Agent for 21 years. She is currently the Chief Division Counsel for the Minneapolis Field Office of the FBI. She came to the attention of this Committee when she wrote a letter to Director Mueller that was given to members of Congress. And her letter refers to a number of issues this Committee has heard from other FBI Agents in the past. And Senator Hatch and I felt that by the nature of the hearing we are having today, it would be good if she testified.

Did you want to say something, Orrin, before it starts?

Senator HATCH. No, I am fine. I am just looking forward to your testimony.

Senator GRASSLEY. Mr. Chairman, could I say something?

Chairman LEAHY. Yes. The Senator from Iowa, of course.

Senator GRASSLEY. Well, I thank you, Mr. Chairman, because Special Agent Rowley is a native of my home State of Iowa and she is also a native of my wife's hometown of New Hampton, Iowa, but more importantly, Agent Rowley is a patriotic American who had the courage to put truth first and raise critical but important questions about how the FBI handled a terrorist case before the attacks and about the FBI's cultural problems.

Agent Rowley, your testimony today is a great service to this Committee, the entire Congress, the FBI, and the American people and I thank you for coming. We should be honored to hear your testimony today. People like you who come forth to, as I put it, to commit the truth, a very terrible sin among some Federal employees, but you come forth with important information about the FBI. There has been heroes like Fred Whitehurst before you, who exposed the FBI Crime Lab scandal, and we had four agents last summer who revealed disparities in discipline and a pattern of retaliation against those who investigated misconduct inside the FBI.

Agent Rowley has thrown the spotlight on specific and general problems happening at the FBI before the terrorist attacks, and she has important insights with her perspective from the field about what the FBI can do to change. The FBI must improve so it can prevent future terrorist attacks, and her testimony, I believe, it very important to help this happen.

Ms. Rowley, I believe, is a dedicated public servant who tells it like it is. She wanted to be an FBI Agent since fifth grade, and she has had a distinguished 20-year career at the FBI. She worked in a variety of offices, including New York where she investigated Mafia after learning Italian and worked with people like Rudy Guiliani, Louis Freeh and Michael Chertoff. She worked in the Minneapolis Division now since 1990 in a number of areas including as the ethics officer.

Agent Rowley, I thank you again for agreeing to testify today so that we can hear your constructive criticism of the FBI to help it reform and to help it improve.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

Well, Ms. Rowley, both Senator Wellstone, the senior Senator from your State and Senator Grassley, who is from your State of

birth, have said very good things about you, and they both have gone out of their way to talk to members of the Committee. With all that, now we would like to hear from you.

I should mention a roll call vote has started. Why do you not being your statement? If we have to stop at some point, I will. It will not be because of something you said. It is only because we have to vote in person. Go ahead.

STATEMENT OF SPECIAL AGENT COLEEN M. ROWLEY, CHIEF DIVISION COUNSEL, FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE, MINNEAPOLIS, MINNESOTA

Ms. ROWLEY. Well, the first thing I want to do is thank you for the opportunity to appear today. I never really anticipated this kind of impact when I wrote this letter to Director Mueller two weeks ago. I do not know if you know, I think they have been saying I anguished over this a week. It was not even quite a week. It was more like a 3-day period, and it was a fairly sleepless 3-day period when I began to initially just jot down my thoughts because I knew I had to appear before the staffers of the Joint Intelligence Committee, and I did not want to forget anything. And also you will probably find out I am a little better on paper than I am verbally, so I was kind of afraid of that. That was one of the reasons I started to write it down.

I also had another big impetus that was kind of behind this all, and one of the things was that I saw the new direction of the FBI perhaps—it was kind of hard to discern when it was first announced—but I thought I saw some impetus towards a little more additional bureaucracy and micromanaging from Headquarters, and I wanted to point out to Director Mueller that that seemed to fly in the face of what we should have learned from September 11th. And the two things were the impetus for the letter.

Of course you know I have many years of experience in the FBI. I really do care about the FBI. I have invested almost half my life in it, and I do care also about our protection now. I have got four children. A lot of my friends have children. And I really think we ought to be doing our best to try to prevent any future acts of terrorism.

I did, in the last couple of weeks, receive hundreds—i was counting them for a while but I lost track—but I received hundreds of e-mails and telephone calls from agents, mostly agents, some supervisors, some prosecutors, some retired FBI leaders, and I am not going to presume to speak for all of those people, but when I looked at them, and I have read most of them—there are a few that I probably have not gotten a chance to look at that have come in since I left, but of the ones I looked at, I did see a real common theme emerging. It seems like I kind of struck a chord with a lot of people about this idea about the bureaucracy. A lot of other agents told me similar stories about cases that had maybe unjustifiably not gotten anywhere, and I have a whole stack of those.

I think there is really the main thing being a real strong consensus that we need to streamline the FBI's bureaucracy in order to more effectively combat terrorism. We need that agility that Di-

rector Mueller was speaking of this morning, that agility and ability to quickly react, and I really see that as you get too top-heavy with too many layers—he also mentioned that problem—that you are going to be stymied. I was encouraged by Director Mueller's testimony this morning, because I think many of his ideas do seem to go in the right direction and actually are quite consistent with the various items I had in my letter to him.

He really has an extremely difficult job, and that is an understatement. When I talk about trying to trim the bureaucracy a little bit, I do not know how you can underestimate that. It has been tried before and failed, and he just has a tremendously difficult job which I can appreciate.

I want everyone to know that no one today previewed in the FBI—of course they gave me approval to be here, but no one read the statement I did. I did this one quite quickly because I did not know I was coming until recently. And in this statement, which I am not going to read because you can read it when you want to, I have some ideas in here. Some of these ideas again come from other agents, some of whom are more experienced in intelligence than I am. And then some of them are my own ideas. I am the legal counsel, so some of the legal issues are things that I have seen as an issue that have arisen in the past few years. And you can read that at your leisure, and if someone wants to ask me a specific question about any of those, that is fine.

I guess what I can maybe go on beyond what Director Mueller, I guess what I am going to try to do is the FBI made mistakes prior to September 11th. I made a little mistake. If you will look at my letter, I made a mistake on the first page. I got the date wrong. It was August 16th. I proofread it once and I missed it. We all make mistakes, and I think that there are other levels of our criminal justice system, there are other Federal agencies I am not going to talk about, but there are also the prosecutors when you try to go criminal, there are entities in the Department of Justice, so to some extent I have kind of broadened some of what I have written in my statement to include those other criminal justice entities. You know the FBI is real important, but there are certainly other entities that are very important here too.

I was also encouraged—I do not know if anyone asked a question about it today, but when I read Director Mueller's statement, he points to integrity. I think it is the last page also. And he does point to that as an issue. And I am very encouraged by that, because of course, if you look at the end of my statement, I think integrity is extremely important.

Some of the people this morning did ask questions about how are we going to effectively combat terrorism? We are going to be in a proactive environment which definitely has the potential of maybe interfering with people's civil liberties, and how are we going to still protect those civil liberties? And I honestly think integrity really plays into this whole item. A lot of when you are asking for some new law or some new authority, it is perhaps not only what the law allows you to do, but it is how it is going to be done. And then it really boils down to an issue of trust with the agency or the entity that you are giving this particular power to. And there are potentials for abuse if you go over that line, and I think as an

agency we have to be so completely truthful and honest that people are able to trust the FBI, that we will not cross those lines or commit any kind of civil rights violation or collect too much information, et cetera.

That basically is all I want to say, and then if anyone has a question from my statement.

Chairman LEAHY. Ms. Rowley, we will. And what I am going to do now, we have about 4 minutes left in this vote. I am going to suggest everybody go and vote. We will stand in recess for a minute or the amount of time it takes, come back, and that way we will be uninterrupted. Thank you.

[Recess from 3:31 p.m. to 3:47 p.m.]

Chairman LEAHY. Agent Rowley, you may be interested I knowing, and I have not even had a chance to share this with Senator Grassley, a copy of this has gone to Senator Hatch. Dan Bryant of the Department of Justice has sent me a letter following a request I made, assuring both me and Senator Hatch there will not be any retaliation against you in any form for the letter you sent to the FBI Director. Of course that would also extend to the testimony here. I will put this letter to Senator Hatch and myself in the record, and Senator Grassley and I both notified the Attorney General and the Director that we would be following this matter carefully anyway.

[The letter of Mr. Bryant appears as a submission in the record.]

Chairman LEAHY. Let me ask this question of you, and I asked this question basically to Director Mueller this morning, so I want to ask you as well. To your knowledge, did the agents in Minneapolis or at Headquarters for that matter, ever try to do a routine search for reports on aviation schools or pilot training on the automated case system? I am not talking about putting in somebody's name, but for search warrants, like "aviation schools" or "pilot training." Anybody do that?

Ms. ROWLEY. Well, I know a little bit about our ACS system and the records we have, as well as the search methods we have, because I also do our Freedom of Information requests. Of course there are strict rules in place about how we search, and when people write to us, you know, if we find their name. Our main system of records, our central record system is indexed according to the name of the subject usually. So, for instance, in a case where a particular suspect was named, the normal method of searching would be to search that name only.

We also do have the ability to search some text for a word, but unlike, for instance if you were doing Lexis–Nexis research, you can put in the "and/or" and there is all different ways that you can search. Our FBI search is probably the most fundamental, rudimentary thing. You can just put in a word. So for instance if you put in "airline" to do a text retrieval, you would get up such a volume of records that it would be impossible to review. It is almost impossible to do just a one-word text.

Chairman LEAHY. You can put in "aviation schools?"

Ms. ROWLEY. Well, what you cannot do—for instance, in Lexis–Nexis, when you are searching for things, you can put those qualifiers in that narrow it down, and we have no way of knowing that. We can put a word in.

Chairman LEAHY. You could put in "aviation."

Ms. ROWLEY. I think we could. And then——

Chairman LEAHY. But you could not put in "aviation schools?"

Ms. ROWLEY. No. You would be getting aviation, and you would just be getting records that you could not possibly review. Now, what the normal method is, is we do search those names, and that is because the subjects' names are indexed. So for Freedom of Information, that is what I do. And I think he mentioned that you have to have the correct spelling. That is right. I mean if you are one letter off, you may not turn up a record.

Chairman LEAHY. But this does not do you much good if you are looking for somebody, for example, who used nitroglycerine in types of bombings and is going around with an alias which changes bombing to bombing.

The Director said in his testimony that your office could not have brought up the Phoenix electronic communication on the computers and use it in connection with the Moussaoui case, but that Headquarters could have done that. Is that your understanding?

Ms. ROWLEY. I do not know specifically about that EC, but I do know that prior to September 11th a number of classified documents, probably almost all classified documents, were blocked, so that only certain people, on a need-to-know basis would be able to—if you went into the computer, for instance, and you did not have that access, you are not going to be able to see those things. It was also in public corruption cases, other types of cases that we had this blocking. And it served a good purpose in a way because it really keeps the people maybe from abusing it.

Chairman LEAHY. But suppose you are a cleared person, the head of your office, head of the Phoenix office and others, they want to do a computer search on the FBI ACS computer network, it is still difficult for them to do; is that correct, even if they are cleared?

Ms. ROWLEY. That is true. I do not know exactly how this blocking, you know, what people in each office were unblocked and which were not. Typically it was the people who had a need to work on that case only.

Chairman LEAHY. Unfortunately, some of the people who may know something about it are not going to be able to go much further. You wrote that a supervisor at FBI Headquarters made changes to the Minneapolis agent's affidavit. I am talking about the FISA process now. You wrote that they made changes to the agent's affidavit that, quote, to use your words, "set it up for failure." Now, the New York Times has also reported that another Headquarters agent was basically banned from the courts, from the FISA Courts, by the Judge, based on his past affidavits. I know that in response to some of these problems the FBI has instituted so-called Woods Procedures. And we have put that in the record. It has been declassified. We put it in the record this morning.

Do you think that some of these problems with the FISA Court made Headquarters more cautious and risk adverse in processing the FISA applications to the Court?

Ms. ROWLEY. I have never actually served at Headquarters, so I guess I would only be speaking from hearsay, and as well as maybe the opinions of some of the people that have called me and e-mailed

me. I think that when incidents occur where people in the FBI are disciplined or even investigated possibly, I think there are some consequences to that, and it does in the future make them much more careful. In the instances that I am aware of in our office where that has happened, we have typically, in order not to repeat the problem, we have instituted some kind of procedure that makes it more difficult. So I think that in a way, from what I know of it, and again, I have never served in Headquarters, that I would probably agree.

Chairman LEAHY. He also wrote that you and the agents in Minneapolis were frustrated with the Headquarters agent that was assigned to the Moussaoui case, and had actually hindered your investigation. Did you or any other supervisor or agent in Minneapolis call—the agent you were concerned with—call his supervisor or others in Washington, to complain about this before September 11th?

Ms. ROWLEY. I am of course a little bit restricted in what I can talk today about the events of pre–September 11th. I had put that in my statement. I failed to mention it earlier. When I comment, I am going to try to comment in a general way and just avoid the specifics prior, the events prior and not get into true real facts.

Chairman LEAHY. I understand.

Ms. ROWLEY. When I wrote the letter to Director Mueller, I think some of the news accounts maybe misunderstood, I really was speaking more from a third-party perspective in talking about what I saw our agents and other people in our office, as opposed to me personally. There was a word in the first page, I said I had a peripheral role, and I think that is very accurate. I did have a role, but it was peripheral, and when you ask if other people took these actions, I will say this. We have a culture in the FBI that there is a certain pecking order, and it is pretty strong, and it is very rare that someone picks up the phone and calls a rank or two above themselves. It would have to be only on the strongest reasons. Typically you would have to pick up the phone and talk to somebody who was at your rank. So when you have an item that requires review by a higher level, it is incumbent for you to go to a higher level person in your office, and then for that person to make a call.

Chairman LEAHY. Has the Inspector General talked to you about this case?

Ms. ROWLEY. I have had a call from the Inspector General, but so far we have not gotten into any real facts or anything.

Chairman LEAHY. And when did he first contact you?

Ms. ROWLEY. I was contacted by an investigative counsel from the Office of Inspector General, and it was basically just to introduce herself.

Chairman LEAHY. How long ago?

Ms. ROWLEY. It was last week, I think just a day or two after Director Mueller announced that it would be turned over to the Office of Inspector General.

Chairman LEAHY. Thank you. And you have raised an important issue also about the so-called McDade Law in your testimony. As you know, that law was slipped into a massive omnibus appropriations bill, that some of us called "ominous appropriations bills,"

back in 1999. Senator Hatch and I and Senator Wyden have been trying to fix this problem. In fact, we introduced S. 1437 to fix the problem. I want you to know there are some of us on the Committee that recognize it is a problem, and Senator Hatch and I are trying very much the fix the problem. We will keep trying. Eventually, hopefully we will be successful. We came very close. We thought we had it fixed in the USA PATRIOT Act, but others did not want it to go through, but I am committed, and I think I can speak for Senator Hatch, he is committed to get it fixed.

Senator Hatch?

Senator HATCH. Well, thank you, Mr. Chairman.

I want to welcome you to the Committee, Ms. Rowley, and at the outset I wanted to thank you for appearing before the Committee. I also commend you for your letter of May 21st to Director Mueller. That letter raises a variety of significant issues that need to be considered during any reorganizing of the FBI. And I can only imagine how difficult it was for you to write the letter and then forward it to Director Mueller and others. So I want to ask you a few questions to clarify some statements in the letter and to seek your views on aspects of the specific reorganization plan.

I believe that the FBI is the most important law enforcement agency in the world, and I know you do too, and that is why you wrote the letter, and you would like to have it continue to be a great agency. But in your letter you detailed the difficulties you and the Minneapolis agents encountered in seeking a search warrant under the Foreign Intelligence Surveillance Act procedures. We have been referring to that as FISA all day. With the FISA and your legal training, what modifications do you believe may be warranted to the FISA statute in order to enable the FBI to obtain such approvals when investigating terrorists?

Ms. ROWLEY. Well, I heard some of the discussion this morning about the necessity to perhaps take out the "working on behalf of a foreign power" aspect. In thinking about that, and to be honest, I have not thought about it a whole lot, and in addition I have not had that much personal experience in working with the FISA process. Our office is not as involved as other offices would be.

However, I think in a way, just knowing what I know about criminal and totality of circumstances, et cetera, I am not quite sure that it needs to be modified. I think in a way, perhaps what we have is because probable cause and proving or making these showings that are required are not like a DNA test, they are not a litmus test. You cannot put it in and have it come out 100 times the same way. And what can happen is mindsets, and over time, different interpretations, and you can have something becoming unduly difficult. When you actually look back maybe 10 years ago, this was not the case, and there was basically a lesser standard. I think when you look at totality of the circumstances and probable cause, you are looking at more probable than not. I am not even quite sure if the FISA—well, I think the FISA statute requires it as well—more probable than not, and I think that if you look at a totality, if someone is working on behalf of a foreign power, these terrorist entities are not like countries. They do not have embassies. They do not send us their membership lists. They do not send us their little organizational charts. I worked Mafia cases in the

1980s, and the Mafia did not do that either. They did not send us their membership. We had to figure it out. And after a few years we certainly did have hierarchies of each organized crime family. But that was gained from surveillance. It was gained from little snippets of information we would get from wiretaps, that so-and-so was working for so-and-so. And I think we should be able to use that same type of thing for demonstrating that someone is working on behalf of a foreign power, especially with a terrorist organization. And I am not sure that the language needs to be modified, but I think we need to realize that it is almost the same type of thing that we are up against. We are not going to get concrete membership lists, organizational charts, that we can say—or even the definition of the group sometimes. These groups are very amorphous. And by nature terrorism groups operate more effectively without having real defined hierarchies and who reports to who, et cetera. So that is kind of my take on it.

Senator HATCH. Of course to a large degree, we are talking about surveillance, and unless you can show that they are operatives for a foreign power or that you have probable cause to believe that they are part of al Qaeda, say, in this particular case, you cannot get a FISA right to surveil. And see, that is what I think—and many people are concerned on the other side that if we grant that broad right, then it will be misused sooner or later by somebody who would not be as perspicacious as you are or Director Mueller, but I see it as a big problem, because as you can see, we basically could not get surveillance on I think basically all of those——

Ms. ROWLEY. Yes. I am not going to comment on all the facts of the case. My analysis of the case is that perhaps that it already—you have read my letter.

Senator HATCH. Right.

Ms. ROWLEY. And I think that it is an obstacle, and I think maybe it is a possibility to consider whether maybe that amount or that threshold should be somewhat eased, especially in cases with terrorists, where it is hard to—but I think things like surveillance and knowing who met who and things like that should figure into it.

Senator HATCH. All right. Agent Rowley, since your letter of May 21st, the Attorney General has issued new investigative guidelines that will expand the FBI's investigative tools. Now, given you experience in the field, can you describe in practical terms how will these new guidelines assist the FBI, at least the field agents, in carrying out FBI mission or missions?

Ms. ROWLEY. I have not had a chance to really fully read the modifications. I have heard what the three, the main topics that have been brought up about going into public meetings and surfing the Net. And there is one additional thing I think in those AG guidelines, which delegates down to the SACs the ability and the authority to open up a case, a preliminary inquiry.

To the extent the I am definitely, and I think we, the rest of the agents I have heard from, are definitely in favor that when it is possible to delegate down to a lower authority level, we will be more nimble and agile. I am very much in favor of that ability to open up a preliminary inquiry by the SAC. That aspect is good.

I do want to maybe at some point get the chance to talk about how—I know people this morning were talking about their fear that some of these new abilities to monitor public meetings, I have a little unique insight because I process Freedom of Information cases. And I read some of our old files from the 1950s. And I will see in there where we got, the people back then, for a lot of reasons, got a little carried away. When they went to a meeting, they recorded everyone who came, whether they were important or not, whether the person advocated whatever, you know, a terrorist point of view or whatever. And I see that type of thing that happened in the past. What I think that we need to do is a lot of it is in the how, and if you go to a public meeting, for instance, maybe we have gotten a little bit of information that someone in that meeting might be discussing a terrorist act.

I think it is very good and logical that someone would go and sit in just to make sure that it doesn't happen. So if, in fact, a person stands up and says, hey, let's all do this, let's all, you know, undertake this, and gives a speech about undertaking an act of terrorism, we are now going to be in a position that we will know it.

Now, if that same agent, even based on a good tip, goes to the meeting and people are merely engaging in their First Amendment rights, here is the thing: nothing happens from that information. That is the difference from the 1950s. We don't come back and record who was there. We do not look into the people that were there. It just ends.

I think there is a difference between how we do this and exactly what the authority is, and I think to the extent that it gives us a little bit extra opportunity to perhaps detect something, I think it would be good.

Senator HATCH. In your May 21 letter, you indicated your concerns about Director Mueller's proposal to create "flying squads" which would operate out of FBI Headquarters here. Could you tell us more specifically your concerns about such squads?

Ms. ROWLEY. When I wrote the letter to Director Mueller, the term—and maybe it was the media that used this term, but the term that was being used was "super squad," and that connotates in my mind that we are going to have more people at Headquarters who now, when let's say an office does detect some terrorism or an actual terrorist event occurs, that now we will get a whole contingent of managers from Headquarters who will direct the case.

And when that term was first used, again by hearsay, I think a lot of people in the FBI had that connotation and it was a major impetus for my giving that letter to Director Mueller.

Senator HATCH. I understand. Now, just one last question because my time is about up. In your testimony, you have identified a number of significant problems with the FBI's bureaucracy. You have stated that, quote, "the problem is huge," unquote, and, quote, "cannot be quickly cured," unquote.

Now, in your view, what immediate steps could be taken to remedy some of the problems that you identified in your letter, and which problems will take more time to address?

Ms. ROWLEY. You know, that is the $100 million question on how to reduce bureaucracy, and I really can't pretend—give me another week—I really can't pretend to understand.

I know Director Mueller is also very cognizant of this problem. He iterated today that there are eight levels before you get to him. This is an unwieldy situation. If there is a way to somehow reduce the levels, I think that is the way we need to go. Seven to nine levels is really ridiculous, and it is just how do we do this once it gets started.

Senator HATCH. Well, I am grateful for your testimony, grateful for your letter, and I think you have done a service and I think Director Mueller has taken it very seriously.

Ms. ROWLEY. I agree.

Chairman LEAHY. We are going to take a three-minute break. I am wondering if the Senators could all meet with me out back. That will also give the photographers a chance to clear.

We will be right back.

[The Committee stood in recess from 4:09 p.m. to 4:13 p.m.]

Chairman LEAHY. Thank you, Ms. Rowley. You have been very patient. I want to turn to Senator Feinstein, who is actually doing double duty on this investigation, like several members on both sides of the aisle.

Traditionally, just so you know, the Judiciary Committee has always had some members from both sides on the Senate Intelligence Committee, as does the Armed Services Committee, the Appropriations Committee, and the Foreign Relations Committee, for the obvious reasons. We handle classified material all the time, so we have members on the Intelligence Committee.

Unfortunately, we are meeting and they are meeting, and Senator Feinstein has managed to be in both places at once and so I yield to her.

Senator FEINSTEIN. Thank you very much, Mr. Chairman.

Ms. Rowley, welcome. We are delighted to have you here and we thank you for your letter and for your comments about your career in the FBI and your concern about it.

You indicated earlier that you were watching this morning the testimony of Director Mueller. Well, I asked my questions really based on some of the things you said in the letter to the Director and one of them involved the FISA process. Without going into the details of it, you indicated your concerns in the letter about the FISA process, and I think Director Mueller put on the record the very clear way in which these FISA warrants are going to be processed in the future and the question of intelligence also being added in the warrant request.

My question of you is do you believe that this is a substantial improvement now over the way things were?

Ms. ROWLEY. Yes, and in my written statement, too, I think September 11 alone, just the acts, really created a huge change in mindset. In addition to that, of course, Director Mueller has announced that prevention will be our goal, over prosecution.

Prosecution, I think, should still be an important thing that we should keep in mind, but there are those instances. And when you have the two, prevention definitely has to override. I think what he is stating is if there is an application that someone at a lower level disputes or does not think should rise up, it will then automatically get reviewed at a higher level.

Senator FEINSTEIN. By him. That is correct.

Ms. ROWLEY. Right now, by him. I am not quite sure that—maybe it could even be lower than him because I think he is a busy man and I don't know that it would necessarily have to be the Director, although it depends——

Senator FEINSTEIN. And that these would go then to the OPIR, as well?

Ms. ROWLEY. Right. Well, obviously, it would depend on his review. He may well agree with the lower level, and that would be fine. We do need, though—as I said in my statement, we need a kind of a way to get around the roadblock, and I think with the FISA process this is a pretty good idea to have the ones that are not approved or disputed to go to a higher level for review. Obviously, the higher level may well agree that it is insufficient, and that is fine, but at least it has had a good review.

Senator FEINSTEIN. Right, and the second area that I asked about was really in direct reaction to your comments in your letter about what you called the super squad, which he has pointed out very carefully today was a flying squad and that the local SAC would have the authority to initiate the first inquiry.

Ms. ROWLEY. The flying squad—again, kind of the difference that I see there is that with a small office that does not have translators, does not have enough forensic computer examiners, perhaps does not even have enough surveillance experts, that if an office had that need to have those additional resources, a flying squad could come and help out.

It would really serve the purpose of flexibility and if they didn't try to take over and micromanage something that may well already be at a certain point, stage along, I think it is a very good idea. The only thing that I was really worried about was the fact that I saw this as managers coming to now take it over and micromanage or whatever. That is the distinction.

Senator FEINSTEIN. Thank you. Now, in your letter you also mentioned, and I quote, "a climate of fear which has chilled aggressive FBI law enforcement actions, decisions." You attribute that to the fact that numerous high-ranking FBI officials who have made decisions or have take an action which, in hindsight, has turned out to be mistaken or just turned out badly have seen their careers plummet and end. That was a very profound statement.

I want you to respond to that, but I also want you to respond to something else, and here is something which is enormously controversial. No matter who you talk to, everybody has got a slightly different view of how racial profiling should or should not be applied and exactly what it is, whether it involves a country, whether it involves a race, whether it has a chilling effect on FBI agents instituting this kind of inquiry.

I would be interested in your observations if there are places where you believe you have actually seen racial profiling impact or chill an agent's perspicacity or desire to look into something.

Ms. ROWLEY. Do you want me to answer that one first, the racial——

Senator FEINSTEIN. Yes.

Ms. ROWLEY. I think one of the Senators this morning drew a distinction. Of course, racial profiling—I don't even like the term or the word because I think it already has this pejorative sense,

and different people have different meanings in their own mind as to what it means.

Senator FEINSTEIN. I agree with you.

Ms. ROWLEY. One of the Senators this morning made a good—I think it was a good line. When you use race, ethnic origin, religion, any one of those factors as a sole reason or the main reason to take an investigative action, that is what I would think of as racial profiling. So if a trooper goes out and stops all Indian males going down the street, that is racial profiling.

Now, on the other hand what you have are—we could get a report that a black male with a red baseball cap wearing white trousers and sneakers just robbed a bank, and you don't disregard the race because it is just one of several factors that is describing that individual. So I think that is kind of what I see as the difference here between—courts, I think, follow that rule.

Senator FEINSTEIN. Do you think your colleagues have the same interpretation that you do, because I think you have a very substantial interpretation?

Ms. ROWLEY. Well, the ones I train do. I am trying to think if I have brought this up in other law enforcement circles. I think in Minnesota it has been a very hot topic and to the extent that it has been discussed, I have tried to point this out at different times that I think a lot of times you see people arguing when they are not even hitting the issue because they have different definitions.

I think the Senators' remarks today kind of show that maybe this kind of thing is rising, where people are getting this better understanding of what is permissible, what is logical and common sense, and then what is improper. And you use the term—it is just a pejorative term—and then people end the debate.

Senator FEINSTEIN. I see the red light. Could you go to the first part of my question, which is the quote?

Ms. ROWLEY. Climate of fear?

Senator FEINSTEIN. Yes.

Ms. ROWLEY. I think that, as I said in my letter, these high-visibility demotions, or even people ending their careers, have impact and everyone sees this. There are times when that results in less than aggressive law enforcement.

There are actually times, though, I think it actually is the opposite because your boss, for instance, could be making a mistake the other way. Let's say that your boss has said something that you think could be—I am just using an example now—it comes close to racial profiling. Now, if you are under that boss, with this climate of fear and whatever, you might actually be unwilling to challenge that. So I think it can actually work both ways, and I definitely think it results in less than aggressive law enforcement when we have had some high-visibility mistakes.

In my paper, I drew a distinction between those mistakes that are really kind of deliberate or made for selfish reasons, and I think our people need to be held fully accountable for those types of mistakes, whereas the good-faith type mistakes—I get involved in civil suits all the time and we are humans; FBI agents are humans. We make mistakes all the time.

In Minnesota, once we made a mistake and had the wrong guy arrested for a bank robbery because he was a complete look-alike

of the real bank robber. And, you know, that type of thing—you know, that agent really did nothing wrong. Everyone would make that mistake.

So I think we have to distinguish between the types of mistakes and be careful about pursuing the ones that really are good-faith ones because I think we will have some repercussions for that.

Senator FEINSTEIN. Thanks. My time is up. Thank you very much. Thanks, Mr. Chairman.

Chairman LEAHY. Thank you, Senator Feinstein.

Senator Grassley?

Senator GRASSLEY. I want to follow up on what Senator Feinstein just was talking about. I have been concerned for a long time about what I call the FBI's culture of arrogance. In your letter, you mention a culture of fear, especially fear of taking action and the problem of careerism.

Could you talk about how this hurts investigations in the field, what the causes are, and what you think might fix these problems?

Ms. ROWLEY. Of course, I don't think this happened overnight. It is one of those things that starts to happen and eventually you get at a point where it is not good. And I think careerism—when I looked up the definition, I really said unbelievable how appropriate that is. I think that the FBI does have a problem with that.

If I remember right, it means promoting one's career over integrity. So when people make decisions and it is basically so that I can get to the next level, either it is not rock the boat or do what a boss says without question. Either way that works, if you are making the decision to try to get to the next level, but you are not making that decision for the real right reasons, that is a problem.

I think that in the FBI we have had some serious disincentives to getting into management. We have also had—some of our promotional system, I think, could be adjusted. There are some standards that we have gone to, kind of a real low level of "legally defensible." It has become over the years kind of a volunteer system, because a lot of good, good people that have good backgrounds prefer not to transfer all those times. There are a lot of other reasons, so I think that careerism is a problem.

I think the pecking order which I alluded to earlier is sometimes a problem and we have to be willing to, I guess, as Director Mueller has done a little bit in this case with me—when I made my critical remarks, I was quite worried because I know in the FBI you don't venture close to criticizing a superior without really running some risks.

But in this case, actually I was pleasantly surprised that, you know, I have been promised repeatedly no retaliation, and I want to hopefully hope that that kind of atmosphere now starts to kind of take over and that people make decisions—some of these huge decisions are just huge. You don't even know when you are doing it, but they are huge and you have got to make them for the right reasons, not because I don't want to rock the boat, not because I don't want to bring up a problem to my supervisor, et cetera.

Senator GRASSLEY. I think it would be helpful to hear about Headquarters FBI from the perspective of your working in the field. Your letter to the Director about the Moussaoui case talked about supervisors actually hindering that case.

Now, I know that you can't talk about that case because of a trial, and I appreciate that and expect you not to. But it would be useful for you talk about how Headquarters gets involved in cases from the field and what you and other agents think of Headquarters involvement and whether the people there are helpful or a hinderance.

Ms. ROWLEY. Well, I mentioned in my letter, because I am a legal counsel in the office, I interact a lot with our Office of General Counsel and for the most part the people in the Office of General Counsel that I interact with on a daily basis are very helpful. I think they mostly see their mission as assisting people, giving advice, that type of thing. Our laboratory, I think, is something like that as well, because their mission is to do that test so they can get it back to the field.

Other entities are less helpful at Headquarters because they do not see their mission as assisting in the investigation. When we get these seven to nine approval management levels in place at Headquarters, many of those people see their job as kind of a gatekeeper function and kind of a power thing or whatever.

Again, I think we have to stress to the people—if we can limit the number of management levels, all the better, but the people, if they realize that their function is to assist with intelligence in the future, hopefully this will happen if we have more analysts that they see their function as assisting that investigation. I think then it is helpful. So it is kind of a mixed bag is, I think, what I am saying. It is kind of a mixed bag and some entities are helpful; others maybe aren't quite what they should be.

Senator GRASSLEY. Well, could you kind of summarize that by saying—or let me summarize it and see if this might fit it. Headquarters ought to be helping people at the grass roots and not be a hinderance.

Ms. ROWLEY. Yes, I think that is true, and the worst is—I forgot to even mention the worst is micromanaging, and there have been instances in the past where a higher level in the FBI has almost decided to tell an office how to do something. And I can name a few cases where these just became disastrous, so micromanaging from a higher level is really the epitome of what would be the worst.

Senator GRASSLEY. I don't think you have to name those cases; we have looked into those an awful lot here in the last decade.

Your letter highlighted some of the problems within the bureaucracy at FBI Headquarters, with many layers of approval in order to get a search warrant. What are your recommendations for streamlining this bureaucracy so that field agents can effectively pursue investigations?

Ms. ROWLEY. Well, I mentioned before that the bureaucracy is a huge problem and I really have to think longer about how that would be remedied. I can mention one other thing about streamlining being able to go around roadblocks that might arise, and I have mentioned internally in the FBI if we are pursuing a FISA or intelligence methods.

It should also be recognized that we can pursue terrorism on a criminal level and we can then go across the street to a U.S. Attorney's office, and I think a similar mechanism perhaps needs to be

considered also for U.S. Attorneys' offices. It is not terribly different when you go and say, here is why I think I have probable cause, to an Assistant U.S. Attorney.

In my write-up, in thinking about this, I thought it is kind of analogous to a person who gets diagnosed with cancer or with a serious illness. Of course, they always try to get a second opinion, and it is accepted in the medical profession. But in the legal profession, for some reason, it is not that well accepted that if you get an answer from an Assistant U.S. Attorney that you possibly have a way to have it reviewed again or have it reviewed by an expert in the field.

I think that we should maybe consider that for the Department of Justice to have—I don't really "super squad," but maybe a cadre of prosecutors that have experience with terrorism; that in the event we were trying to pursue it criminally, we might be able to have a way around a roadblock that way.

Senator GRASSLEY. Is my time up?

Chairman LEAHY. Go ahead.

Senator GRASSLEY. My last question is that we heard quite a bit about how the solutions to problems with the FBI seem to be more computers, more money. It is not the first time that we have heard that supposed solution to problems at the FBI, or for that matter a lot of other Government agencies.

How much do you believe more money and more computers will solve the problems with the FBI, or are there other more important changes that need to be made at the FBI?

Ms. ROWLEY. I think upgrading our computer system would be nice. The capability to do these kind of searches and pull up related information would be nice. I have in my statement today actually suggested a number of things that really don't require a lot of money.

Upgrading our manual to give clear, concise guidance to agents working intelligence is not going to require huge sums of money. The idea of—I have to look at some of the things. The law, if we can possibly toward the end—some of the legal changes I have mentioned could be problems; the development of maybe a Department of Justice cadre of professional expertise.

I have a few ideas that it seems that they really don't cost a lot of money and I think that they should be considered, in addition, you know, perhaps to upgrading the computers. The hiring of new agents always, of course, entails money and funding, and I am not really in a position to comment whether we are adequately staffed. I think that the new measures to hire additional translators is very good.

Senator GRASSLEY. Thank you. Thank you very much.

Chairman LEAHY. Senator Cantwell?

Senator CANTWELL. Thank you, Mr. Chairman.

Agent Rowley, thank you for being here and thank you for your service to our country.

Your memo to Director Mueller said, quote, "I do find it odd that no inquiry whatsoever was launched of the relevant FBIHQ personnel and their actions, and despite the FBI's knowledge of all the items mentioned herein," basically talking about the events of September 11, and the refusal to pursue a warrant in the Moussaoui

case. Your memo goes on: "The SSA and his unit chief and others involved in Headquarters personnel were allowed to stay in their positions, and what is worse, occupy critical positions in the FBI's SIOC Command Center post–September 11."

Then you go on to say, "I am relatively certain that if it appeared that a lowly field office agent had committed such errors of judgment, the FBI's OPR would have been notified to investigate the agent and would have at least quickly reassigned them."

Now, I know you are not going to comment on that, but in your testimony today you did talk about the management of intelligence, which I think is more or less what you were getting at in that particular statement in your letter to the Director. That perhaps there had been a mismanagement of information analysis and processing.

In your recommendations, number five, in your testimony you say that management of information should be improved, but specifically you say "centralized information is required. However, it must be properly analyzed, evaluated, and disseminated in a timely fashion to the field." You also say, "Recently, State and local officials, as well as the media, have frequently received more information than the FBI field divisions."

So how do you think we address that in the reorganization that has been proposed so far by the FBI? I know you are talking about reducing the layers, but what is it specifically that needs to be done to better process information at FBI Headquarters?

Ms. ROWLEY. Well, we have already discussed the computer. That would probably help somewhat again for an analyst to have the ability to go on the computer and then be able to put in "flight," "airline," or whatever it is and draw some intelligence together. So I think that probably would help.

We need professional analysis of the intelligence we already have. I think Director Mueller is talking about an intelligence—I am not sure of the title, but it is something with intelligence, and the way I have perceived that is that basically this is a group of people who put together reports or conduct, at request—if you have an issue or a question that they can produce that intelligence that might add on to an affidavit or whatever.

It may well entail requesting field offices to conduct certain investigations, to be in a kind of a proactive mode; that if they get two offices sending in something that looks like, oh, my gosh, we ought to look into this, that we have a group who is in charge of analyzing and looking at these things so that we don't have two things coming in three weeks apart and not even being able to put it together.

Senator CANTWELL. Today, is that the specific responsibility of one, or several people?

Ms. ROWLEY. Well, I think at the present time it is not done very well. I really don't, and I think that, you know, creating—Director Mueller is starting to do that. I think that we don't have it now, and I think that this group hopefully would be there, function as an assisting thing to the offices that develop something or when they make a request.

Senator CANTWELL. But when I look on this new org chart of an Office of Intelligence, it doesn't strike me as the flat organization that you seem to be describing as a solution. You are talking about

information that is easily processed and driven back to the field. No surprise, that is where most of the corporate world in America is moving towards a flat organizational structure, because information flow is so critical. It seems to me that you are describing a similar need, that I am not sure is addressed in the current reorganizational plan.

Ms. ROWLEY. I haven't seen that chart. That is the first time when you held it up, and when I made my first comments today and I mentioned that many of Director Mueller's ideas seem to be consistent with what my initial letter was, there is one kind of—I see maybe a slight difference, and that is I really think we should scrutinize—when you held it up, it just hit me—we really need to scrutinize all these proposals for this problem that creeps in of having these various levels.

I think that the flat-lining—and if there is a way to reduce these levels somehow, we have to look at each thing and say why create more? It is not going to be an answer, and if I have one little slight difference, that was the impetus for my first letter. Really, it was.

Senator CANTWELL. Well, I happen to agree with you that we are talking about an increase in information flow here, while the thing that seems to be missing is the processing of that information and the quick distribution of that information. And we are only going to get more, given the type of attacks that we are monitoring.

Not to catch you off guard, but I am curious. Tonight, the President is going to be making an address about somewhat of a reorganization of Homeland Security—we don't know all of what he is going to say yet, but, his press secretary said that the new department may be responsible for border security, intelligence, and other functions at several Federal agencies that it now supervises. It wouldn't replace the FBI or CIA, but it might be one of the biggest restructurings that we have had.

What advice would you give the President about this?

Ms. ROWLEY. I really can't presume to give advice on such a high level. I will say one thing. In the past when we have had different agencies where there was some overlap in their jurisdiction—the things that come to mind are FBI–DEA, because we share drugs; sometimes, FBI and ATF where there were bombings that we kind of both got involved in.

If you have two different entities and there is an overlap and it is not clear who does what, we can have some friction starting up and we can have some problems. So that is the only thing that comes to mind, is that it has to be kind of clearly demarked so that the agencies don't develop this friction and we are not at cross-ends with each other.

So if there is a new agency starting, which it sounds like, that is the only advice I can think of.

Senator CANTWELL. Well, I read in your statement that you didn't expect your memo to create such a furor, but thank you for stepping into the spotlight and giving this issue the needed attention.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very, very much, Senator.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Agent Rowley, we thank you very much for coming forward. It is obvious that it was very difficult to write the letter which you did, and it is filled with passion. You were really very concerned, a word you used repeatedly, and your purpose was of the highest and there were obvious risks which you undertook in coming forward.

I am confident at this point that the FBI and the Department of Justice will honor the commitments which they have made, and if they don't, I know that this Committee is prepared to make sure that they do.

I think you performed a great service for the FBI because after Director Mueller's first response, which was unresponsive to your memo, he did come forward and articulate an acknowledgement of the problems and then moved to correct them, which is indispensable.

We have said repeatedly that we are not interested in finding fault. We are interested in seeing to it that if there is a recurrence and you have all of these indicators that you put them together and you read a road map which is there on an analytical basis.

I understand your limitations as to what you can testify to about a case. I spent a dozen years as an assistant DA and as a district attorney, and have some appreciation for what prosecution requires and what the limitations are.

But in trying to understand the mentality of the FBI, which I think there is general agreement has to be changed, I was intrigued by your characterization that the "United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75 percent–80 percent probability and sometimes even higher) ..."

Can you give some insights as to why so that we might approach the issue as to how we change that attitude?

Ms. ROWLEY. Well, in some ways maybe that could be misinterpreted. I think actually there are cases—"playing it safe" has kind of a negative connotation, but playing it careful or being careful or meticulous doesn't. And I think there actually are cases—I think many times in white-collar cases, for instance, when you really want to be extremely careful, public corruption cases, these types of things, where you really want to be careful about proceeding—that it might well be appropriate to maybe require something more than 51 percent.

Senator SPECTER. Well, I can see if it is a prosecution, perhaps, but if it is an investigation, it is very different. I think the FBI has to change the approach to case preparation to investigation.

But even on the quantum of proof, referring to *Illinois v. Gates*, which I mentioned to Director Mueller this morning, a 1983 Supreme Court decision, opinion by then–Justice Rehnquist, he points out, going back to Locke v. United States, in 1813, referring to the term "probable cause," "It imports circumstances which warrant suspicion. More recently, we said the quantum of proof appropriate in ordinary judicial proceedings are inapplicable. Finally, two standards"—and then he refers to "preponderance of the evidence, useful in criminal trials, has no place in the magistrate's decision."

So Justice Rehnquist is pretty explicitly saying that it is not a preponderance of the evidence; it is not "more likely than not." He quotes Marshall; pretty good authorities, Chief Justice Marshall and Chief Justice Rehnquist, talking about suspicion. So one of the things that we are going to be looking forward to—and I have discussed with the Chairman the issue of pursuing this trial through the Foreign Intelligence Surveillance Act to find out.

Let me go to another point which you raised in your exhaustive letter, and that referred to the issue as to Zacarias Moussaoui. And I am not asking you about evidence now. We are still on the Foreign Intelligence Surveillance Act issue, where you pointed out, quote, "For example, at one point the supervisory agent at FBI Headquarters posited that the French information could be worthless because it only identified Zacarias Moussaoui by name and he, the Special Agent at Headquarters, didn't know how many people by that name existed in France."

Now, it is extraordinary. Zacarias Moussaoui is not exactly a name like John Smith. After you tracked it down, going to the Paris telephone book, you noted here that the Special Supervisory Agent a FBI Headquarters, quote, "continued to find new reasons to stall."

Here, we are looking at what we have to do to have a sensible response from FBI Headquarters on an application under the Foreign Intelligence Surveillance Act. Can you give us any insight from your experience, which has been considerably painful, as to what we might do?

Ms. ROWLEY. In my statement, I talk about roadblocks, and basically in my statement I am addressing criminal cases. When you first talked about probable cause—and we all know there is no perfect test for it—what I think has happened is over the years we have adopted certain mindsets from judicial rulings or from what might be the prevailing mindset in a U.S. Attorney's office.

I think what we do see are elevated standards in some cases, and one of my recommendations is that we have a sanity check, a second opinion, somebody else that we can maybe try to reason with. I really think it should be outside a particular U.S. Attorney's office because what can happen is that, you know, people are all kind of—the careerism or whatever can be a problem there, too.

In the FISA process, Director Mueller has proposed the same type of thing internally in the FBI, and I think his idea will definitely have results. Okay, if you don't approve it and now it has to go up, with our kind of attitude of having to take it up, how many times—the pendulum actually might swing the other way too far. So I think that in the FISA process, the proposal that we have now that it will be reviewed at a higher level if it is not handled—I think that is already there.

Senator SPECTER. Well, my concluding comment would be that the review is not really adequate unless you have a standard which meets the legal requirement but doesn't impose a burden which is impossible. We changed the Foreign Intelligence Surveillance Act in the PATRIOT legislation to add the word "significant." A significant purpose of the surveillance is to obtain foreign intelligence information.

After we investigated Wen Ho Lee, the Subcommittee which I chaired, we came forward with a recommendation that when a high-level officer at the FBI like the Director took the issue to the Attorney General, the Attorney General had to give the reasons coming back, because Attorney General Reno personally turned down the FISA warrant in the Wen Ho Lee case.

But this Committee is going to get to the bottom of it. We are going to find out what is going on. So far, we have only glimmers of information, like Agent Resnick was reassigned from a FISA unit, apparently removed by the special court, where the Chief Judge, Royce Lambert, reportedly excluded him. The question is did that make that unit gunshy? The question is did racial profiling make them gunshy?

In this kind of a situation, unlike ordinary cases where courts write opinions and we can tell what happened, I have discussed with some of my colleagues the possibility of consulting with Chief Judge Royce Lambert about what went on because we have got to figure out what is fair on civil rights, not overreact, but not look for 75 to 80 percent, or even 51 percent. You go with Chief Justice Marshall on suspicion; it has to be quantified in accordance with the facts of the case.

But I think that your 13-page memorandum has started us off on a road which could produce a lot of fruitful results when we really get down to brass tacks and do it right with an appropriate legal standard.

Ms. ROWLEY. The language change that has already occurred that you mentioned has been very beneficial. That was a big stumbling block, and that change already has produced some results. As I talked to Senator Hatch, I think that maybe there could be some tinkering with the aspect of having to prove, especially with terrorist groups, that this person is an agent of the foreign power, and kind of use that analogy that we can use other types of information rather than something that—I use the example of a membership list, but, you know, a photograph, a telephone call, the same types of things that we might be able to use in a Mafia case to put a RICO case together as an enterprise, that we can use that in a terrorism case to show that they are affiliated with or have connections to. I think that would be a good idea.

Senator SPECTER. But not imposing a standard which is so high as to be unrealistic, simply to protect somebody for later blame for having made a mistake. If you don't do anything, no mistakes.

Senator HATCH [PRESIDING.] Senator Schumer is next.

Senator SCHUMER. Thank you, and I want to thank you again, Agent Rowley, as everyone else has, for your stepping forward and doing the Nation a service. I read your memo. It showed you how long we have to go. There is a mindset there that has to be sort of cracked, and your memo does it both in a forthright but also a nice and respectful way.

I have a few questions. First, I don't know if you happened to hear my conversation with Director Mueller on the computer system.

Ms. ROWLEY. I heard some of it. I don't know if I heard the exact whole thing.

Senator SCHUMER. Well, the bottom line is that the FBI's computer system is amazingly backward. I have done a little more research on it, or I want to elaborate a little more. You can sometimes do a search by term, but you can never combine two terms. So you can use "aviation" and get a huge amount of stuff, and you can use "school" and get a huge amount of stuff, but you can't do "aviation" and "school."

Ms. ROWLEY. That is correct. Actually, I kind of mentioned that earlier. That is absolutely right.

Senator SCHUMER. That just amazes me because as I said to the Director, you can do that on my daughter's computer—she is in 7th grade—that we bought her this fall for, I think it was $1,400. I know that we have each year increased the amount of money.

Tell me first, because I asked the Director this, what led to the FBI being so backward in such a fundamental tool, in your opinion? I mean, this is not just typical; this is dramatically and deeply atypical worse, negatively atypical.

Ms. ROWLEY. Backward in computers. You have given me a question I—of course, I have thought about some of these questions, I guess, in my dreams or sleeping or whatever, but that is one I haven't thought about.

Senator SCHUMER. But just, you know, your knowledge of the bureaucracy. Assuming that most small businesses, and even most junior high school students have better computers than the FBI, why would the mindset of the FBI be such that—as of today, this is; by the way, this isn't just as of a year ago. Director Mueller said it would take two years, at a minimum, to bring the system up to snuff.

One of the things that troubles me is why wasn't there somebody—and you don't need to get a Ph.D. in computer science to know how deep this problem is.

Ms. ROWLEY. You know, one of the only things that comes to mind—and I have 21-and-a-half years in, so I am going back to when I was a brand new agent and I worked with—kind of like the people now who would have been some 20-some years ago.

When the computers first started coming on the scene, there were many of the old-time agents, who couldn't type. We had secretaries and stenos who actually wrote the interviews. You just dictated it and it got written. I do know there were a number of people at higher levels back in the 1980s who were kind of opposed to computers and they hated them, and the typing and everything.

Senator SCHUMER. Do they still have carbon paper over there at the FBI?

Ms. ROWLEY. No. Actually, when I started I think they still had it. We had a lot of forms that were still on carbon paper that had to be hand-typed. So I don't quite know why we have never—I am real lucky that I took personal typing in high school because that helped so much when you can actually do your own—especially when you are going to write a letter that you don't have anyone else that can see, I am so glad that I can type all right. Actually, now I should say that with our new agents, this is no longer an issue.

Senator SCHUMER. But this is a function—you know, you can have a bunch of agents out there in the field who don't know how

to type, but somebody at the Headquarters should have said years ago that we—it is such an obvious tool in crime-fighting.

Ms. ROWLEY. Of course, that is recognized now, and I don't know exactly how this all developed, but it goes back some time, as you have noted.

Senator SCHUMER. Yes, okay. Let me ask you this. I know the others have been watching this. We can watch these things on television from our offices; they broadcast them. I know a lot of people have asked you about the culture, but let me ask you what would you do if the Director came to you and said, how do you change the culture?

I mean, this is a big, deep, proud organization that is now reeling, you know. I am sure it is, and there are, as been said, many fine people and they have done a good job on a whole lot of things. But it has been obvious to some of us that over the last several years, not just in this area but in several areas, it has sort of lost its edge.

How do you change it? What would you recommend, from your perspective as an agent in Minneapolis?

Ms. ROWLEY. Well, I think there are probably several things that could be done to improve the culture and the FBI leadership and the problem of careerism. Our Director Mueller has—I keep saying Director Mueller has said this, and whatever, and in many cases this is true. He has mentioned time over that we need to pick our best leaders; we need to pick those best people out there.

In my statement, I mention the fact that I have seen in the past few years just the opposite happening. I have seen a number of great FBI agents with great background experience actually stepping down from their positions of leadership. It has actually gone the opposite direction, and for a lot of reasons. So somehow that has to be reversed. We have to give better incentives to getting into management. We have to reduce the disincentives.

Paperwork—no one has asked me about paperwork. I think that is a real problem. I think people——

Senator SCHUMER. I asked you about the inverse, computers.

Ms. ROWLEY. Yes. I think that, you know, we need to be judicious about that. I go back to the "don't rock the boat, don't ask a question" problem. If I say why are we doing this, does this really have any value, does it serve a purpose, it is either one of two things. It is just like a complaint that we can all complain about it, but nothing can ever change. It just kind of falls on deaf ears and no one really examines it.

Or it might actually be seen—if you are criticizing some particular program write-up or some particular inspection thing, it actually might be seen as a challenge to somebody higher up and they may get mad or whatever. So I think to some extent, if we are going to really scrutinize what is necessary and how we can become more effective, we definitely need to encourage people to say exactly, is there a purpose to what this is? And if there is, fine, we will continue doing it. Can it be done quicker? Can it be done in a more minimal fashion?

Senator SCHUMER. Those questions are not asked enough. It is a real bureaucracy, is what you are saying.

Ms. ROWLEY. The day before I came here, I had to fill out our ethics audit, and that meant that I had to name all the people in my office. Essentially, I had to re-type around 60-some names. I am a good typist, but it still took me like an hour-and-a-half, and I was busy as all get-out, you know, three days ago trying to do this and everything.

But yet I had to take about an hour-and-a-half to re-type, and actually these names are in a file and all you have to do is open up this file. And yet, if I would have complained and said why I am doing—I actually did complain, but I still ended up re-typing those. That is just one little example.

Senator SCHUMER. Right, okay. We have a vote. There are only about two minutes left. Oh, Patrick is back. I was going to call a brief recess, but I may come back and ask you a few more questions. But I am just going to vote, and I thank you, and if I can't make it, I thank you double.

Chairman LEAHY. We should you bring you with us while we vote, Agent Rowley. We could probably continue the questioning; just grab the stenographer, who is superb here, who has done this forever, and follow us over.

You can turn the red light off. I don't think I am taking anybody's time.

One thing—and I was going to ask it earlier, but I didn't want to infringe on the time of the others—you said in your letter that there is a perception among rank-and-file agents that there is a double standard when it comes to discipline in the FBI. I remember hearing that way back in my days when I was a young prosecutor in Vermont working with the FBI then.

What do you mean by this double standard, and if we could wave a magic wand, what would we do to get rid of it?

Ms. ROWLEY. Maybe I can think of how we can get rid of it. Of course, we have in the FBI already in the last year or two when this problem has surfaced—it has been surfaced by others at various times and there are examples, I think, that have occurred in the past few years where higher-level management did the same misconduct or made mistakes and it was lightly dealt with or not dealt with at all, whereas a lower-level agent would be disciplined, and this has surfaced before.

Now, in the last year or two, even prior to the Director, there have been attempts just by policy to make sure that this doesn't happen. I think that there already is in place with the SES system—they have made some changes to that, so trying to remedy the problem.

I am not sure. I know that the OIG in some cases now has been given some additional powers to look at things. It might require somebody just outside our agency because if you are in the chain of command, it is going to be very difficult to ignore someone at a higher level. I think it is kind of just inherent, maybe, some double standard. There have been attempts, though, in the past year to try to remedy this.

Chairman LEAHY. Thank you, Mr. Rowley. I am advised that some of the other Senators on the Republican side are coming back after the vote. We will stand in recess for a couple of minutes until

they come back to give you a chance to stretch your legs and even talk to your husband, if you would like.

Thank you. We will stand in recess for a couple of minutes.

[The Committee stood in recess from 5:03 p.m. to 5:08 p.m.]

Chairman LEAHY. Ms. Rowley, Senator DeWine is here.

Senator DeWine, why don't we go to you?

Senator DEWINE. Mr. Chairman, thank you very much.

Agent Rowley, thank you very much for being with us today. Thank you for your letter and your testimony. I most particularly thank you for your over 20 years of service to our country and to the FBI. I know that you are one of thousands of dedicated FBI agents, and we just appreciate your work.

I talked this morning a little bit to the Director and I said that your letter and your testimony, but for the facts of this particular case, probably could have been written by many agents. I sense a great deal of frustration with agents, those who have devoted their life to the FBI, in regard to the bureaucracy that you have outlined in your letter. So I thank you for coming forward with specific recommendations.

Let me talk a little bit about those recommendations, but also try to get a better understanding of how your office works. For example, how many FISA cases would you have in a year, or possible FISA cases?

Ms. ROWLEY. I am not quite sure, really. I am not even quite sure I can answer that from a national security standpoint, other than to say our office would probably be one of the offices that would have far less than other offices in the country. So relatively few is maybe the best I can say.

Senator DEWINE. You are the legal counsel?

Ms. ROWLEY. Yes, I am legal counsel in our office. Some offices have more than one, but an office such as ours, with about 115 agents or so, we just have myself.

Now, there is a similar thing, of course, in regular criminal cases for Title III intercepts, wiretaps, and even in those cases they can be different types of crimes. We also in those cases would not conduct nearly the number that other offices, with the Mafia and bigger drug cartels or whatever, but we do have a few of those a year.

Senator DEWINE. Without getting into the specifics or the numbers or anything, do you think that that in any way impacted how this matter was handled?

Ms. ROWLEY. The fact that our office actually——

Senator DEWINE. I am not suggesting it does. I just don't know.

Ms. ROWLEY. I don't want to comment specifically about this case, but I don't think really our agents in Minneapolis—we have some top-caliber agents. Some of our agents have come from other intelligence—they have other intelligence backgrounds and I really don't think it would have made a difference. We really have top-notch people.

Senator DEWINE. Let me ask you, looking at this particular case, has it been your experience that you have had other problems, not directly related to this case or not using this case even as an example?

In your very lengthy letter, you talk about the bureaucracy, you talk about the frustration. Obviously, that letter just didn't come

up from this particular one case. I mean, you have had other problems.

Ms. ROWLEY. Correct, correct, and not only——

Senator DEWINE. Excuse me. Would it be fair to say this is not unusual? The circumstances are unusual, the national security matter is unusual, the horrible tragedy is unusual but typical, in a sense?

Ms. ROWLEY. Yes, and also as you mentioned at the start, this could be the complaint of any large number of agents around the country. From the responses I have received from field agents in other divisions, up until now—and, hopefully, you know, cross our fingers that it is going to start improving—this has been the experience in many other types of cases. The bureaucracy has been a problem. Hitting roadblocks internally, and again externally, it can be—in criminal cases, as well, is a problem. And I think we need to think maybe somewhat creative ways of trying to remediate this.

If I can, I don't want to take up all your time, but I didn't give a tremendous answer to Senator Schumer earlier when he asked——

Senator DEWINE. We will take that from his time, even though he is gone. The Chairman is not laughing, so——

Ms. ROWLEY. It ties in a little bit with your question, so we will give you 30 percent and him 50.

Senator DEWINE. All right, but I do have a couple more I would like to get in.

Ms. ROWLEY. You know, when we were talking about the probable cause and why this has kind of come into this issue, it is kind of complex where the mindsets start to change. And I know Director Mueller today mentioned something which struck me as a little odd or a little—actually, I kind of bristled a little bit at it.

He said, well, maybe—someone suggested maybe we should give our agents training in probable cause. Well, first of all, that would fall to me, and I am here to say that the agents who have 20 years in the FBI who have done search warrants and Title IIIs and any number of things, really, really are quite familiar with the standard of probable cause. I don't think that that would really serve any purpose to give some kind of esoteric training.

Senator DEWINE. Okay, all right.

Ms. ROWLEY. But there are some improvements, you know, to the writing where the people on the scene should be given some credit for their observations because those are first-hand observations, and in writing an affidavit that should really be of primary importance. And there shouldn't be any rewriting of an affidavit further up the chain unless it is grammatical or really not of any substance.

Senator DEWINE. One of the recommendations you made I would like to read to you and then I would like for you to comment on. Number nine, development of confidential sources and assets: "Just recently, in the wake of the Whitey Bulger scandal, the guidelines for the development of confidential sources and assets have been extremely restrictive and burdensome. While some of the measures undertaken to monitor the informant process were necessary, they have now gone too far, and if not reviewed or trimmed may result in reduced ability on the part of the FBI to obtain intelligence."

Do you want to explain that a little bit?

Ms. ROWLEY. I am not the person in my office who is the informant coordinator, but we have all, of course, in the wake of these new guidelines and informants, been given new, additional paperwork that needs to be completed, additional items that need to be conducted before opening sources, before certain sources can do certain things. I think it should maybe be reexamined.

I have to tell you where I am coming from because back in the 1990s, we actually had an FBI agent who murdered his informant, and to me it is kind of like other scandals. It seems like we should have done something back then, and nothing occurred after that incident.

We did not have a policy in the FBI in the 1990s that prohibited social or sexual relationships with informants. I find that just unbelievable because most law enforcement agencies had such a policy. I think if we would have had a strong policy, if we would have had some accountability and some good oversight, perhaps all of these additional things that later transpired wouldn't have occurred.

Whenever these things happen, it is just inevitable that sometimes it goes a little too far and we might have some additional paper that is——

Senator DEWINE. Let me ask you one last question. In your letter, you mentioned the problem that agents have with the perception that sometimes they try for a Title III warrant and then if that fails, go for a FISA warrant, which requires different proof but an easier standard.

Let me ask this: Do you think that happens a lot?

Ms. ROWLEY. No, I don't.

Senator DEWINE. Are these suspicions reasonable?

Ms. ROWLEY. No, I don't think it actually happens. In real life, I have never seen where you try for something to do it criminally and if you fail, you pursue the intelligence method. I have never seen that.

But do I think that there is a perception out there sometimes? I do think that there is a perception that this smell test or whatever exists. I don't think it is correct, but I think it does exist.

Senator DEWINE. Thank you very much. We appreciate your testimony.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Kyl?

Senator KYL. Thank you, Mr. Chairman.

Agent Rowley, I had to leave to vote just as Senator Schumer was beginning to ask you a question that I wanted to ask you and it related to your answer to Senator Grassley's question about the computers. I just want maybe a quick response.

You had testified in response to Senator Grassley that it would be nice to have the new computers. I am not sure you wanted to leave us with the impression to mean nice as "nice" but not really necessary, and I just wondered if that was the impression you wanted to leave us with. If so, fine. I just wanted to give you a chance to respond.

Ms. ROWLEY. Well, the ability to conduct research of our records, as I described, where you are putting words—just like you would on Lexis–Nexis, for instance, where you are putting connectors and stuff, I guess "nice" is not the word.

When it comes to intelligence and you really have these critical snippets out there, it would be more than nice. I think it is necessary. It may not in other cases be all that critical, but in intelligence I think it is.

Senator KYL. Thank you very much. I assume that most of us would agree with that.

You had what I thought was a very interesting recommendation in your statement and you haven't had an opportunity to discuss it yet. It is the public safety exception, the Quarles case, and I wonder if you would describe a little bit why you think that would be important, and particularly in the context of terrorism that we are concerned about here.

Ms. ROWLEY. Thank you for giving me that opportunity. It is a little issue that has come up before. Actually, in criminal cases, we have had kidnappings, we have had cases where someone's life can be right on the line, and there is a case that makes this really constitutional to—I shouldn't say ignore Miranda, but disregard it, for public safety reasons.

The only problem with that case is it deals with a loaded gun in a grocery store, and when you start mentioning applying it to other cases such as in a terrorism case when we might want to interview someone, there may well be—I always think of the bomb and someone ready to push it down.

Obviously, *Miranda* is a safeguard, and it is a good safeguard in many cases, but it is like everything else. There may well be a time when it should be overridden, and that would be to save a life. As it stands now, there is a case about that, so it is constitutional and I think that it would not be overturned if a statute codifying it was enacted.

The only problem with the case is, like anything else, it is just case law. In order to give timely advice to someone, you have got to run to a computer and pull it up, and I think that many people have kind of forgotten that case and many courts have actually limited it to its facts. So I think that we have cases that come up from time to time and——

Senator KYL. Do you think that we should at least try to write some kind of a narrow public safety exception? I mean, that was your recommendation.

Ms. ROWLEY. I do. After September 11, I called some staffers about this because I think it is an important issue, and I think it definitely has the potential to repeat itself. You know, I know people will get alarmed if we say we are going to violate *Miranda*, but I don't think it is something that comes up all the time, but there are these cases. The one I referred to is the most dramatic one.

There is a baby in a duffel bag in a forest that has been kidnapped that morning, and that is the type of thing, of course, that doesn't arise too often. But when it does, our agents really need to feel somewhat safe that they can proceed.

Right now, after the *Dickerson* case, there are commentators that are speculating that civil liability exists for the agent. So, in addi-

tion to having the statement suppressed, which in a case like this really—if it is saving a life, we would—it goes back to prevention versus prosecution. We wouldn't care about the prosecution, we wouldn't care about the statement being suppressed. We would want to save the life.

Senator KYL. They might even get sued.

Ms. ROWLEY. Right. Now, the agent might even get sued, possibly.

Senator KYL. Do you have to pay for your own liability insurance or umbrella coverage or anything of that sort?

Ms. ROWLEY. It is my recollection that we get $50 reimbursed from the Department of Justice for our liability insurance. I think that is right. I am not sure. We get a portion of it. I think it is $50.

Senator KYL. But a liability insurance policy that would protect agents working in the course of their employment would cost a lot more than $50.

Ms. ROWLEY. A couple hundred, is it? I think it is around a couple hundred a year, and that kind of civil liability protection—you go back to your chilling factors. Agents don't even want to be sued. It is like, you know, any other person. The suit itself is a real chilling factor of somebody aggressively trying to save a life.

Senator KYL. I have been an advocate of trying to have the Government pay for the insurance for people who are working in the line of their duty.

You testified earlier to something I thought was very important and it maybe didn't quite receive the degree of attention that I think is warranted, and it had to do with the new guidelines.

From your experience as an agent on the line—and you said you had also gone back and reviewed more historic documents in the course of your employment—you view these new guidelines as very helpful to doing your job and you indicated that you didn't think the American people had to be fearful that they would be abused by the agents. You used the specific example of being able to go into meeting and if there were a discussion of threats of terror, then that would be very useful. And if there weren't, then that was the end of it, is kind of the way you put it.

Do you want to amplify on that at all, because I think this is a very important point for people to understand?

Ms. ROWLEY. I think that when a certain guideline might be somewhat relaxed in this case—and, of course, Director Mueller has explained that surfing the Net is something any kid can do. Going into any meeting is anything local law enforcement or anyone can do.

I think the real crux of it is in how it is done. We also have the ability to collect information. So just by undertaking to keep your ears open and walk into that meeting, and then if something does transpire you can act on it, that doesn't mean we go overboard and start recording things and mishandle that ability.

It really goes into the capability to use it, but judiciously, because I think it increases only the potential for—it does perhaps increase the potential of going further than we have before. I think we can have our cake and eat it, too, is what I am saying here.

Senator KYL. With good training?

Ms. ROWLEY. I think, with training, we can do these items and we still can avoid interfering with people's rights.

Senator KYL. I appreciate it very much. Thank you.

Chairman LEAHY. Senator Sessions, the most patient man in Washington.

Senator SESSIONS. Thank you, Mr. Chairman, and I think this has been a good hearing.

Chairman LEAHY. I do, too.

Senator SESSIONS. We have had a good, high level of discussion, witnesses talking about important matters.

Agent Rowley, thank you for what you have done. I know it is an unusual thing, but it was an unusual circumstance. Before Director Mueller was confirmed, he and I talked. At his confirmation hearing, we talked and I asked him questions and they focused on the very things you raised in your memorandum.

I raised questions concerning matters such as defensiveness on the part of the FBI, unwillingness to admit mistakes, some arrogance, too much bureaucratic blocking, particularly in Washington, that undermined the effectiveness of investigations in the field. I asked those questions based on my experience of 12 years as United States Attorney and 2 as an assistant United States Attorney.

I believe that is consistent with the overwhelming view of Federal prosecutors throughout the system, and I believe, as you have noted, it is consistent with the views of the agents in the field. So to that extent, your letter and the public hearing that has come about here, I believe, will strengthen his hand in being able to make the kinds of cultural changes that need to be made.

I love the FBI. I know you do, and so we want to see it reach its highest and best potential, not hurt it in any way. I think, in my own personal view, that we hurt the IRS. I think that it has been damaged by some of the things that were done. We don't need to damage the FBI; we need to strengthen it and help it reach its fullest potential.

But just back to this problem we were facing, it seems to me there is always a good excuse that the computer system wasn't up to date. If you had been the point person to monitor the intelligence of the United States, wouldn't you create a system in which important documents from the field would come to your desk personally within hours of the time they were sent forward?

Isn't it unwise or inadvisable, as apparently occurred with regard to the Arizona memorandum, that some clerk sent it off to a different section and it never even got to the supervisor there? Isn't that a poor way to run a shop?

Ms. ROWLEY. Well, as a general matter—I am not speaking to any particular case, but as a general matter, of course, it is obvious that we want the important items that need to be acted on to really get to the right place, and if we do have a focal point at a central location, it is very clear that they have to get that information.

There is a problem when there is a lot of intelligence being gathered and the ability to distinguish the wheat from the chaff, and that isn't easy when you first get this information. So that is, I think, one of the reasons for having an intelligence analysis where we can really attempt to get these important things that need to

be acted on, as distinguished between something that is not so important.

Senator SESSIONS. Yes. Well, I think Director Mueller's new organization will do that, and I don't think there is anybody there that is not going to be reading important documents from the field. I think those documents could have been recognized as being important before September 11, and I don't think we can say with certainty, as you pointed out, that they could not have helped us avoid September 11. Probably not, but possibly.

Ms. ROWLEY. Can I say one more thing, because I just thought of something?

Senator SESSIONS. Yes.

Ms. ROWLEY. You know, one way of recognizing importance really—and this can't be overestimated—is the person who is experiencing first-hand the event. Okay, I am just going to speak generally, but if it is a flight instructor, or whatever it is, and this thing is real—that is not a good example, but I am just saying that somebody who is experiencing it first-hand many times is in the best position. It is not the person five levels up. What often happens is it gets lost in the translation.

Senator SESSIONS. Absolutely, I agree.

Ms. ROWLEY. The person here who sees it, feels it, eats it, really knows it is important. Someone further up the chain—and, again, the message by that time has maybe been diminished, or whatever—doesn't recognize the importance.

Senator SESSIONS. Let me ask you this: It is odd to me that the investigative agency, the agency designed to protect public safety—and I have seen instances where this occurred in the Department of Justice and not just the FBI—they shouldn't be negative about things that might impact public safety. They should be positive and help the people in the field succeed. Rather than putting down and throwing up roadblocks, they ought to be helping them, recognizing that you are onto something important, and maybe helping you legally or through intelligence searches around the country and the world, helping you to succeed.

If the Department of Justice does not advocate and take it to court before a judge who has the final responsibility, who is going to advocate it?

Ms. ROWLEY. Well, I had forgotten to mention a footnote in my letter about the judges. I think our system actually was originally designed to let a judge—it goes to Senator Schumer's question, too. All these perceptions of where probable cause may lie—our system really was designed to let a judge make those determinations, not other levels before you even get to a judge.

When in doubt, and especially when public safety is on the line, I think we need to let judges look at these things and then make their determination. In fact, I have heard from a prosecutor who—you know, many prosecutors might be antithetic to, you know, even the second opinion idea. They may say, well, I don't want anybody second-guessing me. But I have actually heard from a prosecutor about that point, about going—you know, when in doubt, take it to a judge.

Senator SESSIONS. When lives are at stake.

Ms. ROWLEY. Especially.

Senator SESSIONS. This was not a minor matter. This was a matter that dealt with potential loss of life, and I think you should advocate.

Now, you have expressed an opinion in your letter that there was clearly probable cause at some point before September 11. How confident are you of that?

Ms. ROWLEY. I am not going to get into that because, of course, these issues are before the other Committee and I am just not going to comment at this time about it.

Senator SESSIONS. Well, you say in your letter that probable cause existed, in your opinion.

Ms. ROWLEY. That is correct. I actually did not——

Senator SESSIONS. Do you still stand by that, or was it a close call?

Ms. ROWLEY. That letter—actually, the fact that everyone here is aware of that—I didn't really know that would happen because I gave it to the Joint Intelligence Committee and I think I have to be very circumspect at this point because there are ongoing proceedings.

Chairman LEAHY. I might say, Senator Sessions, we have made it very clear that Agent Rowley has been extraordinarily forthcoming, as has Director Mueller and his office. We did agree that we would be careful limiting it to issues that involve an ongoing case.

Senator SESSIONS. I see.

Chairman LEAHY. I would point out that some of the matters you are raising have been raised in Intelligence and we can provide you on a classified basis some of the material you are talking about. I would be happy to arrange that.

Senator SESSIONS. I fully understand that, but I tend to be like Senator Specter. Sometimes, I think there are too many people in the system putting too many burdens that go beyond what the law requires and therefore making it difficult for public safety to be protected.

Thank you.

Chairman LEAHY. Thank you.

I want to thank all Senators, both Republicans and Democrats, who have been at this hearing. From the time we started this morning, it has been about an eight-hour hearing. Ms. Rowley probably thinks it was even longer because she was watching the early hearing before.

Agent Rowley, I have a feeling that you would much rather be in your office doing the things that you, from everything we have been told, do very, very well. But I appreciate your being here. I appreciate Director Mueller and Inspector General Fine for the amount of time they took. We have people like Mr. Collingwood who has sat through all of this patiently.

These hearings, as both Senator Hatch and I have made very clear, are not "gotcha" hearings. These are hearings that we want to help. As I said earlier, terrorists don't ask whether you are Republicans or Democrats, or where you are from, or anything else. They just strike at Americans, and all of us have a duty to protect Americans.

We also have a duty to protect those things that have saved our own liberty. As I said earlier, Attorneys General come and go, Senators come and go, Directors come and go; we all do. The Constitution stays constant and we can protect ourselves within that framework. You are sworn to do that, and you have worked a long career upholding that oath and I admire you for it.

[The prepared statement of Ms. Rowley appears as a submission for the record.]

Chairman LEAHY. So I thank all of my colleagues. This is one of many hearings we have had.

Senator Thurmond has a statement for the record and we will include it at this point.

[The prepared statement of Senator Thurmond appears as a submission for the record.]

Chairman LEAHY. We will stand gratefully in recess.

[Whereupon, at 5:35 p.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 21, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed by Senator Feingold in connection with a hearing before the Committee held on June 6, 2002, regarding the counterterrorism efforts of the Federal Bureau of Investigation. We regret the delay in responding.

Thank you for your attention to this matter. If we may be of additional assistance, we trust that you will not hesitate to call upon us.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

The Honorable Russ Feingold

Written Questions of Senator Russell D. Feingold
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. Do the new domestic surveillance guidelines authorize FBI agents to attend political demonstrations and worship services for the purpose of detecting or preventing terrorist activities, even if there is no evidence that such activities will be discussed at the demonstration or church, synagogue, or mosque? Please explain.

   The type of investigative activity to which your question refers is governed by the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. Those guidelines state that, for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally. The guidelines further provide that no information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity.

2. Do the new guidelines permit an FBI agent, for example, to continuously and repeatedly monitor a chat room in which no criminal activity has ever been discussed, and in which there is no evidence that criminal activity ever will be discussed? Please explain.

   This type of investigative activity is also governed by the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. Those guidelines state that, for the purpose of detecting or preventing terrorism or other criminal activities, the FBI is authorized to conduct online search activity and to access online sites and forums on the same terms and conditions as members of the public generally.

3. During the hearing I asked you whether, under the authority of the Attorney General Guidelines for Foreign Intelligence Collection and Foreign Counterintelligence Investigations, the FBI can initiate surveillance of political meetings or religious services without suspicion of criminal activity. You said that you were unfamiliar with those guidelines.

   (a) Now that you have had a chance to review them, please tell me whether you believe that this authority can be used to initiate surveillance of political or religious activities without suspicion of criminal activity.

Please see response to 3(b).

(b) Please describe the standard for initiation of surveillance of political or religious activities under these guidelines.

The Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations allow for any asset or employee acting for or on behalf of the FBI to join or participate in any organization in the United States without disclosing his affiliation to appropriate officials of the organization for the purpose of establishing, enhancing or maintaining cover, or for the purpose of collecting information concerning a member of the organization when it is determined by the Special Agent In Charge or other appropriate supervisory personnel that the information pertains to activity that is or may be a violation of federal, state, or local law; or is relevant to the conduct of a full foreign counterintelligence investigation being conducted under the guidelines or is to be used as the basis for instituting a preliminary inquiry or full investigation. Participation of this nature that will influence rights protected by the First Amendment may be approved if the Director or the Acting Director of the FBI has determined that there is probable cause to believe the organization is engaged in espionage, sabotage or intelligence activity for or on behalf of a foreign power or international terrorism; or the undisclosed participation is essential to establish, enhance or maintain cover and the effect on the activities of the organization is incidental to this purpose.

4. Have the AG Guidelines for Foreign Intelligence Collection and Foreign Counterintelligence Investigations been modified since May 1995?

a. If yes, please provide a redacted copy of the modified guidelines.

The guidelines were modified on March 8, 1999 and at present are undergoing review within the Department of Justice.

b. If no, are there any plans to modify these guidelines?.

Please see response to 4(a).

c. If there are plans to modify these guidelines, what is the current status of your deliberations on modifications to these guidelines?

As stated above, the guidelines are currently under review by the Department of Justice.

d. Will you consult with Congress before modifying these guidelines?

The Department of Justice is coordinating the process of revising the guidelines. Any inquiry about the Department's approach to consulting with Congress on the guidelines review process should be directed to the Department.

5. In response to a question about whether the previous guidelines on domestic surveillance inhibited FBI investigations that might have prevented the September 11th attacks, you stated that you were aware of "anecdotal evidence" related to using websites and databases. Please describe specific examples of actions that were prohibited under the previous guidelines but that are now permitted under the revised guidelines and that might have prevented the September 11th attacks.

I am unaware of any investigative activity which, if permitted by the guidelines, may have prevented the September 11th attacks. With regard to websites and databases, the old Attorney General Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations allowed for use of the Internet to support existing investigations, including preliminary investigations and the prompt and extremely limited checking out of leads. While the new guidelines provide expanded authority to visit public events and places for the purpose of detecting and preventing terrorist activity, the previous rules governing undercover activity to infiltrate a religious or political group are still in place. These previous rules permit infiltration of such a group only upon a showing that they are engaged in criminal or terrorist activities, a requirement that has not been changed by the new guidelines. Furthermore, the new guidelines impose an additional requirement that a constitutional analysis be completed weighing the advantages of the undercover operation with the potential impact on constitutionally protected rights before any such operation is approved.

6. Last October, after the September 11th attacks, you called for increased hiring of Arabic, Farsi, Pashto and other foreign language speakers. In response to a question by Senator Schumer about Arabic, Urdu and Farsi translators, you stated that the FBI has hired over 100 specialists in these areas. Since October:

(a)(b) How many personnel have been hired with linguistic or cultural expertise? How many personnel with linguistic or cultural expertise have been transferred to the FBI and from which agencies? Please provide a breakdown of these numbers by language, country or region-specific type of expertise (e.g., 8 agents hired with Farsi language skills).

Even prior to 09/11/2001, the FBI was actively engaged in the recruitment and processing of individuals claiming both an English and foreign language proficiency for our Special Agent, Language Specialist, and Contract Linguist positions. During the five year period that ended 09/30/2001, the FBI brought on board 122 Special Agents, 445 Contract Linguists, and 144 Language Specialists with a professional-level proficiency or higher in both English and a foreign language

Since 09/17/2001, the FBI has received more than 20,000 applications for its Contract Linguist position and more than 2,500 applications for its Special Agent position from individuals claiming a proficiency in both English and a foreign language. On the basis of careful workforce planning, the FBI has been able to selectively screen and expedite the processing of the best qualified candidates in order to meet current and projected FBI needs.[1] The processing of each candidate involves proficiency testing, a polygraph examination, and an FBI-conducted background investigation. Special Agent candidates are also subject to a panel interview. Despite the rigors of this process, thus far in FY 2002, the FBI has hired 235 Contract Linguists; 16 Language Specialists, and 25 Special Agents with at least a professional level proficiency in English and a foreign language. Several hundred more candidates remain at various stages of processing and are being expedited to the maximum extent possible.

It is anticipated that a sufficient number of Arabic, Farsi, Pashto, and Urdu-proficient Language Specialists and Contract Linguists will be approved for hire or contract by the end of calendar year 2002 to address current and projected demand for services in these languages. Be assured that the FBI will continue to direct its recruitment and applicant processing resources towards those critical skills needed by the FBI, including foreign languages, as it adapts to its evolving investigative mission.

The following table presents the number of Contract Linguists, Language Specialists, and Special Agents (Language Program) approved for hire or contract with the FBI since 10/01/2002, by foreign language proficiency:

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[1] The FBI's workforce planning in this area was recently the subject of significant praise by the General Accounting Office within its January 2002 report to Congress, titled, "Foreign Languages, Human Capital Approach Needed to Correct Staffing and Proficiency Shortfalls."

Foreign Language Program - FY 2002 Hiring/Contracting		
Language	**Type of Position**	**Number Approved for Hire/Contract Since 10/01/01**
Arabic	**Contract Linguist**	**97**
	Language Specialist	**4**
	Special Agent	**0**
Farsi	**Contract Linguist**	**14**
	Language Specialist	**4**
	Special Agent	**0**
Pashto	**Contract Linguist**	**5**
	Language Specialist	**1**
	Special Agent	**0**
Urdu	**Contract Linguist**	**3**
	Language Specialist	**1**
	Special Agent	**0**
All Other Languages	**Contract Linguist**	**116**
	Language Specialist	**6**
	Special Agent	**25**

c. How many technical, scientific, computer and analytical specialists have been hired? How many have been transferred to the FBI and from which agencies? Please provide a breakdown of these numbers by area of expertise.

SPECIAL AGENT

As of 7/23/2002, during Fiscal Year (FY) 2002, the FBI has hired 39 Special Agents with an expertise in Computer Science/Information Technology; 45 Special Agents with an Engineering background; 26 Special Agents with a Foreign Counterintelligence background; 10 Special Agents with an expertise

in Terrorism or Explosives; 15 Special Agents with an expertise in Military Intelligence; 27 Special Agents who are pilots and 38 Special Agents with a Physical Science background. A total of 674 Special Agents have been hired (through New Agents Class 02-15, which commenced on 07/14/2002). There have been no transfers of Special Agents from other federal agencies to the FBI during FY 2002. All FBI Special Agent applicants are required to pass a series of tests, including a panel interview, and successfully complete a background investigation before they are hired.

PROFESSIONAL SUPPORT

To date, 130 FBI Professional Support employees have been hired (not transferred) during FY 2002 with technical, scientific, computer and analytical abilities including:

6 Physical Security Specialists (Explosives/Hazmat)
2 Security Specialists
1 Security Assistant
3 Intelligence Operations Specialists
15 Intelligence Research Specialists
1 Evidence Technician
4 Computer Specialists
1 Program Analyst
7 Biologists
1 Microbiologist
1 Accounting Technician
3 Budget Analysts
1 Occupational Health Nurse
1 Electronics Engineer
8 Electronics Technicians
11 Attorneys
1 Illustrator
1 Writer
12 Language Specialists
2 Financial Analysts
1 Physical Scientist
2 Physical Science Technicians
1 Computer Scientist
41 Investigative Specialists
1 Chief Information Officer (Policy and Planning)
1 Information Technology Manager
1 Supervisory IT Specialist (Data Management)

d. Have FBI recruiters found that an adequate number of qualified applicants exists to fill positions in all recruitment areas? If not, which areas of expertise lack qualified applicants? For those areas of expertise that lack qualified applicants, what steps has the FBI taken to ensure a qualified applicant pool?

FBI recruiters have found that an adequate number of qualified applicants exists to fill positions in all recruitment areas. In an effort to immediately solicit applications from candidates possessing the needed critical skills, starting on 01/23/2002, the FBI made several national public announcements and advertised our need for Special Agent candidates with those skills. To efficiently and immediately collect those applications, an on-line Internet preliminary Special Agent application system was created and went live on 02/08/2002. Applicants who claimed to possess one of the needed critical skills were drawn from the system and based on their residence, were provided to the FBI field office covering their home address for processing. As of 07/23/2002, over fifty-seven thousand Special Agent applications have been received through the on-line system. These are sorted into those who claimed a critical skill and by field office of residence. There were approximately 30,055 of those self claimed critical skill candidates provided to FBI field offices for processing.

In addition, during FY 2002, the FBI established the Computer Science/Information Technology (CS/IT) Special Agent Entry Program to enhance its ability to attract individuals from the CS/IT community. The program allows applicants who possess a CS/IT degree or certification as a Cisco Certified Network Professional or a Cisco Certified Internetworking Expert to apply without the work experience normally required of a special agent candidate.

The national public announcements noted above also advertised a similar need for numerous Professional Support positions in the FBI and we are aggressively recruiting to fill these positions using an on-line application system as well as targeted recruiting activities. As of 07/23/2002, the FBI has received more than 37,000 applications for support positions. The candidate pool continues to include highly qualified candidates for the advertised Professional Support positions.

7. Earlier this month, you announced a plan to hire approximately 900 new agents and analysts.

a. How many agents and analysts does the FBI expect to hire with linguistic and cultural or other expertise?

The FBI's critical need for additional translation support, particularly among Middle Eastern languages, received national attention following statements made by Director Mueller during a televised news conference on 09/17/2001. During this news conference, Director Mueller asked for assistance from United States citizens proficient in several critically-needed foreign languages to assist in the investigation into the September 11 terrorist attacks. Following this announcement, Director Mueller instructed all 56 field offices to reach out to immigrant communities to address concerns, build relationships and seek assistance.

Even prior to 09/11/2001, the FBI was actively engaged in the recruitment and processing of individuals claiming both an English and foreign language proficiency for our Special Agent, Language Specialist, and Contract Linguist positions. During the five year period that ended 09/30/2001, the FBI brought on board 122 Special Agents, 445 Contract Linguists, and 144 Language Specialists with a professional-level proficiency or higher in both English and a foreign language.

Since 09/17/2001, the FBI has received more than 20,000 applications for its Contract Linguist position and more than 2,500 applications for its Special Agent position from individuals claiming a proficiency in both English and a foreign language. On the basis of careful workforce planning, the FBI has been able to selectively screen and expedite the processing of the best qualified candidates in order to meet current and projected FBI needs. The processing of each candidate involves proficiency testing, a polygraph examination, and an FBI-conducted background investigation. Special Agent candidates are also subject to a panel interview. Despite the rigors of this process, thus far in FY 2002 the FBI has brought on board 235 Contract Linguists; 16 Language Specialists, and 25 Special Agents with at least a professional level proficiency in English and a foreign language. Several hundred more candidates remain at various stages of processing and are being expedited through the hiring process.

It is anticipated that a sufficient number of Arabic, Farsi, Pashto, and Urdu-proficient Language Specialists and Contract Linguists will be approved for hire or contract by the end of calendar year FY 2002 to address current and projected demand for services in these languages. Be assured that the FBI will continue to direct its recruitment and applicant processing resources towards those critical skills needed by the FBI, including foreign languages, as it adapts to its evolving investigative mission.

b. Please provide a breakdown of the target hiring goals by language, cultural, technical, scientific or analytic area of expertise and indicate whether they will be agents or analysts under the Director's proposed reorganization plan.

In January 2002, the FBI's Executive Assistant Directors and field offices identified the desired skill sets and approximate ratios needed in the 966 New Special Agents to be hired in FY 2002 as:

25 %	**(241)**	**Law Enforcement, Attorney, Military, Fixed Wing Pilots, and others;**
20%	**(193)**	**Computer Science, Information Technology;**
20%	**(193)**	**Language (64% Spanish, 13% Chinese, 7% Russian, 4% Vietnamese, 3% Arabic, 2% Korean, and others);**
10%	**(97)**	**Physical Sciences**
10%	**(97)**	**Engineering**
5%	**(48)**	**Military intelligence experience**
5%	**(48)**	**Counter terrorism experience**
5%	**(48)**	**Foreign counterintelligence experience**
100%	**(966)**	**TOTAL**

The FBI's hiring plan for Professional Support personnel requires that we hire over 1,400 employees. This number is comprised of funded positions from our FY 2002 Appropriations and the Counterterrorism (CT) supplemental as well as replacement of personnel lost through attrition. The majority of the new positions (204 from FY 2002 enhancements and 526 from the CT supplemental) are in specialized categories supporting our intelligence mission as well as our information technology, language and technical programs.

FY 2002 target hiring goals for Professional Support, which include specific Congressional enhancements, are as follows:

35	**Language/Cultural**
125	**Technical**
100	**Scientific**
300	**Analytical**
150	**Investigative**
100	**Information Technology**
100	**Security**
100	**Clerical/General Support**

8. News reports indicated that when the US sent troops to Afghanistan last September, we had only a handful of speakers of the two main Afghan languages -- Pashto and Dari. But, this is not the first time that our country has suffered from a lack of expertise. When US troops were sent to Haiti in 1994, the National Security Agency had only one Haitian Creole linguist on staff. Recently in the *Washington Post*, James Bamford proposed the creation of a "linguistic reserve" analogous to our military reserves, in order to ensure that the right expertise is available instantly. What are your views on such an idea? What steps has the FBI taken to ensure that the linguistic and cultural specialists are available immediately now and will be available immediately in the future?

To ensure that present linguistic and cultural needs are met, the FBI has successfully directed its recruitment and applicant processing resources towards those skills needed by the FBI. In addition, the FBI is utilizing the services of the Foreign Service Institute to enhance the language and cultural training of FBI employees, especially those assigned to overseas locations.

The FBI fully supports the creation of a "linguistic reserve" to ensure that the right linguistic expertise is available to support operational surge requirements. The Intelligence Community Foreign Language Committee has proposed a National Foreign Language Skills Registry that will capture this type of information through a self-nomination process over the Internet. Once implemented, individuals who would like to provide language support to the government may register their language skills through the National Foreign Language Skills Registry for use during times of crisis and to alleviate surge language requirements in the future.

The FBI established the FBI's Foreign Language Skills Registry in June 2000 as an extension of recruitment efforts through the fbi.gov website. Applicants who do not possess skills in the languages listed for immediate need are invited to register their skills in the FBI Language Skills Registry for possible future use by the FBI. Since its inception in 2000, over 31,000 individuals have registered their language skills in this manner.

Another initiative sponsored by the FBI to provide a "linguistic reserve" to the law enforcement and intelligence communities is the Law Enforcement Intelligence Linguist Access "LEILA" database. LEILA is the product of an interagency team that has established uniform language proficiency and security standards for linguists under contract to partner agencies. The goal of LEILA is to promote the sharing of language services available to the law enforcement and intelligence communities and to increase the availability of linguists across agency lines. The LEILA database is currently under development and will soon be available to member agencies through the Internet and Law Enforcement On-Line. Once on-line, LEILA will provide easy access to contract linguists who have been previously

vetted by one of the partner agencies.

9. Geoff Porter, a Middle Eastern Studies professor at New York University, wrote in an op-ed in the *New York Times* (6/1/02) about the deficiencies in the FBI's ability to recruit and test for Arabic speaking agents. Porter noted that the written test focused exclusively on Modern Standard Arabic, even though such fluency would only enable a speaker to understand the more formal Arabic used in TV and print news media reports. Porter further contends that spoken colloquial Arabic varies widely from country to country, so much so that speakers of one Arabic dialect may not understand speakers of a different Arabic dialect. He even recounts how he spoke Moroccan Arabic to an Egyptian taxi driver who understood so little of the Moroccan dialect that the taxi driver mistakenly believed Porter was speaking German. Even more troubling in Porter's article is the claim that, when he voiced his concerns to FBI officials during the personal interview stage of the application process, they ignored or dismissed his concerns.

(a) Does the current application process test for spoken fluency and listening comprehension in colloquial Arabic dialects?

The FBI's language test measures proficiency in several Arabic language skills: listening and reading comprehension, Arabic to English verbatim translation, and speaking proficiency in both Arabic and English. The listening and speaking portions of the examination are in Modern Standard Arabic. Inasmuch as the vast majority of linguists tested and ultimately hired by the FBI are native speakers of Arabic, they are proficient in Modern Standard Arabic plus one or more of the five major dialectical variations: Egyptian, Gulf, Iraqi, Levantine, and North African. There is no dialect in the written language. Although the FBI does not currently test applicants in Arabic dialects, we are well aware of their existence and maintain a robust and native translation capability in all of the dialects. In addition, all of our Arabic language testers are educated native speakers of the language.

(b) What will you do to ensure that the FBI recruits and hires individuals who can understand both Modern Standard Arabic and colloquial forms of Arabic, including reading, writing, listening and speaking?

In early 2001, the FBI contracted with a language test development company to create a listening/summary/translation test in the five Arabic dialects. The new test will be available in late 2003 and will become a part of the language test battery once it is fully validated. In the meantime, we have been very successful in recruiting and hiring new Arabic linguists on contract. Since the beginning of this fiscal year, the FBI has hired over 100 Arabic linguists who are proficient in both Modern Standard Arabic and the many varieties

of Arabic spoken on the streets.

10. Your reorganization plan seems to focus on terrorism threats posed primarily by Al Qaeda or terrorists from Arab or Muslim nations. That, of course, is an important priority, but we also know that our nation unfortunately has had home-grown terrorists. The anthrax attacks last fall appear to be among the most recent. But, we have also had attacks by terrorists like Ted Kaczynski and Timothy McVeigh, who were not Arab or Muslim, but white Americans.

The FBI has an entire section, the Domestic Terrorism/Counterterrorism Planning Section (DT/CPS), that is dedicated to domestic terrorism detection, prevention, and investigations. This section was brought into existence in response to the 1995 bombing of the Murrah Federal Building. The DT/CPS is broken down into four units: the Domestic Terrorism Operational Unit (DTOU), Weapons of Mass Destruction Operations Unit (WMDOU), Weapons of Mass Destruction Countermeasures Unit (WMDCU) and the Special Events Management Unit (SEMU). DTOU manages domestic terrorist activity associated with right-wing extremist groups Timothy McVeigh), left-wing extremist groups, or special interest terrorist groups/lone offenders (Ted Kaczynski). The WMDOU manages WMD investigations, operational response, and it routinely conducts WMD threat assessments. WMDCU is responsible for training, exercises, planning and policy related to WMD terrorism and response at the Federal level. Finally, the SEMU is responsible for assessing the risk of terrorist activity at major events. Joint Terrorism Task Forces (JTTF) have also been implemented nationwide. The function of the JTTF is to facilitate liaison and to share intelligence at the Federal, state, and local levels, as well as to conduct Federal investigations at the Direction of FBI Supervisory personnel. Subjects of FBI DT/CPS investigations may be associated with groups, may have an interest in the use of either conventional or unconventional weapons, and/or may be targeting a special event. The DT/CPS has supervisory agents and professional support personnel that are very well versed on these groups and the surrounding issues.

In the post September 11 environment, the DT/CPS has requested an increase in the number of Supervisory Special Agents and Professional Support Staff allocated to the section in order to address the increasing work load handled throughout the section and to help support the FBI's 56 field offices.

a. What are you doing to ensure that the FBI is prepared to detect and prevent future acts of anthrax terror or other domestic terror attacks committed by people not

associated with Al Qaeda or a global terror network?

In response to WMD threats or incidents, FBI has successfully coordinated with local Hazardous Materials Teams (Hazmat), Emergency Medical Services, the Centers for Disease Control (CDC), and other Federal assets as required. This coordination effort ensures that WMD threats are handled properly, suitable screening takes place, and the response of law enforcement equals the perceived threat.

- **Centers for Disease Control (CDC) and Prevention established a laboratory protocol for examining biological and chemical samples. In accordance with CDC guidance, FBI has established laboratory protocols for approved local laboratories and veterinarian clinics. The local laboratories can then process WMD threat material and notify the FBI in a timely and efficient manner. Local laboratories have received equipment to test for: Anthrax, Encephalitis, Glanders, Plague, Q fever, and Botulinum Toxin, among others.**

- **The FBI, in conjunction with other Federal, state and local first responders has engaged in training and live situations in order to better distinguish between the roles of an investigative agency versus agencies with public safety or hazardous materials functions**

- **Each field office is assigned a WMD coordinator - responsible for WMD investigations and liaison. New initiatives involving the coordinator include: liaison with the US Department of Agriculture, CDC, and the Public Health Department; identifying existing nuclear or chemical sites; reaching out to hazardous materials/chemical materials manufacturers and suppliers; and educating the manufacturer's/suppliers on the WMD threat as well as potentially suspicious inquiries or purchases.**

- **The FBI has developed a series of "Special Bulletins" to inform first responders, Federal agencies, and medical personnel of current WMD issues and proper response measures. Some topics covered by the bulletin include chemical releases and exposure to biological agents, such as anthrax.**

- **All 56 field offices have Incident Contingency Plans in place. These plans ensure that if a WMD incident were to occur, a proper coordinated response including Federal, state and local entities would be implemented. The FBI coordinates with local emergency planning committees and local and state government agencies in order to define each agency's role and responsibilities.**

b. Can you tell me how this priority is reflected in your reorganization plan?

In addition to the information provided above, the DT/CPS is increasing its emphasis on prevention and intelligence sharing. Several FBI Supervisory Special Agents and Professional Support Staff are detailed to other Federal agencies in order to enhance the lines of communication between the FBI and its Federal counterparts. Renewed emphasis is being placed on the liaison function at headquarters and in the field. Additionally, the DT/CPS is working to strengthen the relationship between its operational components and analytical assets. The above initiatives are designed to help successfully prevent WMD terrorist acts before they occur. This approach reduces the number of incidents the FBI reacts to which could pose substantial damage to property and loss of life.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 22, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed the Department's second submission to questions posed to Federal Bureau of Investigation Director Robert Mueller following his testimony before the Committee on June 6, 2002. We apologize for any inconvenience our delay in responding may have caused the Committee.

The Department is working diligently to finalize the remaining outstanding questions, and we appreciate the additional time provided to submit our responses. Accordingly, responses to the following questions will be provided as soon as possible: Senator Leahy questions 7d, 17b, 21, 22, 27, 28, 29, 30, and 31; Senator Cantwell questions 6a and 9a; and question 1 submitted by an unnamed Senator.

If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Written Questions of Senator Patrick Leahy
to the Honorable Robert S. Mueller, III
At the Hearing Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

QUESTIONS FOR FBI DIRECTOR MUELLER

Prior Requests:

1. a. When can the Judiciary Committee expect answers to the written questions relating to Zacharias Moussaoui propounded after the May 8, 2002 hearing?

The Department submitted responses to the May 8, 2002 questions for the record on December 23, 2002, April 11, 2003, July 10, 2003, and July 16, 2003.

b. When can the Judiciary Committee expect answers to the letter sent to the Department of Justice by Senator Specter and myself, on June 13, 2002?

Responsive briefings were held with the Committee members and staff on June 27 and July 9, 2002.

Phoenix Electronic Communication:

2. The Phoenix Electronic Communication remains classified but press accounts have made clear that this July 10, 2001 document warned about radical Middle Eastern fundamentalists connected to terrorist groups attending flight schools in this country, possibly for purposes of training for terror operations. This warning was relevant to the profile of Zacarias Moussaoui and could have been used to bolster the factual predicate for the application for a FISA order being drafted by the Minneapolis Field Office and Headquarters personnel in August and early September, 2001. Nevertheless, you testified on May 8, at your last appearance before the Committee, that the Phoenix E.C. was not used by agents who were investigating the Moussauoi case in Minnesota or Headquarters.

a. The Phoenix E.C. was uploaded to, transmitted to Headquarters via, and accessible on the FBI's Automated Case System (ACS). Please explain whether access to the Phoenix EC on the ACS network was blocked or restricted in any fashion.

Access to the Phoenix EC was restricted to the Phoenix Division and FBI Headquarters.

b. Was the Phoenix EC accessible on the ACS network to agents in the Minneapolis Field Office?

No.

c. Was the Phoenix E.C. accessible on the ACS network to agents in the Radical Fundamentalist Unit and other units within the Counterintelligence Division at FBI Headquarters?

Yes.

d. What terms could be used to search for and access the Phoenix EC on the ACS? For example, could a search by those agents with unrestricted access to the Phoenix EC have been able to access this document by using the search terms "flight school" or "aviation training"?

The terms "flight school" and "aviation training" do not appear in the Phoenix EC. Therefore, a search of those terms would not have produced the Phoenix EC. The reference in the Phoenix EC is to "civil aviation universities and colleges." A search of those terms would have yielded the Phoenix EC.

e. Did the Headquarters personnel attempt to conduct any ACS search for reports on "aviation schools" or "pilot training" to assist in bolstering the factual predicate for the Moussaoui FISA application? If not, why not?

The FBI Office of Professional Responsibility referred the issues raised by the Phoenix EC and the handling of the Moussaoui FISA application to the Department of Justice Office of the Inspector General (OIG) on September 28, 2001. On May 21, 2002, the OIG provided its preliminary report on the handling of the Phoenix EC to the FBI and to the Joint Intelligence Committee conducting an inquiry into the events of September 11, 2001. On May 23, 2002, Director Mueller referred to the OIG the matters contained in the letter from Minneapolis Special Agent Coleen Rowley. We respectfully decline to respond to matters relating to the handling of the Phoenix EC and the Moussaoui FISA application prior to

completion of the reviews by the OIG and the Joint Intelligence Committee.

3. Regarding the ACS network in effect prior to September 11, 2001, Special Agent Rowley has informed the Committee that she intends to write a letter correcting her testimony by stating that agents were able to perform multiple word searches (e.g., "Flight school") prior to September 11. Do you agree?

Yes. A letter to the Committee dated June 14, 2002 setting forth the search capabilities of ACS is attached.

a. Was the failure of Headquarters personnel to search the ACS network for the Phoenix E.C. because the FBI's computer systems were not capable of handling such a search, or that the process was unwieldy and agents were not sufficiently trained to use the system?

Please see Question 2e.

b. To the extent that the problem was inadequate training, what steps is the FBI taking to ensure that agents are properly trained in whatever new computer systems the FBI elects to use in the future?

FBI agents and professional support staff are being trained on the new baseline desktops and office automation suite, and will be trained on the web-based investigative applications once available. Training for agents will continue to be provided by professional Government trainers and consultants, as new applications are developed and deployed to the field.

FBI Reorganization:

4. As part of the FBI reorganization plan, new "flying squads" at FBI headquarters are being formed to work on terrorism investigations across the country.

a. Is the role of the "flying squads" to coordinate national and international terrorism investigations and help prioritize these investigations?

The Flying Squads will have a coordinating function. This function will vary depending upon the incident that precipitates deployment. In the case of a domestic (INCONUS) deployment, the squad will, in concert with the relative Field Division, bring to bear intrinsic expertise in a number of investigative areas to provide an initial and

ongoing assessment of the situation and provide both FBIHQ and Field Division management with real time analysis and recommendations. In the case of an international incident (OCONUS) the Flying Squads will deploy rapidly, establish liaison with the host government, conduct a preliminary assessment of the crisis and provide FBIHQ with real time analysis and recommendations. Where applicable, the Flying Squads will assist in securing the crime scene and will coordinate the subsequent arrival of the larger FBI Rapid Deployment Teams (RDT), or elements thereof.

b. The new FBI Investigative Guidelines allow field offices more discretion to open terrorism cases without Headquarters approval and to extend investigations for a full year without Headquarters approval. At what point in this process will a flying squad be activated on a particular investigation?

Field offices will still be required to keep Headquarters apprised of developments in investigations of import. Flying Squad assistance can be requested at any point by Field office management. In the event Headquarters unilaterally deems a field investigation to have reached a level where an immediate benefit would be obtained by deploying a specific body of expertise, a Flying Squad, tailored to address the perceived concern, may be deployed to the field.

c. On the one hand, coordination and priorities of terrorism investigations are being centralized through the "flying squads" and, on the other hand, decisions to pursue certain targets and open certain terrorism investigations are being decentralized through the new investigative guidelines. Please explain how the changes in the investigative guidelines are consistent with the reorganization changes you are making for counterterrorism investigations?

There is a body of expertise in many and varied fields throughout the FBI. Often the need for a specific expertise cannot be fulfilled within a Field office's immediate resources. In many instances, a Field office may not know how to draw upon such expertise or the Field office may be overwhelmed by the magnitude and immediacy of the crisis. The function of the Flying Squads will be to assist the field in a rapid assessment of any terrorism crisis, help the field to recognize a need for specific skills or expertise in the resolution of that crisis and reach back to Headquarters to gather those skills as rapidly as possible. In

essence, the Flying Squads will support the field in resolving their individual investigations. It will also aid in the rapid dissemination of pertinent information to both FBIHQ and other U.S. Government agencies and the ultimate resolution of the crisis.

d. Please describe your vision of how the flying squads will interact with the field?

As stated, Flying Squads will respond to Field office requests, or at FBIHQ direction, as rapidly as possible with an initial assessment team comprised of skilled and experienced investigators and technicians. The squad will, in concert with Field office personnel and in coordination with FBIHQ, identify the investigation's immediate needs and work toward a seamless integration of additional resources as deemed appropriate.

e. The agents assigned to the new "flying squads" may have to work out of suitcases for years at a time. How do you plan to attract the best agents to come and work in Washington on the new "flying squads"?

The Bureau is comprised of many highly motivated individuals who are dedicated to the fundamental mission of protecting the United States from further terrorist attack. Many Bureau employees have expressed a desire to be part of what is deemed to be the "forward element" in our war on terrorism. However, there is a very real concern that some of the Bureau's most qualified talent will be dissuaded by personal concerns, particularly dramatic changes in cost of living and the inevitable uprooting of family. While there are no immediate answers the Bureau is studying options to ameliorate these concerns and remains convinced that these Flying Squads will be staffed by some of the Bureau's most talented and dedicated individuals.

5. The Director's written testimony notes that FBI Headquarters needs to develop a cadre of skilled experts to fight terrorism and that this is impossible with the constant turnover in headquarters personnel. I understand that the unit to which the Phoenix E.C. was initially sent is staffed entirely by agents who have been at FBI headquarters and in that unit for under a year. How do you propose to both attract and retain agents at headquarters long enough to develop the needed expertise to fight terrorism?

Units in the Counterterrorism Division (CTD) are not staffed entirely by Special Agents, but also include analysts. The two units where the Phoenix EC was sent had both experienced Agents and experienced analysts, although there had been some recent turnover of staff.

The positions staffed by GS-14 Supervisory Special Agents at FBI Headquarters represent promotional opportunities for those who apply and are selected. Generally, Special Agents selected for particular positions at FBIHQ already have a level of expertise in the program area to which they will be assigned at FBIHQ. The current policy requires that a Special Agent who takes a GS-14 supervisory assignment at FBIHQ must remain in their HQ assignment for a minimum of 24 months before they can transfer to a position in the field. However, executive management has the discretion to delay such transfers if it is deemed in the best interest of an FBI investigation and operational matter. The decision to manage the Counterterrorism Program in a more centralized manner will provide greater extended promotional opportunities within FBIHQ than have previously existed. GS-14 Agents will have enhanced opportunities for advancement within the Counterterrorism Division (CTD) which should result in the ability to maintain greater continuity of expertise and management in the CTD. However, it is also critical that field offices have squad supervisors with extensive counterterrorism experience managing the day to day investigative operations in the field so movement of experienced personnel between field divisions and FBIHQ is also essential.

6. You said in your prepared statement, "Our foremost mission is to protect the United States from terrorist attacks, foreign intelligence operations, and cyber attacks." You also referred to "the more direct role envisioned for the Counterterrorism Division in managing investigations."

   a. Will there be one person accountable and responsible for what happens in FBI counterterrorism investigations and operations, wherever they occur in the country?

   One of the goals of the Counterterrorism Division (CTD) efforts to implement nationally-managed, centrally driven Counterterrorism (CT) Programs is to enhance the level of accountability for various components of these programs. In this regard, the Assistant Director (AD), CTD is the single individual within the FBI who has responsibility for all CT investigations and operations. Similarly, the AD, CTD is accountable to the Executive Assistant Director for CT

and Counterintelligence (CI) and the Director for all CT investigations and operations.

b. What will be done to avoid the problems that surfaced in the Wen Ho Lee case, where you had the SAC saying it was Headquarters' fault and Headquarters saying it was the fault of the SAC?

One of the goals of the FBI's reorganization is the implementation of automated mechanisms and policies and practices that enhance the flow of information. In this regard, the CTD's proposed organizational structure is intended to enable the seamless fusion of information into analytical products that are useful to field offices. The CTD is also developing protocols to ensure that all field office managers are aware of their responsibilities relative to the CT Program and that all CTD personnel are continuously advised of their responsibility to provide high quality assistance and support to the field offices. Moreover, regular conferences are planned to be conducted with field office managers to ensure that they are receiving up-to-date information relative to the CT Program and that their concerns are considered when investigative policies are developed.

c. Will each national program overall and the important cases in each program be the responsibility of the respective Assistant Directors at Headquarters? If so, how will that shift affect the traditional roles of the SACs and their responsibility for cases as Office of Origin?

The organizational structure and shift of resources supports a redefined relationship between FBI Headquarters and field operations in the counterterrorism program only. The reorganization supports the overall shift from a reactive to proactive orientation towards meeting the terrorism threat.

7. The chart provided to the Committee on the Proposed CTD (Counterterrorism Division) Reorganization shows the establishment of 14 new organizational entities.

a. Please explain the mission of each of these entities.

The reorganization of the Counterterrorism Division has continued to evolve since the chart was provided to the Committee. At present, the missions of the CTD new organizational entities are set forth below:

Executive Staff - The mission of the Executive Staff is to support the executive management of the CT and CI Programs. The Executive Staff will handle congressional testimony, coordinate questions for the record, respond to legislative proposals, and provide executive briefing papers. In addition, the Executive Staff will participate in internal and external CT and CI working groups and assist in projects dealing with policies and procedures associated with the CT and CI Programs. The Executive Staff will be knowledgeable of the operational, financial and administrative issues facing the CTD and Counter-intelligence Division and other Bureau and interagency issues that will have an impact on the CT and CI Programs.

Counterterrorism Division (CTD) Entities

Office of Intelligence - The mission of the Office of Intelligence is to improve the FBI's capacity to gather, analyze, and share critical CT information and build the CT Program's capability to conduct strategic analyses. In this regard, the Office of Intelligence will perform the following functions:

- **Provide advice, information and substantive expertise to the Director and the EADs on intelligence and trends.**
- **Establish, administer, and evaluate policies, guidelines, and standards for aspects of the CT intelligence program.**
- **Oversee and facilitate the sharing of information among FBI entities and with federal, state, local and international partners.**
- **Coordinate and maintain intelligence requirements from the FBI to be satisfied by the law enforcement and intelligence communities, as well as those from the intelligence and policy communities by the FBI.**
- **Track FBI intelligence products to ensure coordination across divisions and ensure that key issues are covered.**
- **Provide guidance to ensure that the FBI's information technology systems are designed to effectively manage collect, disseminate and support analysis.**

CT Administrative and Resource Unit (CARU) - The CARU is

responsible for formulating and executing the CTD budget; preparing annual Congressional Budget Justification Book submissions; coordinating all personnel and security matters for the CTD; conducting administrative projects; and interacting with the FBI's Inspection Division, and Office of Public and Congressional Affairs, as well as the General Accounting Office. The unit will also be responsible for procuring and acquiring technology, equipment and supplies; controlling CTD inventories, addressing space management needs, facilitating and monitoring contractor support, processing CTD travel vouchers, and handling and coordinating all human resource management needs with the Administrative Services Division.

In addition, the CARU will be responsible for the CT Resource Center (CRC). The CRC will provide library science, research and publication subscription support for CT analysis and operations. The CRC will maintain library science expertise and establish relationships with other library services organizations to support the CT program.

Foreign Terrorist Tracking Task Force - The FTTTF was created to ensure to the maximum extent permitted by law that the various federal, state, and local agencies whose missions bring them into possession of relevant data about terrorism, coordinate their programs so that foreign terrorists and their supporters are either prevented from entering the United States or, if already within the United States, they are located and referred in a prearranged fashion to the appropriate organizational entity for further investigation, detention, deportation or prosecution, depending upon the circumstances of each particular case. The FTTTF is now part of the Counterintelligence Division of the FBI.

National Joint Terrorism Task Force (NJTTF) - The mission of the NJTTF is to detect, prevent, and investigate individuals or groups carrying out terrorist acts directed at the United States. The NJTTF will be responsible for the overall coordination of the FBI's JTTF Program and will be staffed by members of the IC, other Federal law enforcement agencies, the New York City Police Department and the Washington, DC Metropolitan Police Department. The NJTTF will emphasize the importance and necessity of sharing information on a timely basis, and creating an intelligence awareness among FBI

employees and other agencies. This will enable the FBI to look at not only the case related value of information, but also relevance to the larger, strategic view of a group or organization. As such, the FBI will continue to develop and sustain bodies of knowledge and expertise.

Terrorism Financing Operations Section (TFOS) - The mission of the TFOS is to provide support to the FBI's investigations regarding the financial component of terrorist operations. In this regard, this section is responsible for providing an identification mechanism to facilitate the FBI's efforts to disrupt terrorist operations and their funding mechanisms and providing centralized coordination and oversight to the FBI's terrorist-related financial investigative initiatives. In addition, the TFOS coordinates terrorism-related financial investigations with other government agencies.

International Terrorism Operations Section (ITOS) I - The mission of the ITOS I is to provide national management and coordination relative to the FBI's effort to identify and respond to Radical Fundamentalist Sunni extremists who are supporting or engaging in terrorist activities targeting the interests of the United States and its allies. In this regard, the ITOS I provides oversight to the field offices regarding investigations and operations targeting Usama Bin Laden and Al Qaeda, and conducts liaison domestically and internationally to support these activities and pertinent IC initiatives. The ITOS I will also be responsible for providing oversight to the "Flying Squads." These squads will provide the CTD with the ability to support field investigative operations by providing a surge capacity for quickly responding to and resolving unfolding situations and developments in locations where there is not an FBI presence or there is a need to augment local FBI resources with specialized personnel.

Terrorism Reports and Requirements Section - The mission of the Terrorism Reports and Requirements Section is to establish reports policies and procedures (classification issues, dissemination vehicles, the clearance process); accept/reject intelligence requirements from intelligence and law enforcement entities; forward requirements to appropriate field offices; and disseminate intelligence information reports (IIRs). This section will also provide feedback to field offices and Legal Attaches on the usefulness of the IIRs submitted and how the information was used. In addition, the section would be

responsible for asset vetting and production reviews and for representing the FBI at the National Human Intelligence Requirements Tasking Center meetings and other interagency fora.

Deputy Assistant Director (DAD), Terrorism Prevention and Counterterrorism Analysis Branch (TPCAB) - The DAD, TPCAB is responsible for national direction and coordination relative to operational, analytical, warning, and liaison activities undertaken by the FBI to prevent terrorism within the United States. This DAD is also responsible for the oversight and coordination of analytical activities conducted in support of FBI investigations and operations, and efforts undertaken to provide finished intelligence products to the FBI, intelligence and law enforcement communities, and US policymakers.

National Joint Analytical Terrorism Task Force (NJATTF) for Strategic Assessments and Warning - The mission of the NJATTF is to produce cross-cutting analysis focusing primarily on early warning of emerging terrorist threats to the US homeland. The NJATTF also will be responsible for identifying long-term, threat-related issues that may affect FBI investigative or operational strategy against terrorist targets. The NJATTF will be organized to focus on the following aspects of the terrorist threat:

- **Strategic Assessments and Warning**
- **Homeland Security Liaison**
- **Counterproliferation and Emerging Weapons**
- **Transportation Security**
- **Watch List Control**
- **Threat Monitoring**

CT Analysis Section - The mission of the CT Analysis Section is to provide expertise on international and domestic terrorist groups in support of the FBI's CT Program. By assessing the full-range of all source information on terrorist groups, the section will produce three principal types of analysis:

- **Assessments of the composition, activities, tradecraft, ideology and linkages of terrorist groups to guide and further FBI investigations.**

- **Assessments of terrorist activities and threats to assist FBI management in deploying resources against the terrorist target.**

- **Analysis of all-source information on terrorist group activities to assist the Department of Homeland Security, the military and the IC in the war on terrorism.**

Communication Analysis Section (CAS) - The mission of the CAS is to provide support to FBI CT investigations and IC initiatives regarding the use of authorities granted under the FISA of 1978 and the US Patriot Act to facilitate the collection, analysis, exploitation, and dissemination of intelligence gathered through the lawful interception of e-mail traffic being sent by known/suspected terrorists. The CAS develops processes, procedures, and techniques to fuse data collected through FISA-related collection operations, applicable documents seized through FBI, IC and Department of Defense operations, and data from sensitive IC databases. The CAS ensures that this data is developed into value-added, finished analytical products that meet the FBI's investigative requirements and are appropriate for dissemination within the law enforcement and intelligence communities.

b. How would the functions of the National Joint Terrorism Task Force differ from the functions of the Foreign Terrorism Tracking Task Force?

The Foreign Terrorist Tracking Task Force (FTTF) provides information upon which the JTTFs and other operational agencies and entities can act. The FTTTF generates leads and provides risk assessments and policy/operational guidance as the result of the FTTTF's manipulation of massive amounts of data in order to identify and locate foreign terrorist and their supporters within or seeking to enter the United States. FTTTF also coordinates with the Counterterrorism Section (CTS) of the Criminal Division and other governmental agencies involved in the denial of entry, detention, investigation, prosecution and removal from the United States of such individuals. The FTTTF also works with other agencies both to prevent known or suspected terrorists from entering the U.S. and in facilitating the identification, detention, investigation, surveillance, prosecution and/or removal as appropriate of known or suspected foreign terrorists and their

supporters who are in the U.S. The focus of the Joint Terrorism Task Forces is operational, that is to investigate and follow up operationally on leads which may in individual cases be provided by the FTTTF or intelligence agencies. Furthermore, the FBI's new National Joint Terrorism Task Force will provide centralized operational coordination of JTTF investigations and intelligence activities subsequent to a lead having been generated by the FTTTF. Similarly CTS and the USAs-led ATTFs provide coordination and operational follow-up regarding prosecution, removal or civil immigration actions stemming from information developed by the FTTTF. The functions of the terrorism related task forces are thus complementary and supportive but distinct.

c. How would the functions of the Office of Intelligence differ from the functions of the analysis entities in the Counterterrorism Division?

The Office of Intelligence (OI) has three core missions:

- **First, OI will be the central clearing house for sharing information among FBI operational and analytical units and with the policy and intelligence communities and the proposed Department of Homeland Security.**

- **Second, OI will ensure that the FBI's information management systems now under development will effectively support the analytical mission by enabling analysts to mine data quickly so that key bits of information do not fall between the cracks.**

- **Third, OI will be responsible for creating an analytical career service in the FBI. In order to attract the best and brightest analysts, we must develop and nurture an analytical culture in the FBI that has the same prestige, status and opportunities for advancement as our law enforcement culture.**

In short, OI has broad and important programmatic responsibilities but is not responsible for the FBI's analytical work on terrorism, which is the responsibility of the Terrorism Prevention and Analysis Branch.

d. What unique functions would be performed by the Terrorism Prevention Section that could not be performed by the other entities in the Counterterrorism Division?

A response to this question will be supplied later.

e. How would the functions of the FBI Office of Intelligence and FBI Counterterrorism Division differ from the functions of the DCI Counterterrorism Center?

CTD is responsible for disrupting and preventing terrorist attacks within the United States. The CIA's CTC is primarily focused on the global terrorist threat outside U.S. borders.

f. What would be the advantages and disadvantages of creating a joint FBI-CIA organization reporting to both the FBI Director and the DCI to perform the functions of the FBI Office of Intelligence, National Joint Terrorism Task Force, the Foreign Terrorism Tracking Task Force, and comparable functions of the CIA Counterterrorism Center?

The primary disadvantage is that dual command structures have not worked very well and most likely would lead to a less efficient operational and analytical effort. Although in theory, consolidating these functions would facilitate information sharing, in practice, the disadvantages, including significant and potentially harmful disruptions to both agencies during the transition phase, would outweigh any advantages. Indeed, cooperation between CIA and FBI in counterterrorism has improved substantially since September 11 and continues to improve. For example, we now have 25 CIA analysts and several CIA managers fully integrated into our Counterterrorism analysis branch with full computer connectivity to CIA headquarters. This is a model we intend to build on in the months ahead to deepen cooperation and enhance the flow of information between the FBI and CIA.

Special Agent Coleen Rowley:

8. Special Agent Coleen Rowley did not intend for her May 21, 2002, letter to you to become public, but the FBI's initial decision to classify the entire letter certainly appeared to be an effort to keep the contents of the letter out of view of the public. Classification is for information that, if revealed, could be damaging to national security, not information that, if revealed, could be damaging to the reputation of the Department of Justice or its component agencies.

a Who made the original decision to classify the entire letter?

The letter was reviewed by the FBI's Document Classification Unit and portions were deemed classified at the Secret level pursuant to Executive Order 12958.

b Please explain the decision to classify the letter in its entirety rather than just those parts that implicated national security or were subject to a protective order?

The letter is not classified in its entirety; only those bracketed portions of the letter marked "(S)" for Secret are classified. As indicated by the stamp on the first page of the letter, "all information contained herein is unclassified except where shown otherwise."

9. The FBI is currently exempted from the Whistleblower Protection Act, and its employees are only protected by internal Department of Justice regulations. While Special Agent Rowley's letter to the FBI Director and the Inspector General is protected under these regulations, three of the five people to whom she sent her letter were Members of Congress, and are **not** covered under the current regulations. Moreover, her testimony at the June 6 Judiciary Committee hearing and before any other committee or subcommittee of the Congress are **not** protected under the current regulations. Even a report or complaint to her immediate FBI supervisors be **not** be protected under the current regulations. That is why the FBI Director's personal guaranty, and the Attorney General's assurances, that she would be protected against retaliations is so important. Do you support the provisions of the Leahy-Grassley FBI Reform Act, which would extend whistleblower protection for FBI employees to all these disclosures?

One of the first official messages I sent to all employees was a Memorandum advising that I embrace the whistleblower protections and will not tolerate reprisals or intimidation by any Bureau employee against those who make protected disclosures. I directed that this Memorandum be distributed to all employees via e-mail, in hard copy format, and posted on the FBI Intranet where it remains today. I defer to DOJ with regard to the provisions of the FBI Reform Act.

10. Please provide the Committee with a copy of any manuscript submitted to the FBI for approval of release by Special Agent Robert Wright of the Chicago Field Office or his legal representatives and explain why the FBI has refused to allow Agent Wright to publish such manuscript which is critical of the FBI's pre September 11 performance in terrorism matters? Will you guaranty Special Agent Wright whistleblower protection, as you did for Special Agent Rowley, based

upon sending that manuscript to members of Congress?

Special Agent Wright's manuscript contains information which cannot properly be disclosed (including intelligence information, information relating to pending investigations, and information covered by the grand jury secrecy rule, Fed. R. Crim. P. 6(e)). As a result, the FBI is coordinating a review of the manuscript with the United States Attorney's Office in Chicago in order to release as much non-protected information as possible to the Committee. This review is ongoing. Whether any FBI employee, including Special Agent Wright, is entitled to whistleblower protection depends on the facts and circumstances of his or her particular case, including the nature of his or her disclosure.

Attorney General Investigative Guidelines:

11. The FBI Director consulted with the bipartisan leadership of the Judiciary Committees before the FBI reorganization plans in December, 2001, and in June, 2002, were announced. This consultation was important to help those committees with oversight responsibilities understand the changes being made. There was no consultation on the need for changing, or the nature of the changes made in, the Attorney General investigative guidelines.

    a. Please explain why there was such a difference in approach to consulting with the Congress between the FBI Director's reorganization plans and the Attorney General's revisions to the investigative guidelines?

    The Department of Justice coordinated the process of revising the Attorney General's Guidelines. Any inquiry about the Department's approach to consulting with Congress on the guidelines review process should be directed to the Department.

    b. How involved were you in the crafting of the new investigative guidelines?

    The FBI participated fully in the review and revision of the Attorney General's Guidelines.

    c. Please provide to the Committee any documents reflecting analysis done by the FBI on the need to change the investigative guidelines.

    We respectfully decline to provide specific information on the

deliberative process undertaken by the Department and the FBI in the revision of the Attorney General's Guidelines. Disclosure of that type of information would chill future deliberations, and make it difficult for the Attorney General and the FBI Director to get full, candid advice on important matters.

d. What specific actions is the FBI permitted to do under the new investigative guidelines that would have helped prevent the 9/11 attacks if you had had that authority a year ago?

It is impossible to say whether or to what degree any particular specific authority would have helped prevent the September 11 attacks. The FBI and the Department believe, however, that the revisions to the guidelines will help us carry out our mission of detecting and preventing terrorist attacks.

12. The day before the Attorney General called a press conference and issued the new investigative guidelines, a Justice Department official was quoted in the press as justifying the relaxed guidelines because agents investigating terrorism misunderstood the existing rules – as he put it, "agents **mistakenly** think they have to stop at the church door."

a. Is it correct that agents believed the investigative guidelines that have been in effect since the 1980s required them to stop at the church door?

There was some uncertainty among some agents as to what was permissible and impermissible under the former guidelines. The Department and the FBI believe that the revisions to the guidelines will eliminate such uncertainty.

b. Is it correct that agents could attend public meetings, including in churches, so long as they had an indication of possible criminal activity, such as an unconfirmed allegation?

Again, before the revisions to the Attorney General's Guidelines, there was some uncertainty among some agents as to what was permissible and impermissible. The Department and the FBI believe that the revisions to the guidelines will eliminate such uncertainty.

13. The new investigative guidelines authorize FBI Field Offices to open a full investigation of a domestic group as a "terrorism enterprise" based on reasonable

suspicion – less than probable cause – that the group will engage in some unspecified type of violence in the indefinite future. The guidelines also say the FBI is supposed to weigh seriousness of the threat against the risk to the exercise of constitutional rights. How will the FBI maintain any consistency across 56 field offices under such an uncertain standard if Headquarters does not approve the investigations?

The revised guidelines require Field Offices to notify FBI Headquarters upon opening terrorism enterprise investigations. This requirement, and continuing interaction between Headquarters and the Field Offices, will ensure that the guidelines are implemented properly and effectively.

14. In the past, FBI Headquarters has sent instructions to Field Offices on how to use the new investigative guidelines. In August 1995, former FBI Director Freeh forwarded to the Committee for review the advice to field offices, stating, "I am providing the enclosed copy to you to assure the American public, through your oversight, of the lawful intentions of the FBI. It has not yet been sent to our field offices. I wanted you to have an opportunity to see the guidance to our Agents prior to its transmittal to the field." Do you agree to consult with this Committee on those instructions so that this oversight committee, as well as the field agents, is able to understand how the new guidelines will work in practice?

There may be situations in which it would be advisable to consult with Congress on proposed guidance before such guidance is distributed to the field offices. On the other hand, there are times when it will not be practicable or advisable to do so, given such factors as the volume or nature of the guidance, and the Executive Branch's general obligation to formulate its own guidance and policies for its agencies and personnel. The FBI will be alert for situations in which it would be advisable to consult with Congress on guidance relating to the revised Attorney General's Guidelines.

15. The new investigative guidelines give FBI field agents broad discretionary authority to attend meetings and compile data on individuals and groups from the Internet and from sophisticated data mining techniques. This authority may be necessary to prevent terrorism, but at the same time do agents in the field need more specific guidance telling them when and how to use this authority?

Further guidance may well be useful in certain circumstances. Where further guidance would be useful, the Department and the FBI will provide such guidance.

16. I would like to ask you about specific situations and whether certain government surveillance would be allowed under these new guidelines – not whether they would be advisable, but whether they would be allowed and in what circumstances. The revised guidelines appear to authorize surveillance in each of these situations. I am interested in whether you agree and, if so, under what circumstances it would be appropriate.

a. Could the FBI decide that an organization such as the NRA, Operation Rescue, Islamic Community Centers, or the Rotary Club is a good intelligence source, and then launch a year-long operation to place undercover agents or paid informants in leadership positions of the 50 largest chapters in the country for these groups, even though there was no allegation of any criminal activity?

It would be unwise, in my view, for the FBI and the Department to address hypothetical scenarios about the potential applicability of the revised guidelines. Whether and how the guidelines apply will be a case-by-case, fact-specific determination. The revised guidelines, however, require scrupulous compliance with constitutional and other legal obligations, and strike a proper balance between effective law enforcement and protection of the rights and liberties of the American people.

b. Under the new guidelines relating to the handling of confidential informants, could a DEA agent sign up a confidential informant based upon an informal meeting in the back seat of his and his partner's car, without reading him precise warnings or asking him to sign and acknowledge an agreement that he had been told that he could not engage in new criminal conduct while working for the government?

See response to 16(a).

c. Could an FBI Agent secretly follow a U.S. citizen who had not been suspected of any crime for an entire calendar year without any headquarters approval?

See response to 16(a).

d. Could the FBI stand at the entrance and write down the license plate of each car entering the parking lot of a Mosque or a particular Church without any indication that anyone there might be involved in terrorism or criminal activity?

See response to 16(a).

e. Could the FBI send an informant into a Mosque, Temple or Church to prepare a list of the people who were present at the service and to wear a body wire and tape record the sermon and conversations with other people there, without any indication that anyone there might be involved in terrorism or criminal activity?

See response to 16(a).

17. The illegal trade in diamonds, timber, col-tan, and other natural resources from the war-torn countries of the Democratic Republic of the Congo, Sierra Leone, Liberia and Angola has been well-documented by United Nations experts and others, and there have been credible news accounts that al Qaeda has gotten involved in the diamond trade.

a. I understand that some companies have made offers to help the U.S. government track the unusual flow of diamonds, as has Belgian authorities. Does the FBI have a hotline or liaison agents for companies and others with information, or another means of handling tips in a sensitive manner? Are there any impediments to such communications?

With regards to a hotline or liaison agents specifically established to deal with companies and others for handling tips in a sensitive manner, the FBI does not have a specially designated hotline or personnel strictly dedicated to conflict diamonds. Ordinarily, diamonds arise as an issue in more complex investigations often involving money-laundering or other white collar crimes in which diamonds provide a way to launder illegal proceeds. There are numerous ways for this information to be provided to the FBI in a discreet manner absent a hotline.

b. You emphasized in your testimony that forming partnerships with foreign governments would be a crucial part of fighting terrorism. Since September 11, has the FBI been approached, directly or indirectly, by any foreign officials, including officials from Belgium, offering assistance with respect to the sale and purchase of diamonds to finance terrorists, and, in your view, has the FBI followed up adequately on any such offers of cooperation?

A response to this question will be provided at a later date.

9/11 Attacks:

18. For several days after the 9/11 attacks, civilian aircraft in this country were grounded as a precautionary measure. Information brought to my attention indicates that on 9/11 a flight from Boston to San Francisco landed in Cincinnati, because flight attendants and the pilot were concerned about two passengers, and box cutters were found under their seats. Has any assessment been made of the likelihood that this flight was intended for hijacking and, if so, what is that assessment?

This report is inaccurate. There was no flight on 9/11 from Boston to San Francisco that landed in Cincinnati because of concerns of the flight attendants and the pilot. This misinformation appears to be a merging of two separate reports which will be discussed below:

On 09/15/2001 a utility knife was discovered on Comair Airlines (CA), a wholly owned subsidiary of Delta Airlines aircraft at Cincinnati/Northern Kentucky International Airport. The utility knife was found in the overhead compartment of row 9 of the CA aircraft, tail number H941CA. Digital photos were taken of the knife by CA and displayed to maintenance personnel. No one admitted to having been in possession of the knife. CA does not issue this brand of tool to its personnel. There were only 9 people on this flight from Dayton, Ohio and no one was assigned to seats beyond Row 6. Investigation could not determine how, why and when the knife was placed in the overhead. It was never determined who the owner of the knife was.

On 09/11/2001, MOHAMMED AZMATH and AYUB KHAN were on a flight from Newark to Texas with a stopover in St. Louis. While grounded in St. Louis, the terrorist attacks occurred and all air flights were grounded. AZMATH and KHAN then traveled by train from St. Louis to Texas. AZMATH and KHAN were questioned on the train which led to them both being detained. Their persons and luggage were searched, a large amount of cash was found along with 2 box cutters found in KHAN's briefcase. AZMATH and KHAN are currently in custody in the Southern District of New York and have plead guilty to over $400,000 worth of credit card fraud. They were investigated extensively by the FBI and no known terrorist ties were found.

19. A Morningside, Maryland, Police Incident Report on 9/11 states that two men wearing turbans were observed praying on rugs in a parking lot facing the main gate of Andrews Air Force Base at 8:10 p.m. The report states that an employee of the nearby Holiday Inn advised that the two individuals were earlier seen

staring at the main gate of Andrews AFB. According to the report, their vehicle had been rented 3 days prior but had already been driven over 2300 miles. The vehicle contained no luggage or clothing, just numerous maps. The report states that the Morningside Police advised Andrews AFB police, Air Force OSI, and U.S. Secret Service. Another source indicates the possibility that the same credit card used for this vehicle was used for the car located at Boston Logan Airport and identified as belonging to a hijacker.

a. Is the latter report correct?

This report is partially inaccurate. Based on the analysis of the PENTTBOM Team, we have determined that the mileage figure is inaccurate (by a factor of 10), as is the credit card information.

b. What is the intelligence assessment of the likelihood that these individuals were engaged in terrorism-related activity?

The likelihood that YOUSEF and CHOWDHURY were engaged in terrorism is unknown. A Baltimore investigation is pending.

c. Were any similar activities observed on 9/11 outside Dover AFB, Tinker AFB, or Wright-Patterson AFB and, if so, what is the assessment of the likelihood that these activities were terrorism-related?

TSGT (Tech Sergeant) William Cross, United States Air Force Police, Andrews Air Force Base advised that there were no other similar activities noted.

20. After the 9/11 attacks, a local police report was filed regarding activity in Oxford, New York. The report indicated that three private planes were observed to be engaged in unusual flight activity on one day in late August, 2001. The planes were observed flying directly towards an abandoned communications tower and turning away at the last seconds. There is also information that the registration number on one of the planes was counterfeit, being the same as a different plane that had previously crashed. Has any assessment been made of the likelihood that this activity was associated with the 9/11 attacks or was otherwise terrorism-related and, if so, what is that assessment?

This report is inaccurate. This incident occurred on 09/01/2001. Detective Raymond Ogborn, Chenanago County Sheriff's Department (CCSD), Norwich, New York, confirmed that on September 1, 2001 an emergency 911

call was received regarding low flying aircraft in the vicinity of Oxford, New York. The tail number of one of the aircraft identified with this incident was N361R, registered to Archie Collum, Jr., 5587 Foxfire Road, Milton, Florida. Archie Collum was interviewed and confirmed that he owned an Acro-Sport hand-built project aircraft, registration number N361R. Collum stated that the aircraft had never been completed, never been flown and had no wings. The registration number has also never been painted on the fuselage of the aircraft. A visual inspection of the aircraft was conducted in its hangar and it was confirmed that the aircraft had never been flown and had no registration number on the fuselage. Stacy Blackburn from Aircraft Management Services, 5550 North Airport Road, Milton, Florida, provided access to the aircraft for the inspection. Mr. Blackburn also indicated that he had received several notices from Canadian aviation authorities requesting payment for aviation-related services for aircraft N361R. Mr Blackburn informed the Canadian authorities on each occasion that N361R had not flown and could not have incurred the aviation fees in Canada.

Collum had also previously received a request for payment from Pensacola Aviation Center (PAC) for an outstanding fuel bill for an aircraft with registration number N361R that had landed, refueled and remained overnight but left without paying for the fuel. Collum was able to prove to PAC that his aircraft had never flown and could not be responsible for the fuel bill. Although this incident was recalled by a PAC employee, PAC had no record of this incident because all records prior to 1998 had been purged.

An aircraft with this tail number has not been located. All appropriate agencies have been notified of this incident.

21. Before 9/11 could the FBI have located the 19 hijackers responsible for the 9/11 attacks and linked them to each other and to previous terrorist activity using investigative techniques that are currently authorized by law?

A response to this question will be provided at a later date.

22. FISA defines "foreign power" to include any group "engaged in international terrorism or activities in preparation therefor." It has been reported that one reason for not going forward with a FISA application in the Moussaoui case before 9/11 was that a Chechen rebel group for which he had recruited in France was not a "foreign power" under FISA because it had not be formally designated as a terrorism group by any U.S. Government agency.

a. To what extent was this issue a factor in not going forward with a FISA application in the Moussaoui case before 9/11?

A response to this question will be supplied at a later date.

b. Please explain whether the Chechen rebel group would meet the definition of a "foreign power"?

A response to this question will be supplied at a later date.

Department of Homeland Security:

23. The same day you testified before this Committee about, among other things, the reorganization of the FBI, the President announced his proposal to form the Department of Homeland Security, including what he called the most sweeping reorganization of the U.S. government in over 50 years.

a. Were you consulted by the President about his plan prior to your appearance before the Judiciary Committee?

I had participated in discussions within the Administration prior to my appearance before the Judiciary Committee.

b. Were you consulted by the President about his plan prior to your public unveiling of the FBI reorganization? If so, why did you not mention in the lengthy briefings that you gave Senators on the merits of the FBI's reorganization any relationship between the reorganized FBI and a new Department of Homeland Security?

The President and his staff were responsible for determining when and how Congress was notified of the Administration's proposal.

24. On June 7, 2002, the White House provided a 24-page document describing the President's plan for a Department of Homeland Security. This document states that the new Department would include two entities currently in the FBI -- the National Infrastructure Protection Center (NIPC) and the National Domestic Preparedness Office (NDPO).

a. Please provide a full description of the missions, resources, and activities of the NIPC and NDPO, including copies of pertinent reports and other documents showing their functions and accomplishments.

The mission of the National Infrastructure Protection Center (NIPC) is to detect, warn of, respond to, investigate, and ultimately, to deter and prevent attacks on the nation's critical infrastructure. NIPC was created in response to Presidential Decision Directive (PDD) 63, to provide national critical infrastructure protection.

PDD-63 mandated that the NIPC be an interagency center. The NIPC's investigators, computer scientists, and analysts include representatives from the national intelligence, defense, and federal, local, and state law enforcement communities, who collectively provide a unique analytical perspective to information obtained from investigation, intelligence collection, foreign liaison, and private sector cooperation. The Center's interagency composition facilitates the NIPC's ability to share pertinent information among agencies and to coordinate agency activities. As a part of its mission, the NIPC also oversees FBI computer intrusion investigations conducted in the field.

From this multi-agency, multi-information source vantage point, the NIPC collects, processes, analyzes and disseminates information on threats in defense of our national security. The mission of the NIPC includes not only the detection and mitigation of attacks on the critical infrastructure but also the prevention and deterrence of such attacks before they occur. The key to prevention is effective attack warning, streamlined communications, and the educating of the owners and operators of our nation's critical infrastructures systems. To integrate its diverse mission, as set forth in PDD 63, the NIPC has traditionally been organized into three interdependent sections:

- **The *Computer Investigations and Operations Section (CIOS)* is the operational and response arm of the Center. CIOS program-manages computer intrusion investigations conducted by FBI Field Offices throughout the country; provides subject matter experts, equipment, and technical support to cyber investigations conducted by federal, state, and local government agencies for critical infrastructure protection; and provides a national cyber emergency response, contingency planning, and coordination capability to crisis-manage major cyber incidents.**

- **The *Analysis and Warning Section (AWS)* serves as the indications and warnings arm of the NIPC; provides analytical support for computer intrusion investigations; performs strategic risk analyses**

encompassing vulnerability and threat trends; and distributes tactical warnings and analyses to appropriate parties, informing them of potential vulnerabilities, threats and long-term trends. It also reviews government and private sector databases; media; and other sources daily to gather information that may be relevant to any aspect of the mission, including indications of a possible coming attack.

- **The *Training, Outreach and Strategy Section (TOSS)* coordinates the training and education of cyber and infrastructure protection investigators within the FBI Field Offices and other federal, state and local law enforcement agencies. It also coordinates NIPC's outreach to private sector companies, state and local governments, other government agencies, and the FBI's Field Offices. In addition, this section manages the collection and cataloguing of information concerning "key assets" – *i.e.*, critical individual components within each infrastructure sector such as specific power grids, telecommunications switch notes, or financial systems – across the country. The Strategy and Planning Unit of TOSS has responsibility for strategic planning, policy management, and resource issues.**

Accomplishments of the NIPC include:

1. **Development of the NIPC into a meaningful Government partnership in which all participating agencies have ownership and control over the direction of the Center. *Example: In regularly held internal and external senior partners meetings, our colleagues freely share information which helps formulate specific, measurable, and attainable goals and objectives for the NIPC.***

2. **Building of trusted relationships with members of the private sector, particularly through InfraGard and Information Sharing and Analysis Centers (ISACs). *Example: InfraGard membership has grown by over 600% in the last 14 months, from 800 to over 5,000.***

3. **The success of our newest unit, the ISAC Support and Development Unit, designed to assist in the development and expansion of ISACs. *Example: Since the formation of the Unit, information sharing agreements have been signed with ISACs for telecommunications, information technology, air transportation, food, water supply, emergency services - fire, banking and finance, and chemical sectors.***

4. **Because of the development of trusted relationships in the above public and private sectors, quantity and quality of information has increased, resulting in the dissemination of more meaningful, actionable, infrastructure-tailored NIPC products.** ***Example: Information Bulletin 02-004, Indicators of Photographic, Mapping, and Related Intelligence Gathering for Terrorist Operations, of April 25, 2002, provided valuable insights on indicators of terrorist activity.***

5. **Responsiveness and dedication of NIPC personnel, who continued to perform their primary infrastructure protection missions while responding to the emergent needs of the 9/11 investigation.** ***Example: On September 18, 2001, NIPC issued an advisory titled, "Mass Mailing Worm W32.Nimda.A@mm", which pertained to a rapidly spreading virus with potential for wide spread damage to computer systems.***

6. **NIPC's ability to successfully complete investigations while simultaneously leveraging the information from those investigations to provide timely, meaningful and actionable information to better protect and prevent exploitation of vulnerabilities.** ***Example: On December 1, 2000, March 8, 2001 and October 5, 2001, NIPC issued advisories pertaining to E-Commerce Vulnerabilities, using investigative information as a basis for the advisory without compromising any cases.***

7. **Establishment of Critical Infrastructure Assessment Teams, which combine knowledge from the intelligence, law enforcement and critical infrastructure communities.** ***Example: On May 23, 2002, NIPC issued Information Bulletin 02-006, titled "Possible Use of Scuba Divers to Conduct Terrorist Attack", combining input from the intelligence, law enforcement and critical infrastructure communities.***

8. **Technical capabilities achieved in the Special Technologies and Applications Unit (STAU).** ***Example: STAU has created a data warehouse and a capability to manage and mine all that stored electronic information obtained in support of the 9/11 investigation. The stored data is currently 5 ½ times that which is contained in the Library of Congress.***

9. **Training curriculum developed for computer intrusions investigations.** ***Example: The curriculum is currently eight courses, and to date, more than 3,200 federal, state, local and international investigators have been trained.***

10. **Establishment of the Interagency Coordination Cell (IACC) to compare, coordinate and deconflict computer intrusion cases.** ***Example: The IACC is now composed of 27 agencies. The IACC was a starting point for establishment of post-9/11 operations center task force.***

The NIPC's resources for FY 2002 are summarized as follows:

Summary of the FY 2002 Personnel Resources for the NIPC:

Office or Section	FBI Agents	FBI Professional Support	Total FBI Personnel	Detailees from Other Government Agencies	Reservists	Contractors
NIPC Front Office	1	1	2	2	3	
AWS	4	46	50	6	7	24
TOSS	19	20	39	9	9	5
CIOS	16	38	54	5	3	87
Totals	40	105	145	22	21	56

Summary of the FY 2002 Resource Budget for the NIPC ($000):

	Personnel	Nonpersonnel	Total
NIPC Front Office	$258	$0	$258
AWS	$4,491	$6,588	$11,079
TOSS	$4,425	$6,945	$11,370

CIOS	$5,909	$43,442	$49,351
Totals	$15,053	$56,975	$72,028

b. How would the transfer of the NIPC affect the new Cyber Division established by your reorganization? If that division were to be disbanded, where would its non-NIPC resources and functions be assigned?

As you know, the NIPC was transferred to the Department of Homeland Security by the Homeland Security Act, Pub. L. 107-296.

That having been said, it is imperative that the FBI maintain lead investigative responsibility for computer intrusion matters for numerous reasons. Most computer intrusion investigations that are national security-related, are initiated as criminal probes since at the outset it is usually not known if the intrusion activity is state sponsored or terrorist related. Therefore, if the FBI does not conduct the criminal probe, or is not aware of the details, the national security issues would not be detected. Computer intrusion investigators also require access to the intelligence data gathered pursuant to national security and counterterrorism authorities to assist in the assessment of the nature and scope of the intrusion activity. The ability to share information internally supports both of the FBI's National Security and Criminal Cyber missions.

The explosion of the Internet has removed all physical boundaries traditionally encountered by physical criminal acts, thus computer intrusion investigations quickly become international matters. The FBI Legat Program, with offices in 46 countries, has a proven track record of coordinating and facilitating international investigative efforts. This international investigative experience, and the established relationships generated by these actions, cannot be easily replicated and is irreplaceable in the cyber arena.

Because technically trained investigators require a significant investment of training time and funding to become proficient, taking these resources from the FBI would have a detrimental impact on other FBI priorities. The FBI would be required to reinvest additional time and money to train new investigators to replace those

transferred to the Department of Homeland Security.

Also, if FBI personnel resources assigned to field National Infrastructure Protection and Computer Intrusion Program (NIPCIP) squads are to remain on the FBI rolls, it is imperative that the FBI maintain a management structure at FBIHQ to oversee, coordinate, and support these resources. Failure to do so would create a dysfunctional situation generated by the lack of accountability and inadequate administrative and operational support.

In addition, computer intrusion cases are inherently linked to other criminal investigative responsibilities of the FBI, such as investigations of Intellectual Property Rights violations, internet-facilitated fraud and theft, and interstate/international extortions or threats. In many cases these "facilitated" crimes are not identified until substantial effort has been expended in the original computer intrusion investigation. Failure to conduct, or be aware of, the intrusion investigation would have a significant negative impact on any subsequent related FBI investigation.

The transfer of the remaining two portions of the NIPC (TOSS and AWS) will not have any significant adverse impact on the new Cyber Division or the FBI. The challenge is to maintain the sharing of information and intelligence developed through investigative efforts with the NIPC components transferred to the Department of Homeland Security. It is anticipated that this challenge will be overcome through the detailing of FBI personnel to the Department of Homeland Security in support of the Department's mission and the development of appropriate information sharing mechanisms. It is anticipated that information developed from Internet facilitated crimes and other cyber investigations will enhance the overall intelligence base of AWS and TOSS in supporting the Department of Homeland Security and the protection of our critical infrastructures.

If the Cyber Division were to be disbanded, the non-NIPC resources and functions would likely go back to the Criminal Investigative Division where they were assigned and dispersed prior to the FBI reorganization plan, thus contributing to the lack of a comprehensive and focused approach to cyber crime and related threats.

c. What would be the advantages and disadvantages of transferring the NIPC to a Homeland Security Department?

As you know, the NIPC was transferred to the Department of Homeland Security by Pub. L. 107-296.

The advantages of the transfer include marked enhancement of the concept of "one-stop shopping", in having those components which have the greatest responsibilities for Homeland Security matters grouped within a single cabinet-level Department; the enhanced potential for faster, more barrier-free information sharing with those having a "need to know"; and savings in both time, which is a critical factor in homeland defense issues, and expense caused by duplication of effort in accomplishing certain tasks, and delays incurred in dealing with the protocols of diverse governmental entities. An enhancement in interagency cooperation is also a result, when all agencies involved are within, and guided by, the same Department.

d. What would be the impact of the transfer of the NIPC to the new Department on the management, direction, coordination, oversight, and support for FBI field criminal investigative, counterterrorism, and counterintelligence activities related to cyber crime, cyber terrorism, and cyber attacks by foreign intelligence services?

As you know, the NIPC was transferred to the Department of Homeland Security by Pub. L. 107-96.

If the computer intrusion investigative component of the NIPC (the CIOS), remains a part of the FBI, the transfer of the remainder of the NIPC's components and missions to the new Department should have a minimal effect, if any at all, on the management, direction, coordination, oversight and support for FBI field criminal investigative, counterterrorism, and counterintelligence activities related to cyber crime, cyber terrorism, and cyber attacks by foreign intelligence services. The transfer of the operational functions would have a devastating effect on FBI capabilities as well as a wide range of criminal, counterintelligence and counterterrorism responsibilities.

e. What would be the impact of the transfer on the Internet Fraud Complaint Center, Innocent Images National Initiative investigations and training, the Computer Analysis Response Team, and deployment of Regional

Computer Forensic Laboratories?

The impact of any transfer of the Internet Fraud Complaint Center, Innocent Images National Initiative investigations and training, the Computer Analysis Response Team and the deployment of the Regional Computer Forensic Laboratories would be in conflict with Director Mueller's plan to restructure and manage decision units under one operational span of control.

Also, based on the FBI mission and scope of responsibility, a transfer of these programs would cause a gap that would impact on the FBI's capability to adequately address cyber crimes. A transfer of these programs would cause the FBI to have to duplicate certain functions creating a less efficient and effective role of the Government. Lastly, all of these programs have a direct impact on field investigations for the FBI , and coordination by another agency would not enhance the FBI's capability nor that of the DHS. These programs would furnish a basis of providing additional intelligence that would otherwise be negated if brought under the DHS .

f. What would be the advantages and disadvantages of transferring to the new Department the existing FBI squads that handle computer intrusions, critical infrastructure protection issues, and the INFRAGARD program?

The capabilities and expertise that currently reside in the existing computer intrusion squads cannot be separated from the FBI without severe ramifications to the FBI's capability to respond to and investigate threats of attacks on critical infrastructures or other computer intrusion incidents. These squads, while highly trained and skilled in a particular area, are nevertheless primarily *investigators*, and the FBI recommends that they remain within the FBI. The FBI has developed an investigative infrastructure, including policies and procedures for the handling of evidence collected as a result of investigative efforts, the use of pro-active techniques, such as undercover operations, the use of consensual monitoring and electronic surveillance techniques that would be severely hampered if these squads were to be transferred from the FBI.

The InfraGard program and the Key Asset Initiatives, now within the FBI field offices, would best be performed under the Department of Homeland Security. While these programs have enhanced the FBI's

intelligence base, the FBI has traditionally been an investigative oriented agency. These initiatives will better support the critical infrastructure protection and warning missions of the Department of Homeland Security. However, the FBI field offices should not only provide interim support until the Department develops the regional assets necessary to handle these programs, but should also support local prevention efforts as a matter of policy.

g. How would the transfer of the NDPO affect the management, direction, coordination, oversight, and support for the Weapons of Mass Destruction (WMD) Coordinators and their functions in FBI field offices?

This transfer has not affected the WMD coordinators. The management, direction, coordination, oversight, and support for the coordinators and their functions comes from the WMD Countermeasures and WMD Operations Units within the Domestic Terrorism/Counterterrorism Planning Section of the Counterterrorism Division at FBI Headquarters. While the WMD Coordinators assisted the NDPO in its responsibilities, they were not organizationally or operationally a part of the NDPO as a field element.

h. What would be the advantages and disadvantages of transferring the NDPO to the new Department?

A transfer of the NDPO has already taken place. When the President announced the establishment of the Office of National Preparedness (ONP) within FEMA, the FBI virtually transferred the functions being performed by the NDPO to ONP. The roles of (1) acting as the "one stop shop" for state and local domestic preparedness support in the areas of planning, training, exercises and equipment, and (2) coordinating the efforts of Federal departments and agencies in these area were transferred to ONP. The FBI personnel were reassigned new responsibilities within the Bureau and interagency liaisons to the NDPO returned to their respective departments and agencies. When FEMA was transferred to the new Department, the transfer of NDPO responsibilities took place automatically.

i. If the NDPO is transferred to the new Department, what would be the advantages and disadvantages of transferring the functions of the WMD Coordinators in FBI field offices to field elements of a component of the new Department, such as FEMA?

The transfer of the NDPO and the transfer of WMD Coordinator functions to the new Department are separate and distinct issues. As stated previously, the transfer of the NDPO occurred automatically when FEMA was transferred. However, the FBI WMD Coordinators are an integral part of the FBI's own WMD program. They perform an important role for the FBI in each FBI Field Office in interfacing with the FBI Headquarters WMD units, training and developing exercises for Field Office personnel, interfacing with the State and local community on WMD issues, and being the expert that the Field Office leadership and agents turn to for WMD advice during incidents and investigations. They are the FBI field extension of the FBI Headquarters WMD units. The FBI would retain the right to continue to provide this same service for its Field Offices with its own personnel. Once again, while the WMD Coordinators assisted the NDPO in its responsibilities, they were not organizationally or operationally a part of the NDPO as a field element. It is the Bureau's understanding that FEMA has already placed its own WMD personnel in each of its 10 regional organizations.

j. If the NDPO is transferred to the new Department, what would be the advantages and disadvantages of revising the Memorandum of Understanding that assigns crisis management functions to the FBI and consequence management functions to FEMA?

The NDPO was not an operational entity. Rather, it was a coordinating body for Federal programs and provided domestic preparedness support to State and local Communities as stated earlier. The NDPO had no role in crisis or consequence management functions. Further, the assignment of crisis and consequence management functions was made in PDDs 39 and 62, which were expanded in the PDD-39 Domestic Guidelines and the U.S. Government Interagency Domestic Terrorism Concept of Operations Plan (CONPLAN). In any event, it is difficult to comment on advantages/disadvantages of revising any document assigning these responsibilities unless specific recommended revisions are identified.

25. The 24-page White House document states with respect to the Intelligence and Threat Analysis functions of the new Department, "An important partner with the Department's intelligence and threat analysis division will be the newly formed FBI Office of Intelligence. The new FBI and CIA reforms will provide critical

analysis and information to the new Department." White House representatives stated at a briefing of Senate staff that the intelligence analysis functions of the new Department would be staffed, in part, by nonreimbursable detailees from other agencies.

a. How many personnel would the FBI detail to the new Department for this purpose?

The FBI cannot predict the number of detailees to be assigned to the intelligence analysis functions of the new Department.

b. What would be their functions and duties?

See response to 25(a).

c. What would be the impact on implementation of the proposed FBI reorganization?

See response to 25(a).

26. The 24-page White House document states, "Currently, the U.S. Government has no institution primarily dedicated to analyzing systematically all information and intelligence on potential terrorist threats within the United States, such as the Central Intelligence Agency performs regarding terrorist threats abroad. The Department of Homeland Security, working together with enhanced capabilities of other agencies such as the Federal Bureau of Investigation would make American safer by pulling together information and intelligence from a variety of sources."

a. To what extent would the new Department duplicate what the FBI would do under the proposed FBI reorganization to pull together information and intelligence from a variety of sources?

There would be some duplication, which is not necessarily a bad thing in the intelligence business. On balance, however, the reorganization will enhance the FBI's ability to provide information and timely analysis to the Department of Homeland Security (DHS). FBI analysis would be one of many inputs into the department's integrated assessments on terrorist threats. Enhancing our analytical capability would thus facilitate the ability of DHS to carry out its crucial missions.

b. What types of information from the CIA, NSA, or other available sources would not be available to the FBI, but would be available to the new Department?

Both FBI and Homeland Security would have the same access to CIA, NSA and other sources of information.

c. What would be the advantages and disadvantages of assigning to the FBI the threat analysis and warning functions proposed for the new Department?

The President's proposal reserved for the new department the ultimate responsibility for this function. What the FBI can bring to the table is that our Counterterrorism Division is the only component in the U.S. government that has fused analysis with its operational and investigative capabilities. The ability of FBI CT analysts to work closely with operational units at headquarters and FBI field offices will result in a product that brings important insights into the plans, intentions, and operational capabilities of terrorism groups operating in the U.S.

Critical to maximizing the synergy between analysis and operations is the creation of a collaborative environment where investigators and analysts can access and exchange information and communicate easily. Information technology is the key to creating such an environment. As Director Mueller has indicated, this is still a major obstacle to achieving the full benefit of our counterterrorism reorganization. We are confident that we have the programs in train that will give us the capabilities we need within two years. We recognize, however, that we cannot afford to wait this long to deal with our information handling problems. Consequently, we have a number of interim fixes in progress that should enable CTD to significantly improve its ability to exploit more effectively the huge amount of data we must deal with daily.

d. Under the proposed FBI reorganization, would the FBI Office of Intelligence and the analysis elements of the Counterterrorism Division be expected to provide a comprehensive net assessment for the President of terrorist threats, domestic vulnerabilities, security safeguards, and recovery measures by pulling together and evaluating not only threat information, but also information about the vulnerabilities of specific targets to the

wide range of terrorist attack methods, the security safeguards available to reduce those vulnerabilities, the measures available to recover from the consequences of an attack, and the capabilities of federal, state, and local government agencies and private organizations to adopt various safeguards and recovery measures?

Until the the new intelligence component envisioned by the Homeland Security Act is fully functioning, CTD most likely will continue to fulfill most of these functions.

e. What would be the advantages and disadvantages of the FBI providing to the new Department all information regarding sensitive FBI counterterrorism investigations and operations including sensitive sources and methods?

There are a number of legal restrictions on providing information on U.S. persons and there are other issues related to discoverability involving persons who have been indicted or who are likely to be indicted that will constrain the FBI's ability to provide all raw operational reporting to the Department of Homeland Security. However, we are taking steps to ensure that raw FBI reporting relevant to threats against targets in the United States will be made available to the new department. For example, we have created a Terrorism Reports and Requirements Section that will be responsible for ensuring that raw operational reporting is disseminated, while at the same time protecting sensitive source and investigative information.

f. Under the proposed FBI reorganization, would the FBI be expected to provide a comprehensive assessment for the President of the status of sensitive FBI counterterrorism investigations and operations against threats by specific individuals and groups including sensitive sources and methods and both successes and failures?

Currently, the FBI provides the President of the United States with regular assessments of sensitive counterterrorism operations and investigations including those which focus on threat reporting and the disruption of potential terrorist threats. The CTD reorganization will serve to enhance the operational and investigative reporting to the President through the addition of comprehensive strategic analysis designed to identify emerging terrorist threat trends.

g. What would be the advantages and disadvantages of transferring the FBI Office of Intelligence, the Foreign Terrorist Tracking Task Force, and/or the National Joint Terrorism Task Force to the new Department?

There would be no advantage in transferring the Office of Intelligence (OI) to the new department. OI has broad programmatic responsibilities, but the office has no direct responsibility for managing analysis. OI, however, will be an important link between the Counterterrorism Division and the Department of Homeland Security by virtue of its role as the central clearing house for all FBI information on counterterrorism.

The Foreign Terrorist Tracking Task Force (FTTTF) was created at the direction of President Bush on October 29, 2001 to identify, locate, and deny entry to, or remove foreign terrorists and their supporters. The FTTTF is a multi-agency task force, consisting of the FBI, the Department of Homeland Security, the U.S. State Department, the Department of Defense, the Drug Enforcement Administration, the Intelligence Community, and local law enforcement, that leverages agency expertise, information, and technology. The FTTTF tracks foreign terrorists and notifies the appropriate agency when a suspected terrorist enters or attempts to enter the United States. The FTTTF also conducts risk assessment on foreign nationals who obtained specialized training in the United States.

The FBI is recognized as the primary federal agency responsible for counterterrorism investigations and enforcement within the U.S. and overseas. Thus, there is a clear functional nexus between FTTTF and FBI activities.

1. The FTTTF has the ability to assist FBI investigations by collecting, sorting, reviewing or adding to information on known/suspected terrorists. More importantly, the FTTTF uses technology to help identify known/potential terrorists who may be in the U.S. and who should be investigated by the FBI.

2. Much of the FTTTF's focus is enforcement/investigations, appropriately placing it as part of the FBI rather than under the Department of Homeland Security, which continues to focus on areas

such as infrastructure protection, emergency preparedness, science and technology, and border/transportation security.

3. The FTTTF complements FBI's currently evolving information systems/intelligence sharing architecture, which also includes the National Joint Terrorism Task Force (NJTTF) element at FBI headquarters and the field-based Joint-Terrorism Task Forces (JTTFs).

The JTTFs are responsible for all CT-related intelligence/investigative operations inside the United States. There currently are a total of 66 JTTFs. A JTTF exists in each of the FBI's field offices and the JTTF Program has expanded into the FBI's resident agencies (RAs) consistent with the 93 judicial districts where the Department of Justice has established ATTFs. The JTTFs today are manned by 649 state and local police officers, 438 Federal investigators, and 1,245 FBI Special Agents. The JTTF Program promotes a coordinated effort among law enforcement agencies in connection with terrorism investigations.

There would be no advantage to moving these entities from the FBI into the Department of Homeland Security.

h. Do you think that <u>any</u> portion of the FBI should be transferred from the FBI to the new Department of Homeland Defense? Please explain your answer.

Non-investigative parts of the NIPC should be – and were -- transferred to the Department of Homeland Security by Pub. L. 107-296. Clearly, the analysis, warning, and outreach functions of the NIPC fall squarely under the purview of that Department. The resources that the NIPC has developed to support these initiatives should also be – and were – transferred to the new Department. Conversely, those NIPC investigative assets, which are essential to the FBI's core mission of investigation should be left with the FBI.

i. Committee staff were informed that initially, some of the material provided by the Administration regarding the President's proposed reorganization <u>erroneously</u> stated that certain entire elements would be transferred from their current agencies. To clarify this basic point, what is your understanding of what agencies or elements will be moved either out

of or into the Department of Justice under the President's proposal? To where, or from where?

Under the President's proposal, the following elements were to be moved from the FBI to the Department of Homeland Security:

1. **The NIPC Front Office, including the Director and Deputy Director of the Center, to assist in an efficient and effective transition, as well as to provide a matrix management capability to ensure the sharing of intelligence developed through the FBI's investigative efforts.**

2. **All components of the Analysis and Warning Section (AWS), consisting of:**

   a. **the Analysis and Information Sharing Unit (AISU); and**
   b. **the Watch and Warning Unit (WWU).**

3. **All components of the Training, Outreach and Strategy Section (TOSS), including:**

   a. **the Outreach and Field Office Support Unit (OFSU);**
   b. **the ISAC Development and Support Unit (IDSU);**
   c. **the Strategy and Planning Unit (SPU);**
   d. **the Training and Continuing Education Unit (TCEU).**

The following components were proposed be retained in the Cyber Division at FBIHQ:

The entire Computer Investigations and Operations Section (CIOS) will be retained in the Cyber Division at FBIHQ, due to its oversight and management responsibilities for all FBI computer intrusion investigations and operations, including:

a. **the Computer Investigations Unit (CIU);**
b **the Counterintelligence/Counterterrorism Computer Intrusion Unit (C3IU); and**
c. **the Special Technologies and Applications Unit (STAU).**

j. What effect will the President's proposal have on the ability of the FBI to coordinate and share information with any other element of the Department of Justice, such as the INS, which will be transferred to the new Department of Homeland Defense under the President's proposal? Will such a change be an impediment to information sharing and coordination?

The President's plan would not – and Pub. L. 107-296 does not – hinder the FBI's ability to coordinate and share information with any other element of the Department of Justice. Our plan for enhancing the FBI's information sharing capabilities are not dependent on any specific organizational structure.

FISA

27 - 31. **Responses to these questions will be provided at a later date.**

32. The Woods procedures require the field office to conduct a computer search only of the target name.

a. Why is it not required that a broader subject or key word search also be conducted?

The indexing procedures used by criminal investigators at the FBI are based on name. Therefore, the most efficient and effective computer search is conducted using the subject's name.

b. Why is the headquarters unit facilitating the processing of FISA applications not required to conduct such a search in addition to the field office, especially since certain reports are "blocked" from field access?

The agent in the field office seeking the FISA authorization has primary responsibility for the overall operation of the case. The headquarters supervisor acts as the sworn declarant on FISA packages for reasons of physical proximity to the FISA Court but must rely on the accuracy of the information presented by the field office in the declaration. Since the field office requesting the authority has the greatest knowledge of the specific details of the case, it is prudent to have the field search the Automated Case Support system to determine if the FISA target is also the subject of a documented FBI criminal investigation, past or present; and to search

the asset and informant files of their particular field office. Positive hits in the computer system on a target name will require additional information that only the field can provide. Prior to the finalization of packages, the field consults with headquarters on the results of the search and discusses further steps that need to be taken to ensure complete accuracy.

c. Is it intended that the Woods procedures be the extent of the investigation in connection with the preparation of a FISA application, or is it expected that the field agents and headquarters unit will pursue all necessary and logical leads, including a basic key word search?

The Woods procedures are used to ensure the accuracy of the information contained in the declaration but in no way constitute the extent of the investigation in connection with the preparation of a FISA application. Requests from field offices to headquarters for a FISA initiation or renewal typically incorporate a memorandum documenting the factual predicate for the requested coverage. The relevant unit at Headquarters then prepares an "action memorandum" to the Office of Intelligence Policy and Review requesting that the FISA initiation or renewal package be prepared. Action memoranda often include relevant additional facts developed in discussion with the originating field office, or classified intelligence community information provided by headquarters agent and analytical personnel who have developed an expertise with respect to and have been assigned oversight responsibility for the investigation of certain foreign powers in the United States and their agents. Additionally, information, both classified and unclassified, which has been obtained by the FBI through a variety of sources, including U.S. and foreign intelligence services and law enforcement agencies, is routinely included in action memoranda (and subsequently the FISA declarations) in order to make the strongest possible case for authorization of FISA surveillance and search authority. Some but not all of this information may be gleaned from the FBI computer system. Effective March 1, 2003, the FBI will submit requests for FISA coverage to OIPR in a standard format developed by DOJ and the FBI.

32. Lt. Gen. William H. Odom, USA (Ret.) has recently proposed the creation of a new National Counterintelligence Service.

a. What is your response to his analysis and what would be the advantages and disadvantages of his proposal?

One of the FBI's greatest strengths is its law enforcement culture, which allows it to creatively generate, and exhaustively investigate, criminal leads to successfully resolve crimes. The fundamental interpersonal, psychological and social skills required to undermine a complex criminal organization serve as a sound foundation upon which to build Foreign Counterintelligence (FCI) professionals. Moreover, the national and international law enforcement network, which the FBI has nurtured over the years, adds exceptional value to FBI investigations and operations.

As part of a new FBI national FCI strategy to be unveiled shortly, the Counterintelligence Division is setting forth 29 actionable items which will drive the FBI's FCI program towards being more proactive and predictive rather than reactive and focused only on targets of opportunity. The strategy sets forth five new strategic objectives and identifies country priorities to direct and focus field offices as part of a concerted national FCI effort. The Counterintelligence Division has also developed a six-point approach to operational strategy which will help the field offices to address the five strategic objectives in the areas of threat assessments, FCI operations, interfacing with the appropriate victim or domain, partnerships and liaison, dissemination of information to policy makers, and changing the behavior of unwitting enablers through CI awareness campaigns.

b. Under your reorganization, to what extent will the FBI perform the functions that General Odom proposes for a National Counterintelligence Service?

The FBI is developing the FCI national strategy noted above which will ensure a centralized, nationally directed FCI program. This will involve the establishment of an FCI career path and an enhanced FCI training program within the Bureau. The FBI has committed to a reprogramming of resources to be directed to the FCI program which will eventually establish FCI squads in all FBI Field Offices. The FBI is working to improve its information management whereby an effective FCI program will have a "hub and spoke" type information management system with FBIHQ at its the hub and the field offices and other agencies of the USIC as the spokes. This will allow for more efficient dissemination of timely CI information to policy makers. Also, a centrally managed Analysis Program within the FBI Counterintelligence Division will: (1) assess foreign intelligence threats on a national level in a manner that is analogous to National Intelligence Estimates, and (2) use a

comparative methodology based on the results of national threat assessments to rank the threats and thus develop a dynamic FCI priority ranking process. This will assist FBI executives in ranking national FCI priorities, in providing national assessments of foreign intelligence threats to policy makers, or in providing information pertinent to managing resources.

33. The Senate Select Committee on Intelligence has reported legislation that would establish the National Counterintelligence Executive by statute in the Executive Office of the President. What are the advantages and disadvantages of this proposal?

The Administration is currently in the process of reviewing the SSCI legislation and is formulating a position paper on NCIX.

34. The Senate Select Committee on Intelligence has reported legislation that would direct the Director of Central Intelligence to establish a Terrorist Identification Classification System listing suspected international terrorists based on all source intelligence and to share information on the list with other Federal, state, local, foreign, and international agencies, as the DCI considers appropriate. What are the advantages and disadvantages of this proposal?

We defer to the Department of Justice regarding this proposal.

Carnivore:

35. The press has reported that problems arose in the use of the DSC1000 (or Carnivore) computer program in an FBI case in 2000 and that these problems are discussed in a memorandum dated April 5, 2000, that has been released under the Freedom of Information Act. Please provide a copy of the memorandum and an explanation of the problems and their resolution.

In the case referred to, the over-collection problem occurred because the FBI had received incomplete information regarding the network protocols and transmission modes employed in the network. The Carnivore/DCS1000 device as programmed was designed to work with standardized protocols, but in this instance the network was employing an uncommon implementation of the protocols -- a circumstance that, unfortunately, was not understood at the time of the interception effort. To be accurate, the problem was not owing to any technical flaw in the FBI's Carnivore/DCS1000 device or its operation, but rather to the understanding of the configuration of the network.

As we have informed Congress before, when implementing an electronic surveillance order for e-mail or other electronic communications or data, we normally prefer to have the Internet Service Provider (ISP) effectuate the surveillance on our behalf, if the ISP is equipped to do so promptly, securely and consistent with the court order. And even where, as here, the FBI was required to deploy its own tool, the FBI worked closely with the network technicians in an effort to understand the network and its configuration. Also, in this case, before proceeding, we conducted a successful "controlled" test interception of our own communications in an effort to ensure the court-ordered interception would be successful once instituted. Unfortunately, despite our successful test, when the interception within the network was instituted an over-collection occurred.

It is important to recall, a key component resulting in the decision to initiate the Carnivore/DCS 1000 research and development effort centered on the lack of commercially available collection systems to effect lawfully authorized electronic surveillance. Concurrent with the development of the Carnivore/DCS 1000, efforts continued toward identifying and leveraging commercially available collection systems. Ultimately, as technology progressed, a data collection system utilizing commercially available software and hardware to effect lawful electronic surveillance was developed. This commercially available system is now the FBI's primary data collection system. The decision to terminate further development of the Carnivore/DCS 1000, or to continue to utilize it in support of investigative matters, was largely based on the high cost of software maintenance and on the much more cost effective commercially available solution.

The Carnivore/DCS 1000 research and development effort afforded the FBI an opportunity to gain valuable knowledge and experience. This research and development effort also influenced the commercial development of collection systems which could be configured to adhere to the specific requirements of a court order.

A copy of the memorandum is attached.

Written Questions of Senator Maria Cantwell
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. From my perspective, little discussion took place before the Administration decided and announced that the FBI would take the role of domestic intelligence agency. How was it decided that the FBI should be the agency tasked with domestic intelligence? What other options were considered? Were you advising the President as to your views on the role and capabilities of the FBI in regard to domestic intelligence gathering?

   The FBI is not in a position to divulge the deliberations among Administration officials, what options were considered, who was advising the President, and other details of the decision making process with regard to the FBI's role in domestic intelligence.

2. I am concerned about comments I have heard regarding the culture and working environment within the FBI. Special Agent Rowley testified that agents and analyst feel that they cannot call on people a rank or two above them to address a problem or discuss an issue. Also, I have heard from my constituents that many former FBI employees, especially those who had worked within the intelligence analyst division, complain that they were treated like "second-class citizens," with all emphasis and rewards going to the special agents.

   As you plan the reorganization of the FBI, how will you address these culture-defining issues? What are your plans to help increase communication between the ranks and to improve the quality of life for intelligence analysts and other support staff? How will you address the potential for delays in the communication flow among nine levels or more of management?

   We recognize that for too long, intelligence analysts have not enjoyed the same status as our Special Agents. We also recognize that if the FBI is to succeed in developing a first-rate analytical capability, this will have to change. One of the key missions of the Office of Intelligence is to create the basis for a strong analytical culture in the FBI that has the same standing as our law enforcement culture. This will take time, but Director Mueller is committed to creating an analytical career track in the FBI that will enable us to attract and retain the best analytical talent. To this, we are taking a number of steps:

   Our reorganization is oriented towards creating a robust analytical branch within CTD and hiring more and better qualified analysts.

a. **We intend to use the CTD model as the basis for expanding our analytical capability to include Counterintelligence, Criminal, and Cyber divisions.**

b. **We are taking steps to break down barriers to communication and the flow of information between the operational and analytical branches in the Bureau.**

c. **Director Mueller is conducting "town hall" meetings with analysts to hear first-hand their concerns and he intends to institute, as rapidly as possible, new policies to address their concerns.**

3. In response to failures that are becoming well documented, failures of process within the FBI and other intelligence and law enforcement agencies, you have announced a change to the organization and guidelines to expand the FBI's ability to gather information. For example, some of the most critical failures that Special Agent Colleen Rowley's memo exemplify, and are well know among those who have in the past looked at the weaknesses in the government's efforts to combat terrorism, are failures in information management and analysis.

a. What processes are you putting in place within the FBI to make sure that information that is acquired by field agents is properly analyzed and disseminated in a timely manner?

We are substantially augmenting our analytical capability by establishing the Counterterrorism Prevention and Analysis Branch in the Counterterrorism Division (CTD) headed by a Deputy Assistant Director for Analysis who is a senior CIA officer with 20 years of experience in the Agency's Directorate of Intelligence. We are hiring several hundred analysts whose qualifications meet Intelligence Community standards. We are revamping our training program for analysis to put greater emphasis on basic analytical trade craft and on counterterrorism analysis. We are devoting more analytical resources to strategic analysis that focuses on providing early warning of emerging terrorist threats so that the FBI can more effectively disrupt and prevent terroristic attacks. Finally, we are enhancing our information technology so that analysts will receive, in a timely manner, all terrorist-related information and we are providing them with the analytical tools that will enable them to analyze more effectively thousands of reports and threat information the FBI receives daily.

b. What are you doing to get the expertise that the FBI will need to better organize, analyze and disseminate information?

We have an aggressive recruitment effort underway that will ultimately bring hundreds of new analysis into the FBI. These new hires will have the academic background and/or experience of their counterparts in the Intelligence Community. The CIA is detailing 25 analysts and experienced Directorate of Intelligence managers to provide the expertise and experience to assist us in creating a first-rate analytical capability. CIA also has detailed to CTD a senior reports officer from its Directorate of Operations to set-up the FBI's own reports officer cadre, which will be critical to making sensitive investigative information available to other federal agencies and to state and local law enforcement engaged in the war on terrorism.

4. Special Agent Rowley discussed her concerns that, in her opinion, for the purpose for approving a criminal search warrant, the U.S. Attorney's Office is more conservative in finding "probable cause" than a judge might be. The new FBI guidelines eliminate some headquarters participation in the approval of search warrants. Would it not be a more measured response to the concern that headquarters is a "roadblock" to investigation to instruct those at headquarters, and I would include the U.S. Attorney in the context to relax their standards rather than eliminate the headquarters oversight? Would it not be better to instruct all at the Department of Justice and others in the federal government to put greater trust in the judgement of agents closest to investigations rather than eliminate the headquarters oversight?

The revisions to the Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations did not "eliminate some headquarters participation in the approval of search warrants"; neither the former nor the revised guidelines specify a role for FBI headquarters in the review and approval of criminal search warrants. What the guidelines have delegated to the field offices is the authority to open and renew certain types of investigations: specifically, the guidelines now give the Special Agents in Charge of the FBI's field offices the authority to open and renew Terrorism Enterprise and Racketeering Enterprise investigations, with notification to FBI Headquarters and further notification to appropriate personnel in the Justice Department (including, in the case of Terrorism Enterprise investigations, the Attorney General and the Deputy Attorney General). Previously, only FBI Headquarters officials could authorize the opening and renewal of such investigations. The revised guidelines place greater investigative and operational authority in the field, while providing for appropriate headquarters involvement in these investigations.

5. If one goal for the FBI is to improve its ability to "connect the dots" between disparate investigations and intelligence, doesn't the involvement of headquarters personnel serve that purpose? They see the different field agent

investigations. Isn't it counterproductive to reduce headquarters oversight of criminal and FISA investigations?

The Counterterrorism Division is in the process of centralizing the control of counterterrorism investigations at the Headquarters level. Director Mueller has stated that protecting the United States in the post-9/11 environment requires the FBI to undertake a series of management actions built upon three key inter-related elements: (1) refocusing FBI mission and priorities; (2) realigning the FBI workforce to address these priorities; and (3) shifting FBI management and operational cultures to enhance flexibility, agility, effectiveness, and accountability. The FBI mission, however, remains constant. First, and foremost, the FBI must protect and defend the United States against terrorism and foreign intelligence threats. Second, the FBI must uphold and enforce the criminal laws of the United States. And third, the FBI must provide and enhance assistance to its federal, state, municipal, and international partners.

On May 28, 2002, Director Mueller announced the FBI's Top Ten Priorities as being:

1. Protect the United States from terrorist attack.
2. Protect the United States against foreign intelligence operations and espionage.
3. Protect the United States against cyber-based attacks and high-technology crimes
4. Combat public corruption at all levels.
5. Protect civil rights.
6. Combat transnational and national criminal organizations and enterprises.
7. Combat major white-collar crime.
8. Combat significant violent crime.
9. Support federal, state, municipal, and international partners.
10. Upgrade technology to successfully perform the FBI's mission.

Implementing the revised FBI priorities outlined above, and redirecting the FBI workforce toward these priorities, requires a concurrent shift in how the FBI manages counterterrorism cases from a national perspective. A significant restructuring and expansion of the Counterterrorism Division at headquarters is necessary because these cases are critical to the very foundation of the FBI's ability to protect national security. Counterterrorism cases often involve parallel efforts ir multiple locations in the US and foreign countries and require extensive coordination and collaboration with other Intelligence Community, federal, state, local and international partners. These cases are complex in terms of inter-relationships among groups and individuals, a complexity that requires continuity and specialized expertise and trade craft. Most importantly, these cases require an organizational capacity to quickly respond and deploy personnel and

technology to emerging and developing situations. The Counterterrorism Division will take on a more direct role in managing investigations, providing operational support to field offices and collaborating with Intelligence Community and law enforcement partners. In addition, by implementing a more proactive approach to preventing terrorist acts and denying terrorist groups the ability to operate and raise funds in the US, the Counterterrorism Division will acquire a centralized and robust analytical and data mining capability.

6. As I have previously expressed, I am uncomfortable with the manner in which the USA-Patriot Act erodes the distinction between domestic law enforcement investigations and foreign intelligence investigations.

Forty-eight of our 50 states plus the District of Columbia have laws making it illegal for libraries to release patron information to anyone without a court order. The USA-Patriot Act expands the authority of the FBI and law enforcement to gain access to business, medical, educational and library records, overriding state laws. It allows the FBI to compel production of library circulation records, Internet use records, and registration information without demonstrating "probable cause." The agent can simply express his or her belief that the records may be related to an ongoing investigation related to terrorism or intelligence activities. The potential for the infringement of basic civil liberties and the right to privacy exists to such a high degree in this situation, as exemplified by concerns over the FBI's Library Awareness Program in 1986.

a. What type of information do you expect to obtain by gaining access to library patron records and other business records pursuant to the USA-Patriot Act?

A response to this question will be provided at a later date.

b. What safeguards are you putting into place to specifically protect civil liberties in light of these new authorities?

The Patriot Act modified key features of the FISA business records authority as well as the National Security Letter (NSL) authority. The current standard is "relevance" but it requires more than just the agent's belief that the records may be related to an ongoing investigation. Use of these techniques are authorized only in full investigations properly opened in accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). Both the FISA business records authority and the NSL statute stipulate that no investigation of a U.S. person may be conducted solely on the basis of activities protected by the First Amendment to the Constitution. Additionally, Executive Order 12333 and the FCIG require that the FBI

accomplish its investigations through the "least intrusive" means. FBI supervisors must keep this in mind in determining whether or not a particular use of an authority is appropriate. Headquarters has also charged field offices with the responsibility for establishing and enforcing appropriate review and approval processes for use of these expanded authorities. Compliance with these and other requirements is monitored through inspections and audits conducted by the FBI Inspection Division, the Intelligence Oversight Board, and the Department's Office of Intelligence Policy and Review.

c. What processes, guidelines or regulations will be in place to assure that searches are not conducted based on racial profiling and will not violate the right to privacy or other civil liberties?

The newly-revised Attorney General's Guidelines on General Crimes, Racketeering Enterprises, and Terrorism Enterprise Investigations make clear that investigations of suspected terrorists will not be carried out on the basis of race, ethnicity, or religious affiliation. Under the guidelines, agents can only investigate suspected terrorists on the basis of information indicating a possibility of actual criminal activity. The new guidelines do clarify that agents who are investigating suspected terrorists, even if they have ties to political and religious groups, can use the same investigative techniques they would use when investigating any other type of organization. Otherwise, the Guidelines are the same today as they were pre-9/11 in that FBI investigative activities must have a legitimate law-enforcement purpose and no religious, political, or ethnic group is singled out for special scrutiny.

d. What assurances can you give us that these new authorities will not be abused in the name of terrorism or intelligence matters, as similar authorities had been abused by the FBI in the past?

The FBI has a number of internal and external safeguards in place today that did not exist in the past. Two key external safeguards are Executive Order (E.O.) 12333 and the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). E.O. 12333 is the primary authority for intelligence activities conducted by the U.S. Intelligence Community. It establishes goals for the collection of intelligence information; assigns responsibilities among the various intelligence components; prescribes what information may be collected, retained and disseminated; and prescribes or proscribes certain techniques that may or may not be used to collect intelligence information.

The FCIG set limits and requirements governing all foreign intelligence, foreign counterintelligence, foreign intelligence support activities, and intelligence investigations of international terrorism conducted by the FBI pursuant to E.O. 12333. Both of these safeguards were instituted in response to past abuses.

Another important internal safeguard is the Intelligence Oversight Board (IOB) which currently reviews the FBI's practices and procedures relating to foreign intelligence and foreign counterintelligence. The IOB was established as a standing committee of the President's Foreign Intelligence Advisory Board by E.O. 12863. Section 2.4 of E.O. 12863 requires that the Inspectors General and General Counsel of the Intelligence Community components (in the FBI, this is the Assistant Director of the Inspection Division and the General Counsel respectively) report to the IOB "concerning intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential direction." By longstanding agreement between the FBI and the IOB, this language has been interpreted to mandate the reporting of any violation of a provision of the foreign counterintelligence guidelines or other guidelines or regulations approved by the Attorney General, in accordance with E.O. 12333, if such provision was designed in full or in part to ensure the protection of the individual rights of a U.S. person.

The FBI has also instituted a Privacy Impact Analysis (PIA) process for the review of major systems involving personal data. Through this process, the FBI seeks to ensure that such systems not only fully comply with the Privacy Act but also comport with general principles of privacy such as ensuring the collection of only relevant and needed data.

Formal ethics instruction has also been instituted in the new Special Agent training curriculum at the FBI Academy. Each Agent gets 16 hours of this training which emphasizes that adherence to the rule of law is not only required and expected but a moral imperative. The class culminates with a tour of the Holocaust Museum to drive home to each Agent what can happen when Law Enforcement places itself above or outside the law.

7. American Indians, including Alaska Natives, have the highest violent crime victimization rate in the Nation. The Bureau of Justice Statistics reported in 1999 that during 1992 to 1996, the violent victimization rate for American Indians (124 violent crimes per 1,000) was more than twice the rate for the nation as a whole (50 per 1,000).

Please provide detailed information about whether any FBI personnel will be shifted away from posts handling Indian country as part of the FBI reorganization.

There are no plans to decrease the number of Special Agents investigating crimes in Indian Country.

8. You testified that it would take up to two years to bring the FBI up-to-date with modern computer technology and provide common search features currently available on search engines such as Lexis-Nexis and Google. Can you explain to me why it takes so long to bring such a critical part of our intelligence analysis infrastructure up to the level available to the public?

It will take up to two years to migrate all of the FBI's data and complete all programmatic aspects required for a comprehensive and secure Investigative Data Warehouse (IDW) capability. Once complete, the FBI will know what it has and with one query to be able to obtain all query relevant information. It will not take this long to provide a Lexis-Nexis/Google type of capability for the Bureau's Counterterrorism and Counter Intelligence Divisions. This initial capability will be made available as part of our IDW Secure Counterterrorism Operational Prototype Environment (SCOPE) project. A pilot version of this capability will be demonstrated for FBI HQ use in the fall of 02 and should be available for FBI wide use once the Trilogy Wide Area Network (WAN) is operational. The major challenges to rapid full implementation are security, privacy, records management and other legal issues, which Google and public search engines are not subjected to.

9. The USA-Patriot Act includes a measure that I proposed that requires the development of a technology standard for visas that will help us be sure that visa holders seeking entry to the U.S. do not pose risks to our country. Additionally, the Enhanced Border Security Act, submitted to the President for signature on May 8th, mandates INS and Department of State access to information held by the FBI within the next year.

   a. What is the FBI doing to ensure appropriate and timely integration of information systems to allow access to this information? What safeguards are being designed to protecting the privacy and security of this information?

A response to this question will be supplied at a later date.

   b. My impression from his testimony in July 2001, Assistant Director Bob Dies indicated that it would be two or three years before the FBI would have "baseline," not even a state-of-the-art, computer system under the Trilogy Program. Please describe:

i. how the FBI will achieve the goals you have set out for improved technology in two years in light of Mr. Dies expectations;

Trilogy was planned as a three-year initiative to upgrade FBI's aging computer infrastructure and migrate five existing investigative and intelligence applications to a new web-based architecture. Contracts were awarded for the infrastructure and applications development, on May and June 2001. However, based on 9/11, the Director accelerated the infrastructure components of the Trilogy's schedule, in order to provide those capabilities most urgently needed to significantly enhance work productivity. In response, Congress provided additional funding for accelerating Trilogy's network and desktop infrastructure. By March 2003, Trilogy will provide an infrastructure consisting of a highly reliable high-speed network, capable workstations, modern office automation and E-Mail software. However, the re-engineering, design and development of the five core applications will take three years.

The infrastructure enhancements are being deployed in two phases. The first phase, called "Fast Track", is the installation of Trilogy architecture at our 56 Field Office locations and all of our Resident Agencies. The infrastructure improvements consist of new network printers, color scanners, local area network upgrades, desktop workstations, and Microsoft Office applications. To date 56 FBI Field Offices, two Information Technology Centers (ITCs) and 205 RAs were completed. Fast Track is continuing to deploy this infrastructure at the remaining Resident Agencies.

The second phase of infrastructure deployment is called "Full Site Capability," and completes the Trilogy infrastructure upgrade. The full upgrade will provide the wide area network connectivity together with new encryption devices to protect our data, new operating systems and servers, and new and improved e-mail capability. The WAN design also has been enhanced to eliminate possible single points of failure. Completion of this phase is scheduled for March 2003. The application component is scheduled to be delivered in the Spring of 2004.

To ensure that our investment in Trilogy does not deteriorate and lose its effectiveness, the FBI is requesting, beginning in FY 2004, funding for a comprehensive Operations and Maintenance and a Technology Refreshment Program.

ii. how the FBI's restructuring plan will improve fundamental computer capability.

Just as the restructuring plan will enhance the FBI's operational capabilities, the Information Technology (IT) support given to FBI's operational entities will be improved. The FBI's IT resources will be better aligned to meet the needs of the operations personnel by the Bureau's consolidation of all IT initiatives within the FBI. This will free operations personnel to focus on their mission priorities, while they will be ensured that their IT needs are being met. Specifically, the FBI has instituted a number of IT process improvements, which now link enterprise architecture, data management, and on-going IT operations and maintenance to the Bureau's IT investment strategy. Once an IT project is proposed, it is reviewed by several boards to ensure that it is consistent with the overall architecture, strategic objects, and is a cost effective undertaking for its entire lifecycle. These process improvements coupled with an emphasis on strong program management are the foundations, which the Bureau is using to institute a continuous improvement of its computer capabilities.

iii. how you intend to train agents to use the technology available to them to make the agency more effective.

The FBI has already taken major steps to improve its training program. We are currently training field Agents and professional support staff on the new desktops and MS Office suite and will provide training on the new applications, once developed. End-user training of our new office automation suite has been provided to over 7,000 field personnel, utilizing both instructor led training and Computer Based Training (CBT). We anticipate completing this training in the Fall. We will continue to offer CBT to all employees, and we will develop tailored courses for the converted applications, to be available prior to installation. The FBI has implemented a new on-line Learning Management System (LMS) to support registration and tracking for Trilogy training, and which will be used to administer all FBI training.

The technical support training will be available through the LMS as self-paced instruction using CBT. Classes will also be available to Information Technology Specialists (ITS), Electronic Technicians (ET), and Enterprise Operations Center (EOC) staff members on the operational support procedures of the EOC.

Written Questions of Senator Herb Kohl
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. **EXPLOSIVES**

One of the major security gaps that the country faces today is the ease with which people off the street can buy explosive material. Most Americans would be stunned to learn that in some states it is easier to get enough explosives to take down a house than it is to buy a gun, get a drivers' license, or even obtain a fishing license. In some states, anyone can walk into a hardware store and buy explosives or a box of dynamite. In many states, no background check is conducted and no effort is made to check whether the purchaser knows how to properly use this deadly material. And it is perfectly legal for people here in this country on a student visa to buy explosives. We're trying to close all these loopholes. Senator Hatch and I have legislation that would require a federal permit and thorough background check for everyone who wants to buy explosives. Do you think this is a security gap that we should take seriously and act to close?

We note that Congress has addressed this issue by enacting legislation very similar to the proposal cited in this question. See Title XI, Subtitle C of Pub. L. 107-96.

2. **FBI BUDGET**

Please provide information documenting the FBI's information technology budget for the last ten years. This should include the amounts authorized to be spent and those actually spent by the Bureau on all facets of information technology including technology upgrades and the purchase of new equipment.

Congressional appropriations for information technology resources are generally provided to the FBI through the Information Management, Automation, and Telecommunications (IMAT) and Criminal Justice Services (CJS) decision units. The table below displays the amounts appropriated and expended per fiscal year for these two decision units. These amounts include the full range of personnel and nonpersonnel resources associated with each decision unit, including compensation and benefits, travel and rent, services, and equipment and supplies funding.

The actual amounts expended may include resources appropriated in the budget for that fiscal year, as well as those carried forward from previous years either through no-year or two-year funding accounts. Therefore, it is difficult to draw a direct relationship between dollars funded and expended for a specific fiscal year.

Direct Funding: Salaries & Expenses and Violent Crime Reduction Program

	Information, Management, Automation and Telecommunications		Criminal Justice Services	
FY	Funded ($000s)	Actual ($000s)	Funded ($000s)	Actual ($000s)
1992	170,128	188,525	146,694	137,349
1993	170,146	198,153	172,203	193,314
1994	175,558	181,645	192,706	259,823
1995	161,136	195,769	181,492	110,832
1996	141,010	212,363	178,393	199,037
1997	143,438	222,543	216,738	235,158
1998	144,811	184,926	191,570	204,465
1999	136,541	156,749	188,252	116,284
2000	160,655	182,245	210,066	177,799
2001	171,488	199,031	205,071	197,836
2002	507,367	-	210,353	-

Additionally, please provide information documenting the FBI's travel budget for the last ten years. This should include the amounts authorized to be spent and those actually spent by the Bureau.

Funds for the FBI's travel expenditures are received through both direct appropriations and reimbursable services. The reimbursable amounts vary from year to year depending upon reimbursable work performed. Therefore, it is difficult to display travel amounts authorized per fiscal year. The following information displays FBI travel expenditures for both direct and reimbursable appropriations since 1993.

FY 1993: $38,092,067
FY 1994: $36,885,269
FY 1995: $52,300,370
FY 1996: $64,933,478
FY 1997: $71,033,155
FY 1998: $74,391,270
FY 1999: $78,869,762
FY 2000: $67,504,053

FY 2001: $71,445,171
FY 2002: $77,054,205 (as of July 31, 2002)

3. MANAGEMENT CHALLENGES

After Robert Hanssen compromised national security by accessing information on computers that he had no business looking at, the Webster Commission suggested that the FBI do a better job of tightening control over information within the Bureau. The lesson of the Hanssen case was that only those who need access to sensitive information should have it.

Today it appears that we have the opposite problem -- there is not enough information being shared within the FBI between agents. The agents in Phoenix and Minneapolis did not know what the others were doing. Headquarters might not have known and might not have been alarmed enough. And, not enough information was shared with the CIA to coordinate with them.

How does the FBI balance these competing interests? It seems that there are lessons to be learned to be both more vigilant and more relaxed about sharing information. How does the Director of the FBI manage those two competing interests?

The lesson learned from Hanssen is still applicable -- those persons with a "need-to-know", and only those persons, should have access to information that will facilitate the accomplishment of their responsibilities. From a practical standpoint, implementation of this lesson is more difficult.

Following the events of September 11, 2001, in an effort to support the information needs of the PENTTBOMB investigation, some access restrictions were removed from information contained within the Automated Case Support (ACS) system. Cases remained restricted if there was an approval by an Assistant Director (AD) from one of the operational divisions. This shifted the responsibility for restricting case access from the squad supervisor to the AD.

The Security Division is currently facilitating a review, in conjunction with the operational divisions, regarding the kinds of cases restricted within ACS. This review is to ensure, from a policy standpoint, that sharing is maximized while still protecting sensitive information. Additionally, we recently deployed a more user-friendly auditing tool to give case agents and their supervisors the ability to review whether anyone attempted or gained access to the most sensitive investigative files. This tool, the Case Document Access Report, was accompanied by step-by-step instructions on its use and how to restrict case access.

The Security Division is also in the process of building a robust Information Assurance Program. As part of this program, we are developing "enabling" technologies that allow for the secure sharing of information within "communities of interest". Examples of these technologies include public key infrastructure and virtual private networks. Significant liaison is also taking place with other Intelligence Community (IC) agencies and the Office of the IC CIO to ensure that the FBI is positioned to securely share information with its IC partners.

4. **FIREARMS AND EXPLOSIVES CASES**

For each of the last five years, please detail the number of cases in which federal firearm violations were the primary or a significant reason for a FBI investigation. Detail the same information for cases involving violations of the federal explosives laws.

	FY 2002	FY 2001	FY 2000	FY 1999	FY 1998
National Firearms Act	**86/61/44**	**177/121/78**	**137/91/68**	**141/86/49**	**89/49/52**
Bombings and Explosive Violations	**31/5/6**	**31/7/10**	**46/25/16**	**42/21/13**	**41/5/2**

Case Openings/Indictments, Complaints and Informations/Convictions

Please provide an analysis of the areas in which the FBI and ATF's authorized jurisdiction currently overlaps. Under the Director's proposed restructuring of the FBI, will the FBI become less involved in firearms related cases? If so, why?

The FBI has only a secondary jurisdiction over the enforcement of the National Firearms Act (NFA) and the State Firearms Control Assistance Act (SFCAA). Primary investigative jurisdiction for the NFA and the SFCAA rests with the Bureau of Alcohol, Tobacco, Firearms, and Explosives.

With few exceptions, the FBI does not open criminal investigations that are based solely on federal firearms violations or federal explosives violations. Rather, the FBI would open an investigation into a criminal enterprise focusing on violations over which the FBI has primary jurisdiction, but the investigation could also include a violation of the NFA or the SFCAA. The exceptions to this general rule occur in cases where, due to its size, the Bureau of Alcohol Tobacco and Firearms does not have a presence and the United States Attorney decides to prosecute a federal firearms matter or a federal explosives matter federally. In such a case, the FBI

would conduct an investigation. Generally, most of the exceptions are "felon in possession" matters. It is anticipated that the proposed reduction in the number of Special Agents involved in drug investigations and violent crime investigations could decrease our involvement in firearms related cases.

Written Questions of Senator Jeff Sessions
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. During the hearing, you were asked about the Attorney General's new entry-exit registration system, and specifically, about the fairness of fingerprinting aliens from countries that are state sponsors of terrorism or are determined to pose an elevated risk. You were asked about the fairness of fingerprinting persons under the entry-exit registration system in the morning and interviewing persons for employement with Arab language skills in the afternoon. Please answer the following questions:

   a. Are the people who will be subject to the entry-exit registration and fingerprinting requirements citizens of the United States?

      No, citizens of the U.S. will not be subjected to the entry-exit registration and fingerprint requirements of the entry-exit registration system.

   b. Are the people with Arab language skills who are being interviewed for employment with the FBI citizens of the United States?

      Yes. A mandatory requirement for employment with the FBI is U.S. citizenship.

   c. If the FBI decides to hire a citizen with Arab language skill, to interpret classified intercepts, will that person be fingerprinted?

      Yes. All employees of the FBI are fingerprinted during the background process.

   d. Are all new Special Agents of the FBI fingerprinted?

      Yes. All employees of the FBI are fingerprinted during the background process.

   e. Are new Assistant United States Attorneys fingerprinted?

      Yes. According to the Executive Office for United States Attorneys, all new Assistant United States Attorneys are fingerprinted.

   f. Are new recruits into the Armed Forces of the United States fingerprinted?

Yes.

g. Are new federal government workers for the Central Intelligence Agency, the National Security Agency, the State Department, as well as House and Senate staffers who receive top secret clearances fingerprinted?

All employees of the FBI must be eligible to receive a Top Secret clearance and, as previously indicated, are fingerprinted during the background process. The procedures for granting Top Secret clearances by the other agencies should be obtained directly from them.

h. Are new employees of state and local law enforcement agencies commonly fingerprinted?

Yes, most state and local agencies fingerprint their applicants as part of their hiring process.

i. Do a number of state bar associations require new lawyers to be fingerprinted?

According to FBI's Criminal Justice Information Services (CJIS) Division, nineteen (19) states have statutes approved pursuant to PL 92-544 for fingerprint-based background checks for bar applicants. They are:

Alaska	**Montana**
Arizona	**Nebraska**
Arkansas	**Nevada**
California	**New Jersey**
Colorado	**New Mexico**
Connecticut	**North Carolina**
Florida	**Oklahoma**
Georgia	**South Carolina**
Idaho	**Texas**
Michigan	

2. Did the Phoenix, Arizona Electronic Communication from Special Agent Ken Williams, as reported in the press, ask for investigation of suspicious students at flight schools or for Mid Eastern men at flight schools?

No, the Phoenix EC recommends that the FBI establish liaison with civil aviation universities and colleges for the purpose of determining whether a coordinated effort is underway to establish a cadre of individuals who will one day be working in the civil aviation community.

3. How many levels of FBI management are there? Do you plan to eliminate any levels of management? If so, how many?

Within the upper levels of FBIHQ management, the first phase of the Director's reorganization established four major branches, created two new divisions, established four new offices and realigned the existing FBIHQ structure within the new framework. The major elements of the Phase I reorganization include: four new Executive Assistant Directors to oversee: counterintelligence and counterterrorism; criminal investigations; law enforcement services; and administration; two new divisions to address the investigation of computer-facilitated crimes and security; four new offices to address significant issues relating to information technology, intelligence, records management, and law enforcement coordination with our state and local partners. The reorganization dissolves the Investigative Services Division and redistributes the functions of that Division among other FBIHQ elements.

A copy of the reorganization chart is attached.

Written Questions of Unnamed Senator
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. In response to a question I asked you at the time of your nomination, you stated:

Respecting the lawful exercise of First Amendment rights is essential and we must never let our zeal to investigate and fight crime undermine those rights. I commit to begin vigilant to ensure that investigations do not interfere with such rights.

I trust that you have not changed your views on this subject. However, I am concerned that some of the recently announced changes to the FBI guidelines may undermine the First Amendment rights of persons involved in lawful political dissent and lawful protest activities.

The new guidelines seem to open the door again to the many abuses documented by the Church Committee in 1975, which found that the FBI's internal security and domestic intelligence programs had compiled hundreds of thousands of files on Americans engaged in lawful political expression and association. The guidelines established by Attorney General Edward Levi, which the Department is now modifying, were adopted precisely to prevent these First Amendment abuses from recurring.

Rather than strengthening First Amendment safeguards, the new guidelines weaken them, by allowing the 56 field offices to conduct preliminary investigations based on uncorroborated allegations for up to a year -- instead of 90 days -- without approval by FBI Headquarters.

Under these new guidelines, what safeguards exist to prevent abuses from occurring at the local level? How will the FBI ensure that offices do not unnecessarily intrude on First Amendment rights in investigations where there is no "reasonable indication" of criminal activity?

A response to this question will be supplied at a later date.

2. Protecting First Amendment rights is not simply a matter of allowing only certain kinds of investigations, and not allowing others. It also requires that officials tailor their investigations to the scope of the potential crime. As one federal court recently observed, it is "axiomatic" that when the actions of government officials directly affect citizens' First Amendment rights, the officials have a duty "to take the least intrusive measures necessary to perform their assigned functions." The new guidelines, however, appear to

play down the need for agents to use the least intrusive investigative techniques sufficient to achieve their purposes. Why is this?

The revised guidelines contain cautionary guidance about using intrusive investigative techniques, as the old guidelines did. The revised guidelines retain the general principle that investigations should be no more intrusive than necessary, but direct that the FBI shall not hesitate — particularly in relation to terrorism — to use any authorized lawful technique, even where intrusive, where the intrusiveness is warranted in light of the seriousness of the terrorist activity or crime, or the strength of the information indicating their existence or potential commission.

3. What role should Congress have in ensuring that the FBI protects First Amendment rights? Don't these new guidelines demonstrate the need for greater oversight by Congress when it comes to preserving political and religious freedoms?

The Department and the FBI welcome Congress' exercise of its important oversight role. We do not believe, however, that the revisions to the Attorney General's Guidelines create any danger to First Amendment rights. The revised guidelines do not, and cannot, allow the FBI to disregard constitutional and statutory limits. The revised guidelines (and Department and FBI policies generally) require scrupulous compliance with constitutional and other legal obligations, and strike a proper balance between effective law enforcement and protection of the rights and liberties of the American people.

4. As you know, a scandal within the Boston FBI office led to important changes in how the FBI handles confidential informants. The Justice Department adopted important guidelines on the use of confidential informants in January 2001, after extensive discussion and debate. Now, less than two years later, the Department has changed these guidelines. Why are these changes necessary, and what is the reason for making them now?

Only very limited changes have been made to the Attorney General's Guidelines Regarding the Use of Confidential Informants. The principal change relates to the manner of providing required instructions to confidential informants: the old guidelines' requirement that the instructions be read verbatim to all confidential informants has been replaced by a requirement that the instructing agent, with an additional agent or law enforcement official present as a witness, review the written instructions with the confidential informant. This minor change was necessary because the verbatim instructions, written in often intimidating legalese, were proving to have a chilling effect, causing confidential informants to leave the program. All of the significant reforms to the confidential informant program implemented by the January 2001 guidelines, however, have been retained: e.g. the

creation of the Confidential Informant Review Committee, Department of Justice Criminal Division participation in the program, requirements that the FBI notify United States Attorney's Offices about confidential informants in certain circumstances, etc.

5. What steps are you taking to ensure that the kind of misuse of confidential informants that occurred in Boston will not happen again? What safeguards are in place to prevent abuses from occurring?

As set forth in the answer to question 4, above, the revised Confidential Informant Guidelines retain all of the significant reforms implemented in the January 2001 Guidelines, designed to prevent any recurrence of the Boston situation.

U. S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 29, 2003

The Honorable Orrin G. Hatch
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Please find enclosed the Department's third and final submission of answers to questions posed to Federal Bureau of Investigation Director Robert Mueller following his testimony before the Committee on June 6, 2002. We again apologize for any inconvenience our delay in responding may have caused the Committee.

Responses to the following questions are enclosed: Senator Leahy questions 7d, 17b, 21, 22, 27, 28, 29, 30 and 31; Senator Cantwell questions 6a and 9a; and unnamed Senator question 1.

Thank you for your attention to this matter. If we can be of further assistance on this or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Written Questions of Senator Cantwell
to the Honorable Robert S. Mueller, III
At the Hearing Before the Senate Judiciary Committee
Oversight Hearing on Counterrorism
June 6, 2002

6a. **As I have previously expressed, I am uncomfortable with the manner in which the USA-Patriot Act erodes the distinction between domestic law enforcement investigations and foreign intelligence investigations.**

Forty-eight of our 50 states plus the District of Columbia have laws making it illegal for libraries to release patron information to anyone without a court order. The USA-Patriot Act expands the authority of the FBI and law enforcement to gain access to business, medical, educational and library records, overriding state laws. It allows the FBI to compel production of library circulation records, Internet use records, and registration information without demonstrating "probable cause." The agent can simply express his or her belief that the records may be related to an ongoing investigation related to terrorism or intelligence activities. The potential for the infringement of basic civil liberties and the right to privacy exists to such a high degree in this situation, as exemplified by concerns over the FBI's Library Awareness Program in 1986.

a. **What type of information do you expect to obtain by gaining access to library patron records and other business records pursuant to the USA-Patriot Act?**

There have been significant misunderstandings concerning the terms of the USA PATRIOT Act, particularly as they may relate to library records, and the FBI appreciates each opportunity it has to articulate the authorities the Patriot Act does, and does not, afford.

Section 215 of the USA PATRIOT Act is not specifically directed at library or other records, but instead permits the FBI to seek "any tangible things," including books, records, papers, and other items. This authority may, however, only be used with respect to an authorized investigation conducted in accordance with the Attorney General's Guidelines; the application must specify that the records concerned are "sought for an authorized investigation." With respect to records concerning a U.S. person, the investigation must be to protect against international terrorism or clandestine intelligence activities and may not be conducted solely upon the basis of activities protected by the First Amendment.

Even under these circumstances, a "street Agent" may not request such records. Instead, the application must be signed by the Director of the FBI or by a senior FBI supervisor no lower than Assistant Special Agent in Charge. Such an application must then be submitted through the Department of Justice Office of Intelligence Policy and Review for consideration by a Federal

judge assigned to the FISA Court. This judge would approve the application only if it meets statutory requirements.

In general, the state laws referenced in the question have not been interpreted to prevent the release of records sought through a federal grand jury subpoena, which may be used even in the absence of probable cause. Accordingly, Section 215 permits investigators the same access to records in the context of terrorism and intelligence investigations that federal law enforcement investigators have traditionally enjoyed in ordinary federal grand jury investigations, although Section 215 orders require court approval and grand jury subpoenas may be issued without court approval.

Section 215 can be used to obtain records such as apartment leases, car rental papers, employment applications and a wide variety of documents that assist the FBI in understanding the activities and associates of individuals suspected of terrorism or clandestine intelligence activities. As one example in the library context, if investigators were to execute a search warrant in the course of a terrorism investigation and locate a book with some apparent evidentiary value that had been previously signed out of a library, Section 215 would permit the FBI to seek library records to identify the individual who signed out the book.

There have been instances in the course of FBI foreign counterintelligence investigations in which subjects used libraries for anonymous communications via library internet access. To obtain information regarding these electronic communications, we would ordinarily seek records from the internet service provider, and not the library, because libraries ordinarily do not have such records. The request for these electronic communication transaction records would be made pursuant to 18 U.S.C. § 2709.

9a. The USA PATRIOT Act includes a measure that I proposed that requires the development of a technology standard for visas that will help us be sure that visa holders seeking entry to the U.S. do not pose risks to our country. Additionally, the Enhanced Border Security Act, submitted to the President for signature on May 8th, mandates INS and Department of State access to information held by the FBI within the next year.

a. What is the FBI doing to ensure appropriate and timely integration of information systems to allow access to this information? What safeguards are being designed to protect the privacy and security of this information.

The USA PATRIOT Act of 2001, Section 403, requires the FBI to provide the Department of State (DOS) an extract of specific National Crime Information Center (NCIC) files to be included in the DOS Consular Lookout and Support System (CLASS) to support and facilitate the visa applicant screening process. Since May 2002, the FBI, Criminal Justice Information Services (CJIS) Division has provided the DOS with data extracts from its NCIC and Interstate Identification Index (III) databases on a monthly basis. The NCIC extract includes approximately 425,000 Wanted Person, Violent Gang and Terrorist Organization, Foreign

Fugitive, and Deported Felon File records for persons having a foreign or unknown place of birth. The III extract includes approximately 7 million criminal history records for persons having a foreign or unknown place of birth. The FBI and the DOS are engaged in efforts to automate the NCIC extract process. An ongoing dialog regarding this information sharing initiative is maintained through monthly conference calls between the FBI and the DOS.

The Immigration and Naturalization Service, now a part of the the Department of Homeland Security (DHS), currently has access to FBI CJIS Division systems through the Treasury Enforcement Communication System (TECS) and the DHS, Immigration and Customs Enforcement (ICE), Law Enforcement Support Center (LESC). The CJIS Wide Area Network provides access to the ICE for submission of fingerprints and the Justice Telecommunications (JUST) System provides access to FBI systems for the DHS offices located throughout the country.

The privacy and security of this data is governed by rigid security policy developed and maintained through the shared management of the CJIS Advisory Policy Board. This policy mandates technical measures required to protect the data in the criminal justice systems and networks, as well as biennial audits of the data and its use. This policy also dictates that operators with access to the data are trained and certified and that they be re-certified biennially. Data protection involves a string identification and authentication scheme including password protection and properly configured firewalls.

At the Hearing Before the Senate Judiciary Committee
Oversight Hearing on Counterterrorism
June 6, 2002

7d. What unique functions would be performed by the Terrorism Prevention Section that could not be performed by the other entities in the Counterterrorism Division?

In the aftermath of the terrorist events of September 11, 2001, the CTD added capabilities to support its expanded efforts to prevent acts of terrorism. The Counterterrorism Analysis Section in the Counterterrorism Analysis Branch (the renamed Threat Prevention and Analysis Branch) is the component in the FBI designated with the responsibility for connecting the dots across investigative case and program lines to provide information on potential threats and terrorist modus operandi. Its mission is to provide context to and guide FBI counterterrorism investigations and to further broaden US Government counterterrorism efforts. The Section is intentionally structured by program and issue to avoid stovepiping of information that can occur unintentionally with a strictly case-oriented approach. The case-oriented approach of the FBI's operational units is complemented by the program-focus approach of the Counterterrorism Analysis Section. This relationship has proven to be a powerful tool in developing a comprehensive picture of terrorist targets in the United States.

17b. You emphasized in your testimony that forming partnerships with foreign governments would be a crucial part of fighting terrorism. Since September 11, has the FBI been approached, directly or indirectly, by any foreign officials, including officials from Belgium, offering assistance with respect to the sale and purchase of diamonds to finance terrorists, and, in your view, has the FBI followed up adequately on any such offers of cooperation?

The FBI continues building and strengthening law-enforcement partnerships across the globe. The International outreach initiative is orchestrated through the network of FBI Legal Attache Offices located in 44 principal cities worldwide - providing coverage for over 200 countries, territories, and islands. These relationships allow the FBI to assist a number of foreign countries in their efforts to establish financial terrorist investigative components. On-site liaison, training, and information sharing have occurred with a number of foreign countries to include: Canada / RCMP, France, Germany, Japan, Morocco, Philippines, Saudi Arabia, Singapore LEO, Spain, Sweden, Turkey, UAE, UK/Scotland Yard, Italy, Switzerland, Belgium and Luxembourg, Turkey, Greece, and China. Specific attention was directed toward discussing terrorist funding mechanisms such as Non-government Organizations (NGOs) and Islamic charities, predictive patterns of terrorist finance, and the use of electronic banking and informal arrangements to move terrorist funds worldwide.

With respect to the sale and purchase of diamonds to finance terrorists, the FBI received an indirect offer of assistance from the U.N. Special Court in Sierra Leone for War Crimes, has received briefings from Global Witness (a London-based non-government organization), and has

worked closely with the Federal Belgian Police concerning their investigation of an "arms for diamonds" transaction. In addition, FBI officials have met with foreign government officials from England, Israel, Belgium (Military Intelligence), and Mali concerning the conflict diamond issue, and will discuss this issue in the near future with law enforcement officials in the African country of Mauritius.

21. Before 9/11 could the FBI have located the 19 hijackers responsible for the 9/11 attacks and linked them to each other and to previous terrorist activity using investigative techniques that are currently authorized by law?

Our efforts to combat terrorism have been greatly aided by the provisions of the PATRIOT Act. The success in preventing another catastrophic attack on the U.S. homeland would have been much more difficult, if not impossible, without the Act. It has already proved extraordinarily beneficial in the war on terrorism, and our opportunities to use it will only increase. Most importantly, the PATRIOT Act has produced greater collection and sharing of information within the law enforcement and intelligence communities. It is important for Congress and the American people to know that the FBI is using the PATRIOT Act authorities in a responsible manner. We are making every effort to effectively balance our obligation to protect Americans from terrorism, with our obligation to protect their civil liberties.

The FBI has devoted unprecedented resources to investigating the attacks of September 11, 2001. To date, the FBI investigation has encompassed all offices of the FBI, including our overseas Legal Attaché offices. FBI Agents conducted over 182,000 interviews, collected and submitted for analysis over 7,500 pieces of evidence, and collected over 45,000 crime scene photos. The investigation has been aided by the participation of our federal, state, local and international partners. Our investigation has determined that all of the hijackers entered the United States legally. At the time of their entry into the United States, the FBI did not possess any information which would have identified them as terrorists or provided sufficient legal predicate for placing them under surveillance under then-existing or current law. Furthermore, as set forth in its Final Report, the Joint Intelligence Committee Inquiry uncovered no information in the possession of the FBI, prior to the attacks, that would have provided specific advance warning of the details of the attack. The report further found no single piece of intelligence or information that could have stopped the attacks.

22. FISA defines "foreign power" to include any group "engaged in international terrorism or activities in preparation therefor." It has been reported that one reason for not going forward with a FISA application in the Moussaoui case before 9/11 was that a Chechen rebel group for which he had recruited in France was not a "foreign power" under FISA because it had not be formally designated as a terrorism group by any U.S. Government agency.

a. **To what extent was this issue a factor in not going forward with a FISA application in the Moussaoui case before 9/11?**

A group's formal designation by the U.S. Department of State as a "foreign terrorist organization" (FTO) is not a necessary predicate to meeting the statutory definition of "foreign power" under FISA. If the Chechen rebel group had been formally designated as an FTO, it would have been useful in helping to establish the group as a foreign power under FISA but, it still would have also been necessary to establish Moussaoui as an agent of that foreign power in order to obtain search authorization.

b. **Please explain whether the Chechen rebel group would meet the definition of a "foreign power"?**

The answer to question 22(b) is classified at the level of SECRET. Pursuant to the longstanding Executive Branch practice on the sharing of operational intelligence with Congress, the Department will provide the answer to the Senate Select Committee on Intelligence (SSCI), which is the Committee responsible for receiving and handling sensitive intelligence information. This answer will be provided to the SSCI under separate cover and with the expectation that it will be handled in the manner deemed appropriate under longstanding applicable Senate procedures.

27. **Currently there is no mechanism through which the Congress as a whole or the public can understand the body of case law through which courts have interpreted the FISA statute, and thus no way to assess how the recent changes to the statute passed in the USA PATRIOT Act are working or whether any further changes to the FISA statute are required. In order to facilitate such an evaluation, and provided that it is accomplished an a manner consistent with the protection of national security, would you support a requirement that the Department of Justice issue an annual report providing the portions of FISA documents, including opinions and orders that include significant construction or interpretation of the FISA statute or the U.S. Constitution, not including the facts of any particular matter, which may be redacted?**

The problems with such a requirement are set forth in the August 6, 2002, letter from Assistant Attorney General Daniel J. Bryant to Senators Bob Graham and Richard C. Shelby (copies to Senator John Edwards) providing the Administration's position on a similar legislative proposal. A copy of the letter is attached. Moreover, Foreign Intelligence Surveillance Court Presiding Judge Colleen Kollar-Kotelly made clear in her letter of August 20, 2002, to Senators Leahy, Specter, and Grassley, that "should the FISA Court issue any unclassified opinions or orders in the future, it would be our intention, as a Court, to release them and publish them."

28. Would you consider supporting a requirement that the Department of Justice issue an annual report setting forth the numbers (but not the identities) of United States persons (including individuals, groups, associations, corporations or other entities) and non-United States persons named as targets under orders for electronic surveillance, physical searches, pen registers, and access to records?

We defer to the Department of Justice on the feasibility of such a reporting requirement.

29. Currently there is no way for the Congress as a whole or the public to assess the usefulness of the FISA statute in the investigation and prosecution of terrorism matters, another matter that was affected by the provisions of the USA PATRIOT Act and subject to that Act's sunset. Would you consider supporting a requirement of an annual report with respect to FISA orders for electronic surveillance, physical searches and pen registers of the number of times that the Attorney General authorized information obtained from such FISA orders or derived therefrom could be used in a criminal proceeding and the number of times that the Attorney General completed a statement as required under Sections 106(b), 305(c), or 405(b) of FISA to accompany a disclosure for law enforcement purposes?

We defer to the Department of Justice on the feasability of such a reporting requirement.

30. We have heard from Coleen Rowley that a supervisor at FBI Headquarters made changes to the Minneapolis agents' affidavit that 'set it up for failure.' The New York Times has also reported that another headquarters agent was basically banned from the FISA court by the Judge based on his affidavits. This is a matter of bipartisan concern among Members of the Judiciary Committee. On the day of your appearance before the Judiciary Committee, the FBI provided a copy of the so-called "Woods Procedures" relating to the FBI's process for obtaining orders under FISA:

a. According to the document provided, these procedures were declassified the day of your appearance. Since these matters relate not to any specific case but only bear on procedures to be followed in seeking FISA orders, please explain the decision to originally classify this document and provide the name of the person responsible for that decision.

The decision to classify the guidance setting out the procedures to be followed for ensuring accuracy in factual submissions to the FISA Court was made by the drafter of the

document, Michael Woods, who was then the Unit Chief of the National Security Law Unit, Office of the General Counsel, FBI. The guidance was classified, because under Section 1.5(c) of Executive Order 12958, it met the criteria for classified information in that it contained information on intelligence sources and methods.

b. Why were the procedures adopted? Please include in your answer whether there were any actual or perceived problems or incidents that made these procedures necessary and describe these incidents and problems.

The FISA Verification Procedures (the so-called "Woods Procedures") were instituted in April 2001 in order to minimize factual inaccuracies in FISA packages. Specifically, the goal of the procedures is to ensure accuracy with regard to: (1) the facts supporting probable cause; (2) the existence and nature of any related criminal investigations or prosecutions involving the subject of the FISA; and (3) the existence and nature of any prior or ongoing asset relationship between the subject and the FBI.

Applications to the FISA Court for electronic surveillance or physical search authority are complex and detailed. The declaration is an important part of the application package in that it sets out the factual basis supporting probable cause and conveys to the FISA Court any other facts relevant to the Court's findings. Prior to implementation of the so-called "Woods Procedures," there were instances where inaccurate information was provided by FBI field office and headquarters personnel to the Court. Problems included representations that there were no pending criminal investigations on the surveillance target when in fact there were such investigations, and an omission that a target of FISA surveillance was an FBI criminal informant. Additionally, there were FISA application and renewal packages which included incorrect descriptions of the "wall" procedures put in place to separate parallel criminal and intelligence investigations. As a result, incorrect information was repeated in subsequent and related FISA packages. These issues are discussed at length in the May 17, 2002 opinion of the FISC, which has been provided to the Congress and to the public; as noted in the opinion, the Department's Office of Professional Responsibility is conducting an investigation into the matter. By signing and swearing to the declaration, the headquarters agent is attesting to knowledge of what is contained in the declaration. Prior to the imposition of the verification procedures, the declarant had to rely on his or her best understanding of the information submitted by the field office.

c. To what extent, if at all, have the procedures worked to address any of the problems or concerns that led to their adoption?

The procedures have been very successful in helping to ensure that the facts contained in the FISA declarations are accurate. Under the verification procedures, documentation showing

that certain steps have been accomplished must be attached to every initiation and renewal FISA package before it is sent for certification. The steps required include searching one of the FBI's computer systems, Automated Case Support (ACS), to determine whether the target is also the subject of a documented FBI criminal investigation, past or present; searching ACS for asset and informant files of the relevant field office; contacting the Asset and Informant Unit at Headquarters for a check of the target's name for asset/informant status Bureau-wide; determining the status of any criminal investigation related to the target; and ensuring the relevant field office(s) reviews for accuracy all the facts presented in the declaration.

Perhaps the best unclassified evidence for the improvements made by the new procedures is a public speech given by the then-Presiding Judge of the FISC in April 2002, in which he said, among other things, that "we consistently find the [FISA] applications "well-scrubbed" by the Attorney General and his staff before they are presented to us," and that "the process is working. It is working in part because the Attorney General is conscientiously doing his job, as is his staff." It was particularly gratifying to hear the Judge compliment the FBI. He said: "I am personally proud to be a part of this process, and to be witness to the dedicated and conscientious work of the FBI, NSA, CIA, and Justice Department officials and agents who are doing a truly outstanding job for all of us."

d. Are any additional or amended procedures relating to the seeking of FISA orders being considered? If so, what is the nature of those additional or amended procedures?

The FBI, in coordination with the Department's Office of Intelligence Policy and Review (OIPR), has instituted a number of changes in the FISA process that are designed to improve the accuracy and timeliness of the FISA applications submitted to the FISA Court.

Starting March 1, 2003, field offices are now required to follow a standard format, distributed as an eight-page FISA request form. The form elicits information about the target's status, the facts and circumstances that establish probable cause to believe the target is an agent of a foreign power, and particulars about the facilities and places to be targeted and the minimization procedures to be employed. The form also requires confirmation that field offices have verified the accuracy of facts alleged in the form. The request form is filled out by the case agent in the field office, reviewed and approved by the field office's Chief Division Counsel and the Special Agent-in-Charge, and then sent via e-mail to an operational unit within the appropriate Headquarters Division.

We expect that the use of this standard form will aid agents in the field by making clear what information is expected from them in order to begin the FISA initiation process. It should result in a more organized and complete request from the field.

In order to ensure that each FISA initiation request that is passed from FBI Headquarters to OIPR is viable and complete, we are implementing a new process in which the FBI's National Security Law Branch attorneys will receive a copy of each counterterrorism initiation request when it arrives in from the field. The attorneys will work closely with Supervisory Special Agents and analysts in counterterrorism to finalize each request and submit it to OIPR in a timely fashion. The goal of this change is to increase the level of legal review given to FISA initiations at the front end, identifying at an early stage any deficiencies in the factual basis for the applications.

In an additional effort to improve the efficiency of the process, the FBI established a FISA Unit within the National Security Law Branch in November, 2002. The FISA Unit, which is currently staffed with a Unit Chief and six staff members, performs administrative support functions for the FISA process. The FISA Unit is currently working with contractors to design, install, and test a new FISA management system. The FISA management system is an automated tracking system that will electronically connect field offices, Headquarters, the National Security Law Branch, and OIPR to one another. It will transmit FISA documents between the participants in the FISA process and allow them to track the progress of FISA packages during each stage of the process.

The management system should speed up the process in several ways. First, the FISA request form will be loaded onto the system so that field agents can quickly insert their case-specific information into a standardized form. In addition, by tracking the progress of each package, the system will identify delays in the process. Also, it will allow OIPR to request additional information from the field via the system, so that questions can be resolved in a timely fashion. The FISA management system will soon be ready for testing in several field offices.

In addition to managing the development and operation of the management system and ensuring that those involved in the FISA process adhere to reasonable time-frames, the FISA Unit is responsible for distributing the FISC's orders and warrants to the appropriate field offices for their use and for service upon communications carriers and other persons specified in the orders and warrants.

Finally, in addition to these improvements in the process, the Director of the FBI has ordered that any issue as to whether a FISA application is factually sufficient must be brought to his attention.

31. The Woods procedures require the field office to conduct a computer search only of the target name.

a. Why is it not required that a broader subject or key word search also be conducted?

The indexing procedures used by criminal investigators at the FBI are based on name. Therefore, the most efficient and effective computer search is conducted using the subject's name.

b. Why is the headquarters unit facilitating the processing of FISA applications not required to conduct such a search in addition to the field office, especially since certain reports are "blocked" from field access?

The agent in the field office seeking the FISA authorization has primary responsibility for the overall operation of the case. The headquarters supervisor acts as the sworn declarant on FISA packages for reasons of physical proximity to the FISA Court but must rely on the accuracy of the information presented by the field office in the declaration. Since the field office requesting the authority has the greatest knowledge of the specific details of the case, it is prudent to have the field search the Automated Case Support system to determine if the FISA target is also the subject of a documented FBI criminal investigation, past or present; and to search the asset and informant files of their particular field office. Positive hits in the computer system on a target name will require additional information that only the field can provide. Prior to the finalization of packages, the field consults with headquarters on the results of the search and discusses further steps that need to be taken to ensure complete accuracy.

c. Is it intended that the Woods procedures be the extent of the investigation in connection with the preparation of a FISA application, or is it expected that the field agents and headquarters unit will pursue all necessary and logical leads, including a basic key word search?

The Woods procedures are used to ensure the accuracy of the information contained in the declaration but in no way constitute the extent of the investigation in connection with the preparation of a FISA application. Requests from field offices to headquarters for a FISA initiation or renewal typically incorporate a memorandum documenting the factual predicate for the requested coverage. The relevant unit at Headquarters then prepares an "action memorandum" to the Office of Intelligence Policy and Review requesting that the FISA initiation or renewal package be prepared. Action memoranda often include relevant additional facts developed in discussion with the originating field office, or classified intelligence community information provided by headquarters agent and analytical personnel who have developed an expertise with respect to and have been assigned oversight responsibility for the investigation of certain foreign powers in the United States and their agents. Additionally, information, both

classified and unclassified, which has been obtained by the FBI through a variety of sources, including U.S. and foreign intelligence services and law enforcement agencies, is routinely included in action memoranda (and subsequently the FISA declarations) in order to make the strongest possible case for authorization of FISA surveillance and search authority. Some but not all of this information may be gleaned from the FBI computer system. Effective March 1, 2003, the FBI will submit requests for FISA coverage to OIPR in a standard format developed by DOJ and the FBI.

Written Questions of Unnamed Senator
to the Honorable Robert S. Mueller, III
Before the Senate Judiciary Committee
"Oversight Hearing on Counterterrorism"
JUNE 6, 2002

1. **In response to a question I asked you at the time of your nomination, you stated:**

"Respecting the lawful exercise of First Amendment rights is essential and we must never let our zeal to investigate and fight crime undermine those rights. I commit to being vigilant to ensure that investigations do not interfere with such rights."

I trust that you have not changed your views on this subject. However, I am concerned that some of the recently announced changes to the FBI guidelines may undermine the First Amendment rights of persons involved in lawful political dissent and lawful protest activities.

The new guidelines seem to open the door again to the many abuses documented by the Church Committee in 1975, which found that the FBI's internal security and domestic intelligence programs had compiled hundreds of thousands of files on Americans engaged in lawful political expression and association. The guidelines established by Attorney General Edward Levi, which the Department is now modifying, were adopted precisely to prevent these First Amendment abuses from recurring.

Rather than strengthening First Amendment safeguards, the new guidelines weaken them, by allowing the 56 field offices to conduct preliminary investigations based on uncorroborated allegations for up to a year -- instead of 90 days -- without approval by FBI Headquarters.

Under these new guidelines, what safeguards exist to prevent abuses from occurring at the local level? How will the FBI ensure that offices do not unnecessarily intrude on First Amendment rights in investigations where there is no "reasonable indication" of criminal activity?

The revised guidelines strengthen preliminary inquiries as part of an increased emphasis on early intervention and prevention of terrorist acts before they occur. These changes in no way reflect a lessened commitment to the protection of First Amendment rights. The revised guidelines maintain extensive oversight, notice, and approval requirements which ensure that preliminary inquiries, as well as full investigations, will be undertaken only for legitimate law enforcement puposes.

For example, as in the previous guidelines, the initiation of a preliminary inquiry must be based on information or an allegation which indicates a possibility of criminal activity. An FBI supervisor must authorize a preliminary inquiry and must assure that the allegation or information which warranted the inquiry is recorded in writing. In cases involving sensitive criminal matters – such as alleged criminal conduct involving the activities of religious or political organizations or of individuals prominent in such organizations – the United States Attorney or other appropriate Department of Justice official must be notified concerning a preliminary inquiry as soon as practicable after its initiation. In all preliminary inquiries, the use of investigative techniques outside of a limited list of relatively nonintrusive methods normally requires the prior approval of a supervisory agent.

The duration of preliminary inquiries under the revised guidelines is limited to 180 days. Extensions beyond that period at the field office level can only be granted by the Special Agent in Charge, and are capped at two possible 90-day extensions. A preliminary inquiry may be continued beyond a year only with the approval of FBI Headquarters. All extensions of preliminary inquiries beyond the initial 180 day period must be based on a written statement of the reasons why further investigative steps are warranted when there is no reasonable indication of criminal activity. The guidelines further direct the FBI to maintain a database that identifies all preliminary inquiries and investigations, and that permits the prompt retrieval of information concerning the status (open or closed) and subjects of all preliminary inquiries and investigations.

These extensive requirements ensure appropriate oversight and accountability regarding the conduct of preliminary inquiries within the FBI and the Department of Justice. In addition, the guidelines emphasize that all activities under the guidelines must be undertaken only to further legitimate law enforcement purposes – not to curtail or infringe on constitutionally protected activities. Preliminary inquiries are carried out to determine whether grounds exist to commence full investigations, and full investigations in turn are carried out for the purpose of preventing, solving, or prosecuting crimes. Investigations initiated in advance of criminal conduct must "not be based solely on activities protected by the First Amendment or on the lawful exercise of any other rights secured by the Constitution or laws of the United States."

Likewise, the revised guidelines' authorization of proactive information collection for counterterrorism purposes emphasizes that the authorized activities "do not include maintaining files on individuals solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States."

The foregoing points may be found in the following provisions of the guidelines: Parts I, II.A(2), II.B(1)-(3), (6)-(8), II.C (1), V.B, VI.C(1).

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U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Suite 1100
111 Washington Avenue South
Minneapolis, Minnesota 55401

June 24, 2002

Senator Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington D.C. 20510-6275

Dear Senator Leahy:

This is in response to the following written question submitted by U.S. Senator Russell D. Feingold following my testimony to the United States Senate Judiciary Committee regarding the "Oversight Hearing on Counterterrorism":

> "Your letter related your concerns that applications for search warrants in the Moussaoui case had been altered by FBI Supervisory or headquarters personnel. Can you discuss whether the Director's revised procedure for handling FISA search warrants announced last week addresses these concerns?"

The short answer is that I don't think the Director's revised procedure for handling FISA search warrant requests internally within the FBI fully addresses the concern about possible alteration of the facts by Headquarters personnel at the earliest stages, prior to the point of verification pursuant to obtaining the Director's certification and/or involvement by the Department of Justice's Office of Policy and Review (DOJ-OIPR).

The long answer is the following: I could not locate anything in writing at the present time concerning the FBI Director's revised procedure for handling FISA search warrants. My knowledge of the Director's announcement and discussions with appropriate FBI Headquarters personnel,[1] however, have led me to

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[1] The following information and input was furnished by a higher level attorney assigned to the FBI's National Security Law Unit. Since he is so knowledgeable as to the FISA process, I thought it would be good to provide his insights and comments on my concern that we do more to ensure accuracy of the facts during the earlier internal FBI reviews in the process:

1) You might want to clarify for the Senator up front that the Moussaoui case never

reached the "application for search warrant" phase of the FISA process. Rather, it's my understanding that the farthest the Minneapolis request for a FISA got prior to 09/11/2001 was the drafting stage of an LHM to be sent to OIPR in a FISA initiation request. If there had been some sort of improper alteration of the declaration in the search warrant application, it would have been caught by Minneapolis during the "Woods Procedures" review.

2) The thrust of your response seems to be that the facts shouldn't be altered by FBIHQ prior to being submitted to OIPR, and that the Director's policy of reviewing denied requests does not address this concern. You may want to limit your response to this theme. Much of your letter is devoted to areas where this concern is not a factor. For example, prior to the Director's certification, all FISA applications are reviewed pursuant to the "Woods Procedures" for factual accuracy. You could delete or condense your discussion of these procedures because they aren't relevant to the portion of the FISA process with which you are concerned. Also, the discussion about field agents serving as the declarants for the FISA declarations occurs much later in the process and doesn't have much bearing on the problem you identify. [While I agree that in certain cases a field agent could serve as the declarant, in many cases they cannot. Counterintelligence and counterterrorism investigations are national programs. The investigations of the foreign powers usually span many field divisions. While a particular case agent might track an individual agent of a foreign power, s/he may not be as well-versed in the facts asserted against the foreign power as the FBIHQ SSA in that particular FISA declaration]. There are other areas of the response that could be deleted or condensed, but that's up to you. This is your response, not the FBI's.

3) While I agree with you that it would be inappropriate for FBIHQ to alter an underlying factual assertion from the field without reason, I don't think this happens to the extent that justifies any additional special procedures. My experience is that, nine times out of ten, the LHM provided by the Field is simply attached to an action memorandum and sent to OIPR. Thus, the field's facts are left entirely intact in those cases. In the few remaining cases to which your response is directed, I'm not sure there would be much additional benefit from formalizing a requirement that the field formally review the LHM prior to it being sent over to OIPR. Again, it is my experience that in borderline cases there is significant interaction between FBIHQ and the field to develop the facts required to meet the FISA probable cause standard. It is a rarity that FISA requests are actually "denied," rather, investigation continues until sufficient facts are developed. There are two limited contexts that could force a technical denial. First, in an emergency or expedite situation in which we want to proceed to court immediately, but someone has opined that we lack probable cause. Second, when the field insists that all logical investigation has been conducted and the investigation cannot proceed without a FISA. It is in the context of these two situations that the Director's new policy will likely arise.

4) As I stated in our previous phone conversation, I am aware of no written procedures that address the Director's stated FISA denial policy. Historically, the chain-of-command approach has worked well. In the rare instance in which a FISA is "denied" by the substantive unit, NSLU usually receives a call from the field requesting assistance. For close calls, the NSLU attorney receiving the call would normally consult with other NSLU attorneys and/or the NSLU unit chief. If NSLU concludes that there is sufficient probable cause, the matter is forwarded to OIPR for preparation. If NSLU concludes that insufficient probable cause exists and the field accepts this conclusion, the field usually conducts further investigation to shore up

understand that, at the present time, the revision is limited to "bumping up" for further review through the FBI's chain of command those terrorism-related FISA requests which are declined at lower management levels. Although I am not sure of the specifics, I have been told that theoretically the Director himself would provide the ultimate review if a FISA request was successively turned down at each of the lower levels in the chain of command. I say theoretically because, in a practical sense, I do not know what the likelihood would be of a meritorious terrorism-related FISA application request being repeatedly turned down within the FBI without the FBI even consulting DOJ-OIPR post-September 11th. In most cases wherein the seeking of FISA authority is warranted, prior to "bumping up" the review, I would think that FBI Headquarters personnel would work with the requesting field agent(s) to conduct further investigation or analysis to further develop the necessary probable cause and/or satisfy the other legal requirements for obtaining of a FISA order. At some point, prior to reaching the FBI Director's level, mid-level FBI Managers would, in all probability, consult with DOJ-OIPR. Again, since no written specifics exist at this time, I do not know if the Director's revised procedure covers all FISA requests or just those related to international terrorism. It is also not clear whether the Director's revised procedure requires draft FISA declarations and applications to be reviewed in writing. This is an important point as verbal presentations have in the past sufficed for internal FBI decisions regarding FISAs with little or no record being kept of the internal decision-making process.

My understanding is that the Director's procedure did not include any mandate that, to the extent possible, information obtained first hand by a field office agent or provided by a foreign intelligence agency not be substantively altered or changed by a Headquarters Supervisory Agent. FISA Orders are rather unique in this respect in that, since the FISA Court sits in Washington D.C., it has been considered cost-prohibitive to bring field office agents to appear directly before the Court (except for the New York and Washington Field Offices as part of their "pilot program"). Therefore an FBI Headquarters Supervisor is the affiant/declarant who goes before the FISA Court. Since the responsibility for the accuracy of facts contained in an

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the probable cause. If the field or FBIHQ disagrees with NSLU's conclusion they can appeal up the OGC or operational chain or both. Now they can appeal these cases up to the Director. It is this "appeals process" that should ferret out the facts as presented by the Field and FBIHQ. In this sense, the Director's policy might actually address your concerns.

affidavit or declaration usually rests with the affiant/declarant, the wording of facts becomes the prerogative of a (distant) Headquarters Supervisor. It should be acknowledged that there could be some good reasons for rewording by a Headquarters Supervisor. Although all FISA requests emanate from specific field offices, it may be necessary in some situations for a FBI Headquarters Supervisor to add or consolidate information received from more than one field office, FBI Headquarters' record checks, other agencies and/or foreign sources. Obviously non-substantive changes merely correcting grammar, spelling or format should not be at issue. Substantive changes, even slight ones, going to the facts, however, ought to be avoided or minimized and this could be accomplished by giving the requesting field office agent an equal say in what gets submitted in the draft declaration under review. In almost all cases, any disagreement in wording could be easily resolved so that both the requesting agent and Headquarters Supervisor are comfortable with the information contained in the proposed declaration. Information should normally be quoted verbatim with the source of the information noted. In those rare cases wherein there is a dispute, both versions should be bumped up for higher level review and determination. Again, if higher level review continues to be allowed on the basis of verbal presentations within the FBI, than there is no way of even documenting this issue of proper wording of the facts presented.

It should be noted that there is a verification process already in place for FISA declarations actually presented to the FISA Court. The above discussion therefore relates only to the early review process within the FBI prior to contact with OIPR. In early 2001, both OIPR and the FISA Court expressed the view that more direct contact between OIPR attorneys and FBI field office personnel would improve the efficiency and accuracy of the FISA process. While supporting this view in principle, the FBI's official position, however, emphasized "the need for proper supervisory and program management structures at both the field and headquarters level". The language in the Attorney General's Memorandum dated May 18, 2001, (quoted below) subsequently reflected a "compromise position":

> "Accordingly, beginning July 1, 2001, appropriate field office personnel shall be made available for direct contact with OIPR attorneys throughout the FISA process. All participants in the FISA process-- OIPR, the FBI's National Security and Counterterrorism Divisions, the FBI's Office of General Counsel, and FBI field offices-- should coordinate their activities in order to ensure effective management of the national FISA program. It is essential that the FBI headquarters agent who will sign the FISA declaration be fully informed of all communications between OIPR

and an FBI field office. The preferred method of accomplishing this is, wherever practicable, to have the FBI headquarters supervisor directly involved in the communications."

Bureau-wide procedures, (the so-called "Woods Procedures") were enacted in April, 2001, to help ensure the accuracy of factual submissions to OIPR and to the FISA Court. The number of levels of review involved in the FISA process in the FBI and in the Department of Justice makes the FISA process an inherently overly-complicated process. Given the involvement of all these levels of review, the point here is that consideration should be given to specifying that similar verification procedures apply prior to the Director's certification and prior to the involvement of OIPR and the FISA Court. I agree with the opinion expressed in the footnote written by the higher level attorney in the FBI's National Security Law Unit that the Director's new "appeal process" may serve to ferret out the facts as presented by the Field and FBIHQ- (because presumably any disagreement would be expected to be pointed out to next higher level officials). I also have no reason to disagree with the NSLU attorney's assessment that alterations of facts by FBIHQ personnel do not happen to any great extent. I therefore also agree with him (the NSLU attorney) that it may not be necessary to formalize such requirements as the "Woods Procedures" for the earlier stages, but I do think it is necessary for the Director to at least remind all of those involved in the FISA process, even those involved at the earliest stages, that it is inappropriate for FBIHQ to alter, without reason, an underlying factual assertion from the field. The accuracy of facts presented during the earlier FBI internal review(s) needs to also be ensured.

Thank you for your consideration of this issue.

Sincerely,

Coleen Rowley

Coleen M. Rowley
Special Agent and Chief Division Counsel
Minneapolis Division

U.S. Department of Justice

Office of the Inspector General

Washington, D.C. 20530

July 23, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510
Attention: Patrick Wheeler

The Honorable Orrin G. Hatch
Ranking Minority Member
Committee on the Judiciary
United States Senate
Washington, DC 20510
Attention: Makan Delrahim

Dear Mr. Chairman and Senator Hatch:

Enclosed are my responses to follow-up questions from my appearance before the Committee on the Judiciary at its June 6, 2002, "Oversight Hearing on Counterterrorism."

Please contact me at 514-3435 if you have additional questions.

Sincerely,

Glenn A. Fine
Inspector General

Enclosure

Written Questions for Inspector General Glenn A. Fine
Senate Committee on the Judiciary
"Oversight Hearing on Counterterrorism"
June 6, 2002

(questions received by fax June 14, 2002, from Beryl Howell):

1. *Question: There have been many reported statements of FBI personnel who say that they did not see or read the Phoenix E.C. until very recently. You testified that you were asked to conduct an internal inquiry on the Phoenix E.C. in late September 2001. Please explain fully how this came about.*

   Answer: On September 28, 2001, the Office of the Inspector General (OIG) received a copy of the Phoenix Electronic Communication (EC) from the FBI's Office of Professional Responsibility (FBI OPR). An FBI Special Agent working in the Strategic Information Operations Center had come across the memorandum and had forwarded it to FBI OPR out of concern that there may have been some misconduct or failure to act on the part of FBI employees. FBI OPR forwarded the memorandum to the OIG.

   The OIG opened a preliminary inquiry into the handling of the Phoenix EC at FBI Headquarters and conducted interviews of FBI Headquarters employees in November and December 2001. The preliminary inquiry consisted of interviews with seven Headquarters-based FBI employees about their knowledge and handling of the Phoenix EC.

   During this same time period, Members of Congress were discussing establishing a commission or a joint committee to review government actions prior to the September 11 attacks. Congress did establish a joint committee – the Senate and House Intelligence Committees September 11 Joint Inquiry (Joint Inquiry) – to review the intelligence and law enforcement information related to the September 11 attacks.

   Rather than conduct a full review of how the Phoenix EC was handled, we decided to defer to the Joint Inquiry's review. Our decision to defer to the Joint Inquiry was based on our belief that the Phoenix EC needed to be analyzed in the context of other information available to the FBI and other intelligence agencies throughout the government, and that the Joint Inquiry was the entity that Congress had established to conduct this comprehensive review. The OIG, therefore, had discussions with staff from the Joint Inquiry about our preliminary inquiry on the Phoenix EC and provided the write-up from our preliminary inquiry to them.

2. *Question: You have now agreed to look into the matter of whether there were intelligence failures prior to 9-11 with information that was in the possession of Department components. Could you confirm that fact for us, and please explain the nature and parameters of the inquiry that you are conducting in this regard?*

   Answer: The OIG has initiated a review of the FBI's actions with regard to intelligence issues relating to the September 11 attacks. Our review will focus on issues raised in Special Agent Coleen Rowley's May 21, 2002, letter to Director Mueller; the FBI's handing of the Phoenix EC; and the FBI's handling of other intelligence and law enforcement information related to the September 11 attacks.

3. *Question: You said in your written testimony, there is a great deal of confusion over whistleblower protections afforded to FBI employees because the FBI is exempted from Whistleblower Protection Act and such protections are only defined by internal DOJ regulations. In Special Agent Rowley's case, while her disclosure to you and the Director may be protected, three of the five people to whom she sent her letter were Members of Congress, and are not covered under the current regulations. Neither her testimony today nor any other Congressional statement would be covered under the current regulations. Nor would a report or complaint to her immediate FBI supervisors be covered. Do you support the provisions of the Leahy-Grassley FBI Reform Act, which would extend whistleblower protection for FBI employees to all of these disclosures?*

   Answer: One of the most important changes the FBI can make as it looks to the future is to foster a culture in which employees are able to identify deficiencies in programs or operations and bring their concerns to management without fear of retaliation. I support strong protections for FBI whistleblowers as a way to improve agency operations, and I believe that expansion of protections for FBI whistleblowers is appropriate. I believe Congress, working with the Department, should consider expanding the list of individuals and entities to whom an employee can make protected disclosures in an attempt to provide FBI employees with as many of the whistleblower protections afforded to other federal government employees, consistent with the FBI's sensitive law enforcement responsibilities.

4. *Question: Special Agent Rowley referred to a "double standard" at the FBI in her letter. Is it correct that you are conducting a review of the FBI's "double standard" in disciplining line agents differently than senior FBI officials? If so, can you tell us what you are looking at and when you expect to release your report?*

Answer: The OIG is nearing completion of our review of whether the FBI imposes a "double standard" in its discipline process – specifically, whether the FBI disciplines its senior managers less harshly than lower level employees. This matter initially was raised to the OIG by an FBI whistleblower. We expect our review to be completed by the end of August.

(questions forwarded by Chairman Leahy in letter dated June 17, 2002):

From Senator Cantwell:

1. *Question: Mr. Fine. Title X of the USA Patriot Act requires the Inspector General to undertake certain responsibilities in regard to alleged civil liberties issues arising as a result of actions of employees or officials of the Department of Justice. Could you please describe the status and progress of implementation of this title and could you indicate when Congress can expect to receive the first report as proscribed by section 1001(3) of the Title?*

   Answer: Please see the enclosed report to Congress, dated July 15, 2002, that describes the OIG's implementation of its Section 1001 responsibilities. In addition, the report is posted on the OIG's website at http://www.usdoj.gov/oig/special/patriot_act/pdf/full_report.pdf.

From Senator Feinstein:

1a. *Question: Has the INS developed a procedure for determining which schools should remain eligible to participate in the foreign student-tracking program?*

   Answer: In part. All schools are being required to reapply for certification. The INS has decided to initially split schools into two categories, with each category requiring different levels of review. The first category of schools, considered to be low risk, consists of public schools that meet state and local educational requirements and schools (other than flight schools) that are accredited by specified Department of Education-approved accrediting agencies. Only schools that have been approved by the INS for at least three years qualify. Qualifying schools are being allowed to preliminarily enroll in SEVIS beginning on July 1. The INS's review of these schools will be minimal, consisting solely of ensuring that the schools meet the preceding criteria. In our opinion, this appears to be a reasonable strategy for these types of schools. An interim final rule was published in the Federal Register on July 1, 2002, describing the procedures for preliminary enrollment.

INS officials have told us that all schools not meeting the preliminary enrollment criteria will be subject to more rigorous scrutiny prior to approval, including mandatory site visits. These schools will not be able to apply for certification until mid-August, at the earliest. At that time, the INS plans to publish an Interim Certification Rule, which will describe the relevant procedures. These procedures are still being finalized within the Department of Justice. We do not know what these procedures will entail and therefore are unable to assess whether they are reasonable.

1b. Has the INS to your satisfaction actually conducted site visits of some of the schools to ensure they are in compliance, and will continue to comply, with the foreign student reporting requirements?

Answer: To date, the INS has not conducted any site visits. The INS is proposing to hire contract investigators to conduct the site visits of selected schools applying for certification. According to the INS, this will include all schools that do not meet the preliminary certification standards described in my response to question 1a (i.e., all flight schools, those schools that are not accredited by INS-specified accrediting agencies, and those schools that have not been an INS-approved school for at least the past three years). The contract investigators would review the schools using checklists provided by the INS. The INS school adjudicators will use these checklists, along with the I-17 and supporting documentation submitted by the school, to determine the eligibility of a school to accept foreign students. Because we have not seen a copy of the checklist that will be used to conduct these site visits, we cannot state whether we think the site visit reviews will be adequate. In addition, although INS officials have told us that the site visits of the high-risk schools could commence as early as August, we believe that it will be difficult for the INS to meet this timetable.

1c. In your view, has the INS adequately reached out to school officials to adequately train them to understand how to use the new electronic reporting system?

Answer: The INS's efforts to reach out to schools since April 2002 include the presentation of SEVIS implementation seminars at 46 locations in 27 states and the District of Columbia, personal contacts with INS-approved schools in locations where the seminars are presented, mass mailings to INS-approved schools listed on its old data base, and a media campaign to publicize the requirement. While these efforts, and the efforts of organizations such as the Association of International Educators and the American Council on Education, would

appear to be sufficient to reach the larger, more established schools, we still are concerned about notification of the smaller vocational, language, and flight schools. During our review we noted that most of the vocational and language schools included in our sample had been approved by state education departments or, in the case of flight schools, by the FAA. To ensure that these schools are aware of the requirement, we have suggested to INS officials that they enlist the assistance of these groups to notify schools on behalf of the INS. We are unaware as to whether the INS is pursuing our suggestion.

2a. *In the aftermath of the September 11th terrorist attacks, do you believe the INS has taken the necessary steps to enhance its technological capacity to keep track of the foreign students and other temporary visitors entering the U.S. and determine that the programs in which they are enrolled are legitimate educational programs (as opposed to sham operations set up for the purpose of providing a way for potential terrorists to obtain student visas)?*

Answer: By developing and fully implementing SEVIS, we believe the INS will establish the technological capability to monitor foreign students and exchange visitors while they are enrolled in INS-approved schools or State Department-approved programs. As mentioned in our report, the INS will not to be able to track students from their entry into the United States through their eventual exit from the country until the automated entry-exit system is implemented.

In relation to ensuring that the programs in which students are enrolled are legitimate educational programs, the INS has taken some steps, but we believe it needs to do more. The INS is planning to utilize contract investigators to conduct site visits to all high-risk schools prior to certification. Site visits are critical to ensure the legitimacy of these schools. Although site visits will establish the *initial* validity of the INS-approved schools, the program will not be successful unless the INS periodically conducts recertification reviews that include additional site visits.

2b. *Can you assess the INS's capability to use its existing technology to determine who has violated their visa, and therefore, should in the future be denied entry into the U.S.?*

Answer: Without an automatic tracking system such as SEVIS, the INS does not have the capability to readily identify students who are out-of-status and therefore in violation of their visas. SEVIS could be used to identify those students who are potentially out-of-status due to their failure to carry a full-time course load or because they ended their school enrollment. Once SEVIS is fully integrated with other INS

systems at INS district offices, service centers, and ports of entry, the INS will be able to determine whether the student has left the country, is in the country legally under another visa status, or is in the country illegally.

Currently, in order to determine whether a student has violated his or her visa, the INS would have to physically obtain the student's records from the school and then query several INS systems to determine whether the student had legally changed his or her status, or if he or she had departed the United States. A number of INS field investigators we spoke to during our review stated that many INS systems are inaccurate and therefore they are reluctant to rely on the information contained in those systems.

2c. *Do you believe the INS has established the necessary oversight operations and trained the necessary staff to monitor schools accepting foreign students, particularly those who have violated the terms of the program in the past?*

Answer: No. The INS has not yet decided on the field staffing needed to monitor the foreign student program. Although our report recommended that full-time, dedicated positions be established within the INS districts, this has not yet occurred according to INS officials.

The INS recently started training representatives from INS district offices on implementation of SEVIS, including a session the week of June 24 that provided training on using SEVIS, the adjudication process, the legal aspects of the program, and the role of the contract investigator. However, since the INS has not yet determined who in the field will be monitoring the foreign student program, there is no assurance that the appropriate individuals received the training.

2d. *Do you believe the foreign student tracking system will make it easier for the INS to identify schools and remove from the foreign student program schools that may be committing student visa fraud? Please explain your response.*

Answer: Yes, SEVIS will make it easier for the INS to identify and remove from the program those schools that may be committing or facilitating student visa fraud.

The INS could use the data contained in SEVIS to identify potential fraudulent operations, including to:

- Compare the capacity of a school program and the actual number of foreign students either accepted to or enrolled in the program. Past fraud investigations have identified schools that were accepting hundreds of students beyond the actual capacity of the school.

- Compare the length of the course of study and the actual length of enrollment. A 1998-99 review conducted by the INS of F-1 language programs in the California region identified numerous cases where schools were reporting students as being in an active status as long as seven years beyond the normal course of study.

- Generate a list of all schools with high percentages of no-shows or program dropouts. This could indicate a potential alien smuggling operation.

SEVIS also will facilitate the INS's removal of a fraudulent school from the program. The INS will be able to remove a school's access to SEVIS by inactivating the applicable passwords. Without access to SEVIS, the school will be incapable of generating I-20s.

However, although SEVIS has analytic capabilities, we are not confident that the INS will fully utilize this potential. For this to be successful, the INS would have to devote sufficient resources to both performing the analyses and following up on the results.

3a. *In your own assessment, how soon should the INS provide the schools information about the type of software they need and the batch processing specifications that will be necessary to implement the foreign student tracking system by the January 30, 2003 deadline?*

Answer: Schools do not need software to use SEVIS, since it is accessed through the Internet. Schools can opt to access SEVIS via either the real-time interactive method or the batch method. The real-time interactive method, which generally will be used by schools with a small number of foreign students, allows the user to directly interact with the SEVIS website. It requires the school to have Internet access and an INS-provided password and log-in that will be available in July. The batch method (system to system) requires the uploading and downloading of data between the school's Information Technology system and SEVIS. To use the batch method, schools will need to ensure that their systems transfer the data using a particular format.

According to the INS, the final version of batch specifications will be posted on its website in the very near future. (The draft version has been on its website for nearly a year.) INS officials we contacted also

noted that they have been providing information regularly on the batch specifications to some of the larger schools and that the batch specifications were distributed at a conference held recently that was attended by 250 organizations and 40 vendors.

However, although the final batch specifications soon will be available, the batch processing system will not be operable until this fall. Consequently, due to the short time frame, we believe that some schools will find it difficult to comply with the January 30, 2003, deadline.

3b. *What is your assessment of the potential technological obstacles the INS will face in getting the system up and running by January 2003?*

Answer: For SEVIS to be fully operational by January 2003, the INS still needs to have the batch processing system operable and SEVIS connected to the consular posts, ports of entry, INS service centers, and INS district offices. The INS believes it will meet this goal. Our review was operational, not technical, and therefore we did not assess whether this goal is technically achievable by January 2003.

4a. *What do you believe is the key reason that these systems are not being linked within a more expeditious time frame?*

Answer: There are several related reasons contributing to the time delay:

- The complex engineering and system design modifications required for each phase of the integration.
- The time taken by the pilot study to test each stage of the development process, analyze the results, and assess the operational impacts.
- The time taken by the Justice Management Division, the Federal Bureau of Investigation, and the INS to incorporate the pilot study results into the system and make subsequent system modifications and deployment decisions.

4b. *Is it your assessment that the IDENT systems could be deployed at the INS port-of-entry inspections stations to work in conjunction with the Interagency Border Inspection System (IBIS)?*

Answer: Yes, and we understand that this is beginning to be done. Most INS port of entry inspection stations have or soon will have IDENT. Fingerprints of wanted felons are being added to IDENT. Anyone sent to

secondary inspection as a result of a text-based match in IBIS would have their fingerprints checked in IDENT.

5a. *Given your office's ongoing review of many of the data systems the INS use, are you in the process of working with the INS and the FBI to take an inventory of the legacy systems that should be sustained and integrated into the interoperable system, and those that [should] be discontinued?*

Answer: The OIG is not involved currently in any project to inventory Department data systems to identify systems for discontinuance or integration into an interoperable system. Rather, the Department's Justice Management Division – specifically its Information Resource Management unit – has initiated efforts in this area.

SUBMISSIONS FOR THE RECORD

WASHINGTON NATIONAL OFFICE
Laura W. Murphy
Director

122 Maryland Avenue, NE Washington, D.C. 20002
(202) 544-1681 Fax (202) 546-0738

To: Interested Persons
From: Marvin J. Johnson, Legislative Counsel, ACLU Washington National Office
202-675-2334
Re: Analysis of Changes to Attorney General Guidelines
Date: June 5, 2002

On May 30, 2002, Attorney General Ashcroft released new Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations. Sweeping away protections that have been in place since the 1970s, the new Guidelines allow the government to spy on domestic groups even when there is no suspicion of wrongdoing. Furthermore, the investigations the new Guidelines authorize can continue longer, with intrusive techniques and with less oversight, even when they produce no evidence of crime.

Recent revelations regarding the FBI's pre-9/11 activities suggest that its hands were not tied by the Guidelines changed by Attorney General Ashcroft. Any failure appears to be the result of inadequate analysis of the information already collected rather than a failure to collect it under the Guidelines then in place.

Rewarding the FBI's failure with broad new powers when it has demonstrated its inability to adequately use the existing tools at its disposal is unnecessary and dangerous.

WHY PROTECTIVE GUIDELINES ARE NEEDED

To understand why these changes are detrimental to American society, one needs to understand why the Guidelines were originally adopted.

During the 1950s through the early 1970s, the FBI and other intelligence agencies launched various programs to spy on Americans. Political dissidents, anti-war activists, civil rights activists, groups from the left to the right, all found themselves subject to infiltration, disruption, and harassment, even though most of the groups did nothing more than exercise their First Amendment rights. For example, the FBI's COINTELPRO (Counterintelligence Program):

- Anonymously attacked the political beliefs of targets to try and have their employers fire them;
- Anonymously mailed letters to the spouses of targets to try and destroy their marriages;
- Falsely and anonymously labeled as Government informants members of groups known to be violent, thereby exposing the falsely labeled members to expulsion or physical attack.[1]

Under the leadership of Senator Frank Church, Congress commenced hearings to examine the FBI's and other intelligence agencies' conduct, and to make recommendations to prevent further abuse.

In 1976, the Church Committee released its report on Intelligence Activities and the Rights of Americans. Its findings were shocking: FBI headquarters alone had developed over 500,000 domestic intelligence files on Americans and domestic groups, and additional files at FBI Field Offices augmented these.[2] In 1972 alone, the FBI opened 65,000 domestic intelligence files.[3] The Church Committee found that intelligence collection programs naturally generate increasing demands for new data, and once the data has been collected, strong pressures are exerted to use it against the target.[4]

> Too many people have been spied upon by too many Government agencies and to [sic] much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs pose no threat of violence or illegal acts on behalf of a hostile foreign power. The Government, operating primarily through secret informants, but also using other intrusive techniques such as wiretaps, microphone "bugs", surreptitious mail opening, and break-ins, has swept in vast amounts of information about the personal lives, views, and associations of American citizens. . . . Groups and individuals have been harassed and disrupted because of their political views and their lifestyles. Investigations have been based upon vague standards whose breadth made excessive collection inevitable. Unsavory and vicious tactics have been employed -- including anonymous attempts to break up marriages, disrupted meetings, ostracized persons from their professions, and provoke target groups into rivalries that might result in deaths. Intelligence agencies have served the political and personal objectives of presidents and other high officials.[5]

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1 Intelligence Activities and the Rights of Americans, Book II, Final Report of the Select Committee to Study Governmental Operations With Respect to Intelligence Activities, 94th Cong. (1976), page 10, hereinafter S. REP. No. 94-755 (1976). Senator Frank Church chaired the Committee.

2 Id. at page 6

3 Id.

4 Id. at page 4.

5 Id. at page 5

In fact, the Committee found that every administration from Franklin D. Roosevelt to Richard Nixon had "permitted, and sometimes encouraged, government agencies to handle essentially political intelligence."[6]

The targets of these intelligence activities spanned a broad spectrum, from the left to the right, religious groups, and establishment politicians.[7] For example, the "Womens Liberation Movement" was infiltrated. FBI sources reported on the formation of the Conservative American Christian Action Council, and even collected information about the John Birch Society.[8] The NAACP was investigated to determine if it "had connections with" the Communist Party. In the first year of the investigation, a report was issued that the NAACP had a "strong tendency" to "steer clear of Communist activities." No evidence was ever adduced to rebut this report, yet the investigation continued for a total of twenty-five years.[9]

Dr. Martin Luther King, Jr. was investigated and harassed for decades in order to destroy his reputation.[10] The FBI saw him as a potential threat because he might "abandon his supposed 'obedience' to white liberal doctrines (non-violence)."[11] As the Committee stated: "In short, a non-violent man was to be secretly attacked and destroyed as insurance against his abandoning non-violence."[12]

During the span of the 1960s, the FBI and the CIA conducted hundreds of break-ins; sometimes to plant bugs, and in other cases to steal membership lists from so-called "subversive" organizations.[13]

As a result of these revelations, Congress considered enacting statutory protection for American citizens. That proposal was dropped when then-Attorney General Edward Levi adopted the original Guidelines. Thus, Attorney General Ashcroft's statement that his changes do not violate any statute is disingenuous. No statute was enacted precisely *because* the original Guidelines were adopted to head off an effort to enact a law to

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[6] Id. at page 9

[7] Id. at page 7

[8] Id.

[9] Id. at page 8

[10] For a more in-depth case study of the investigation of Dr. King, see the ACLU report, *The Dangers of Domestic Spying: A Case Study on FBI Surveillance of Dr. Martin Luther King*, located at: http://www.aclu.org/congress/mlkreport.PDF

[11] S. REP. No. 94-755 (1976) at 11-12

[12] Id.

[13] Id. at 13

protect Americans from an overzealous FBI.

To those who claim this is ancient history, one only needs to read the newspapers to see that the FBI is already questioning people who exercise their rights to freedom of speech.

- The FBI, because of comments he made at a local gym, visited Barry Reingold, a 60-year-old retired phone company worker. Reingold had stated during an argument that "Bush has nothing to be proud of. He is a servant of the big oil companies and his only interest in the Middle East is oil." The FBI agents informed Reingold that he had a right to freedom of speech, whereupon he told them "Thank you. That ends our conversation." As Reingold closed his door, he heard one of the agents say: "But we still need to do a report."[14]
- Kate Rafael, a California peace activist, was shocked when the FBI came to her door seeking information about Muslim men. "If it's your job to hunt Islamic fundamentalist terrorists," said Rafael, "Then it's your job to know that they don't hang out with Jewish lesbians in San Francisco."[15]
- Donna Huanca's small art gallery was preparing to open an exhibit on U.S. covert operations entitled "Secret Wars," when she was visited by the FBI and the Secret Service. The agents were investigating reports of "anti-American activity" at the gallery.[16]
- A.J. Brown, a student at Durham Technical Community College in North Carolina, was grilled for forty minutes about "un-American materials" in her apartment. From the doorway, the agents took particular note of a poster of George W. Bush holding a noose. It read: "We hang on your every word," referring to his staunch support of the death penalty as the governor of Texas.[17]

It is clear not only that the original guidelines were necessary, but that they are still needed.

BACKGROUND ON THE GUIDELINES

It is important to note that when conducting terrorism investigations the FBI is subject to two sets of guidelines: the first is a classified set of guidelines for foreign intelligence and international terrorism; the second is an unclassified set of guidelines on general crimes, racketeering and domestic terrorism.[18]

The Foreign Guidelines are applicable to investigations inside the United States of foreign powers and

[14] Christian Science Monitor, www.csmonitor.com/2002/0108/pls4-usju.htm

[15] CBSNews.com, May 15, 2002

[16] Christian Science Monitor, supra.

[17] Id.

[18] The old Domestic Guidelines may be found at: http://www.usdoj.gov/ag/readingroom/generalcrimea.htm A redacted version of the Foreign Guidelines may be found at: http://www.usdoj.gov/ag/readingroom/terrorismintel2.pdf The Ashcroft Domestic Guidelines may be found at: http://www.usdoj.gov/olp/

international terrorism organizations (like al Qaeda, Osama bin Laden, or Hamas). In other words, the Foreign Guidelines are used when the groups originate abroad, but carry out their actions within the United States. In many ways, the Foreign Guidelines are much more relaxed than the old Domestic Guidelines. For example, under the Foreign Guidelines, investigations may be conducted when there is no suspicion of criminal activity. A person may be investigated on the mere suspicion that he is affiliated with an international terrorist group, even though he has committed no wrongdoing.

On the other hand, the Domestic Guidelines govern investigations of groups that operate in the United States and originate in the United States (like white supremacists, WTO protesters, animal rights activists, and anti-abortion groups).

The Attorney General announced changes to the Domestic Guidelines rather than the Foreign Guidelines. This suggests these changes have little or nothing to do with September 11: the investigation of al Qaeda and its activities in the U.S., because it is a group originating abroad, would be conducted largely under the Foreign Guidelines. Additionally, the fact the investigation of al Qaeda was conducted under the more lenient Foreign Guidelines is further proof that the FBI failed in analyzing the information it had, rather than having its hands tied by the Domestic Guidelines.

Under both the old guidelines and the new, when the FBI has a "reasonable indication of criminal activity", something far less than probable cause of crime, it can open a full investigation. If it has even less evidence of crime, it can open a preliminary inquiry. Under the old Domestic Guidelines preliminary inquiries should be completed within 90 days after initiation of the first investigative step. FBI Headquarters could grant extensions of time for succeeding thirty-day periods upon receipt of a written request and statement of reasons why further investigative step were warranted when there was no "reasonable indication" of criminal activity. Therefore preliminary inquiries could last longer than 90 days, but extensions required headquarters approval. The purpose of this rule was to avoid fishing expeditions and waste of manpower when there was no "reasonable indication" that anyone was breaking the law.

GUIDELINES CHANGES

The Domestic Guidelines were adopted to put the FBI out of the business of spying on Americans when there was no evidence that they were involved in criminal activity. The Ashcroft Guidelines put the FBI back in that business. The Ashcroft Guidelines represent a generalized lifting of restrictions on FBI spying activity that have worked well for many years. Under the old Domestic Guidelines, the FBI already had the operational freedom and authority to gather the information needed to do its job. The problem was its inability to analyze the information it already had. Now, the FBI will add to that mountain of information even more useless facts.

Additionally, the Attorney General has not demonstrated any need for relaxing the domestic guidelines.

The Domestic Guidelines were adopted to deal with three problems arising from abusive FBI investigations:

- Surveillance of dissenters from government policy because they dissent, not because they may be involve in criminal activity;
- Inadequate supervision of agents who engaged in objectionable investigative techniques; and
- The use of unlawful or otherwise objectionable investigative techniques to disrupt the efforts of those wh dissented.

By severing the tie between investigative activity and crime and by lessening the accountability of agents in the field to superiors who could reign in or prevent unlawful conduct, the Attorney General has undermined two of the fundamental purposes for adopting the Guidelines in the first place.

Increased Spying on Domestic Religious and Political Organizations

That Ashcroft Guidelines state: "For the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally. No information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity."[19] This was the same basis upon which the FBI sent agents into churches and other organizations during the civil rights movement, and then attempted to block the movement, suppress dissent, and protect the administration.

The old Domestic Guidelines required that FBI activity be predicated upon at least a modicum of suspicion that crime was afoot. After all, during the 1950s and 1960s the FBI routinely infiltrated political and religious groups to spy on their activities. The original Domestic Guidelines were designed to prevent these widespread fishing expeditions. Preliminary inquiries could be opened when there was not yet a "reasonable indication" of criminal activity, but where the FBI possessed information whose responsible handling required some further scrutiny beyond the prompt and extremely limited checking out of initial leads.[20] Preliminary inquiries could use intrusive investigative techniques such as photo and physical surveillance, interviewing the subject, conducting background checks, and using informants, but could not use mail covers, mail openings, and nonconsensual electronic surveillance.[21] Thus, under the old Guidelines, even when the FBI lacked reasonable indication of criminal activity, it could employ nearly the full panoply of investigative techniques available in a full investigation. Terrorism investigations could be initiated when the facts or circumstances reasonably indicated that two or more persons were engaged to in an enterprise for the purpose of furthering political or social goals wholly or in part through activities that involved force or violence and a violation of the criminal laws of the United States.[22]

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[19] Ashcroft Domestic Guidelines, VI A 2

[20] Old Domestic Guidelines, II B (1)

[21] Id. at II B (5)

[22] Id. at IIII B 1 a

The Ashcroft Guidelines permit FBI agents to attend every single public meeting or demonstration, from political conventions and demonstrations, to churches. So long as there is a claimed anti-terrorism purpose, nothing in the Ashcroft Guidelines imposes any judicial control, FBI Headquarters control, or even local Special Agent in Command control over this activity. While Attorney General Ashcroft is fond of saying agents may only conduct such surveillance for the purposes of ferreting out terrorism, the Ashcroft Guidelines permit the agent, once there, to collect information about *any* crime, including those the FBI currently uses as pretexts to detain people in its 9/11 investigation.

Proponents of this change -- permitting the FBI to spy when there is no evidence of a crime -- claim it is necessary because the requirement of evidence tied the hands of the FBI when suspects entered mosques or temples, or other houses of worship. In fact, the old guidelines did not prohibit FBI agents from entering houses of worship; it merely required that the agent be following a lead, or conducting an investigation or preliminary inquiry.[23]

Although the new guidelines say that information obtained from such surveillance must relate to potential criminal or terrorist activity, it is unclear how broad or attenuated that relation must be. The natural tendency is to gather as much information as possible, fitting together bits and pieces of information, many meaningless by themselves, to determine whether a pattern of criminal activity exists.[24] Therefore, the tendency will be to collect more information, rather than less, in the hopes some of this "innocuous" information will be helpful when it comes time to "connect the dots."

The danger of this provision is that the FBI will now be attending religious functions and political rallies to take note of who attends, what they say, and what they do. The administration will have its own taxpayer-financed intelligence arm to inform it of political moves and strategies its opponents may be hatching. Furthermore, the FBI will be wasting money and resources gathering information in situations in which there is no suspicion of any criminal conduct. And, most importantly, this will chill First Amendment activity from worship to free speech.

Internet Spying on Political Activity with Insufficient Oversight

As noted above, the old Domestic Guidelines required that FBI activity be accomplished pursuant to a preliminary inquiry or investigation. The Ashcroft Guidelines allow the FBI to carry out and retain information resulting from general topical research.[25] This includes conducting online searches and accessing

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[23] Washington Post, 5/30/02 "Under guidelines have been in place for several decades, the FBI has not been permitted to send investigators into religious settings unless the agents can establish their following a lead, or conducting an investigation or preliminary inquiry. As a practical matter, the Justice Department officials said, "*agents mistakenly think they have to stop at the church door.*" [Emphasis added.]

[24] Ashcroft Domestic Guidelines, III (discussing criminal intelligence investigations, noting these investigations are "broader and less discriminate than usual, involving 'the interrelation of various sources and types of information.'") The same rules apply for domestic terrorism investigations. Thus, a wide net is necessarily cast to gather this information.

[25] Ashcroft Domestic Guidelines, VI B 1

online sites and forums as part of such research. Once again, the FBI can use this information to suppress dissent and help cripple political enemies.

The Ashcroft Guidelines define "general topical research" as "research concerning subject areas that are relevant for the purpose of facilitating or supporting the discharge of investigative responsibilities."[26] "It does not include online searches for information by individuals' names or other individual identifiers, except where such searches are incidental to topical research, such as searching to locate writings on the topic by searching under the names of authors who write on the topic, or searching by the name of a party to a case in conducting legal research."[27]

First of all, the FBI has never been prohibited from reading the newspaper or surfing the Internet. For decades, and under the old Domestic Guidelines, it opened preliminary inquiries and investigations based on what agents have read in the newspaper about potential criminal activity.

Second, there is great concern over the types of topics the FBI will be researching. The FBI talks about searching for "anthrax" or "smallpox," neither of which would have been prohibited under the old guidelines, particularly after the initial anthrax scare. Neither of these topics inherently implicates privacy or civil liberties issues. However, it is a whole different matter to search for "Islam," "Pro-life," or "gun rights," and use the results to form the basis for suspicion. And, this new surveillance authority is not limited to searching for information on terrorism.

While the Ashcroft Guidelines say individuals' names or identifiers may only be searched when they are incidental to the topical research, such as finding authors who have written on a particular subject, that provides little protection. "Authors" and "writing" have a much broader connotation on the Internet. For example, one who posts to a chat room or discussion forum may well be considered an "author" who has "written" on the topic for purposes of an FBI search.

Third, searches based on political, ethnic, or religious terms could easily enough be the basis for further round-ups and questioning by a government which has already demonstrated its willingness to indefinitely detain individuals on little or no evidence they have committed a crime, such as "material witnesses."

Finally, this ability to troll for information is unlikely to catch terrorists, because it assumes they will leave behind a trail. The September 11 terrorists left little behind.

On May 8, the Director of the FBI, Robert S. Mueller testified to the Senate Judiciary committee that the 9-11 hijackers "... contacted no known terrorist sympathizers. ... The hijackers also apparently left no paper trail. In our investigation, we have not yet uncovered a single piece of paper ... that mentioned any aspect of the September 11th plot. As best we can determine, the actual hijackers had no computers, no laptops, no storage media of any kind."

[26] Id.

[27] Id.

Use of Commercial Data Mining to Snoop on Americans' Buying Habits

Commercial data mining has become a big business. Any time you write check, use a credit card, buy something on credit, make department store purchases, surf the Web, use an e-z pass to buy gasoline or pay a toll, you leave a record. Commercial companies take this information and build profiles, such as who reads *Gun Week* magazine, or who buys books online about terrorism. Those profiles are then used to send to catalogs, credit cards, spam, and much other information you may not wish to receive.

Under the Ashcroft Guidelines, once again, the FBI will be able to engage in a fishing expedition using these resources. With no evidence that any crime is even contemplated, the FBI can purchase detailed profiles compiled by the data miners. And, once it obtains this information it is entitled to retain possession of it indefinitely.[28] Thus, the FBI may purchase information about you that is incorrect. However, even if you are able to correct the data the data mining company gathered about you, the FBI will still have possession of incorrect data.

There is no provision in either the Ashcroft Guidelines or the law similar to that in the Fair Credit Reporting Act, which would allow an individual access to the information and the ability to correct it. The disadvantage of a data mining company having incorrect information about a person is that the person may receive more spam, credit cards, or unwanted catalogs. The disadvantage of the FBI having incorrect information about a person is that the person may be arrested. In fact, since September 11, the FBI has arrested people based on innocent activity.

Furthermore, some data mining services profile people by race and religion. Allowing the FBI to use this type of information will continue the unacceptable practice of racial profiling. For example, the FBI may use this data to find consumers who are of Middle-Eastern descent to round up and question.

Another clause in the same section permits acceptance and retention of information "voluntarily provided by private entities." This raises the specter of private intelligence gathering by groups who wish to use the FBI to pursue and harass their enemies. For example, anti-abortion groups may supply the FBI with information on their opponents in order to subject them to intrusive investigations.

Permitting Lengthy Preliminary Inquiries and Investigations Even Where No Evidence Is Found

The Ashcroft Guidelines will extend the authorized duration of preliminary inquiries from 90 days to 180 days. They also allow the Special Agent in Charge of field offices to authorize two ninety-day extensions. Thus, preliminary inquiries can now last for up to one year without any meaningful

[28] Ashcroft Domestic Guidelines, VI B. The Old Domestic Guidelines were silent on the retention of the data, but required some indication of criminal activity before the search was authorized.

oversight by FBI Headquarters.

Remember, there are few constraints on the FBI in conducting preliminary inquiries. Under the new guidelines, the FBI is empowered to troll for information on the Internet, use commercial data mining services, and attend any public meetings, even when there is no suspicion of crime. This information however, may be used in order to form such a suspicion. Once that occurs, the FBI may use all lawful investigative techniques during the inquiry, with the exception of mail openings and nonconsensual electronic surveillance.[29] This includes physical or photographic surveillance, interviews of potential witnesses, examination of all public records, examination of federal, state, and local government records, interviews of the potential subject, interviews of the complainants, previously established informants, and other sources of information. Thus, with no reasonable indication an individual is involved of criminal activity, the FBI may use in highly intrusive techniques to conduct its preliminary inquiry for up to one year.

Under the old Domestic Guidelines, Racketeering and Domestic Security/Terrorism investigations could last for six months.[30] These are wide-ranging investigations that are less precise than investigations directed at more conventional types of crime. These investigations are of an entire enterprise rather than individual participants in a single criminal act, and seek to determine the scope of the enterprise as well as the relationship of the members. Thus, these investigations are disruptive to a wider range of people and businesses than a conventional criminal investigation. After six months, the FBI had to show that it found some evidence of crime in order to extend the investigation. Under the Ashcroft Guidelines, the FBI will be able to continue an investigation for up to one year, with the full panoply of its investigative powers, even though it found nothing to justify keeping the investigation open.[31]

Both of these changes are open invitations for fishing expeditions. Agents will be allowed to spy on citizens and noncitizens, and gather political intelligence for up to one year with no oversight from FBI Headquarters.

Furthermore, after the fishing expedition, the information stays with the FBI. According to the Ashcroft Guidelines, "the FBI shall maintain a database that identifies all preliminary inquiries and investigations conducted pursuant to these Guidelines and that permits the prompt retrieval of information concerning the status (open or closed) and subjects of all such inquiries and investigations."[32] Therefore, the FBI may engage in a fishing expedition in order to form a suspicion, which then results in a highly intrusive inquiry with no

[29] Ashcroft Domestic Guidelines, II B (5). Note that this is also a change from the Old Domestic Guidelines. Under the Old Domestic Guidelines, preliminary inquiries were prohibited from using mail covers, mail opening, and nonconsensual electronic surveillance. Old Domestic Guidelines II B (5). The Ashcroft Guidelines now only prohibit mail opening and nonconsensual electronic surveillance. Ashcroft Domestic Guidelines, II B (5). Thus, with no warrant or even a "reasonable indication" of criminal activity, the FBI may check a person's mail to determine who they are sending mail to, and who they receive mail from.

[30] Old Domestic Guidelines, III B 4 b

[31] Ashcroft Domestic Guidelines, III B 4 b

[32] Id. at V B

oversight outside of the local field office, for up to one year.

CONCLUSION

By severing the tie between initial FBI surveillance and evidence of crime, the Ashcroft Guidelines fundamentally alter the role of the FBI in our society, and ignore the lessons of its past abuses. Now, the FBI is authorized to attend every public meeting and every demonstration, and to track the Internet activities of groups and individuals in chat rooms and on web sites, even though it lacks even a scintilla of evidence that a crime has been, is being, or may be committed. Similar activity prompted the Congressional action that resulted in adoption of the original Attorney General Guidelines a quarter century ago.

America is changing as a result of the 9/11 attacks, but many of the changes in the Ashcroft Guidelines are unnecessary. In fact, the Ashcroft Guidelines likely have nothing to do with heading off another attack from al Qaeda because its activities are investigated under an entirely different set of investigative guidelines, the Foreign Intelligence Guidelines. Instead, it appears that the FBI is using America's fear of terrorism to dramatically increase its power in areas that have little to do with terrorism. Despite its inability to manage and analyze the information it already gathers, it now wants to gather more information free from the constraints previously imposed. This not only makes the FBI less effective in preventing terrorism, but it chills Americans' freedom to associate and speak without the fear that their associations and speech will end up in an FBI database.

Associated Press Newswire
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Tuesday, June 4, 2002

District attorney in New Orleans says he won't prosecute brothel's customers

By DOUG SIMPSON
Associated Press Writer

NEW ORLEANS (AP) - The district attorney said Monday he has decided not to prosecute customers of a pricey brothel whose operators face federal money laundering charges.

Harry Connick's decision means the brothel's customers will likely escape any prosecution because the local U.S. attorney has said there is no federal law against paying someone for sex.

FBI agents and New Orleans police arrested the brothel's operators in April.

The prostitution ring's managers face federal charges because the brothel's business operations reached across state lines, charging up to $400 per hour to customers around the country, prosecutors said.

Last month, acting U.S. Attorney Jim Letten invited Connick to a debriefing on evidence, including wiretaps of phone conversations, collected during the investigation. Connick declined.

"I think if there's a criminal violation, they can handle it just as easily as we can," Connick said.

The brothel's operators, Jeanette Maier, 43, and her mother, Tommie Taylor, 62, pleaded guilty last month to prostitution conspiracy. Taylor also pleaded guilty to money laundering. The women are scheduled to be sentenced on Aug. 28.

Maier has said she will cooperate with prosecutors including by providing the names of her customers.

Seventeen others, including Maier's daughter, were also charged with prostitution and drug charges.

THE FBI GUIDELINES
AND THE NEED FOR CONGRESSIONAL OVERSIGHT
SOME OBSERVATIONS AND LINES OF INQUIRY

Jerry Berman*
Center for Democracy and Technology
June 6, 2002

The real issue before the Senate Judiciary Committee and the Congress is the impact of these guideline changes on civil liberties AND security. Much has been written about how the criminal nexus was designed to protect civil liberties and how, on their face, the Ashcroft Guidelines give the FBI sweeping authority to collect information about lawful political, religious, and social activity about citizens without such a criminal nexus. But the Guidelines, crafted by the Ford Administration (AG ED Levi), in consultation with Congress, tied FBI inquiries and investigations to some modest showing that they were focused on suspected criminal or terrorist activity for security reasons as well.

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* Jerry Berman is Executive Director Center for Democracy and Technology, a high tech civil liberties and Internet policy organization in Washington.

In earlier years at the Center for National Security Studies, and as Chief Legislative Counsel to the ACLU, Berman worked with Congress and the Administration on Levi Guidelines, FBI Charter legislation, Foreign Intelligence Surveillance Act of 1978, and other national security issues. He wrote widely on FBI Reform.

Security Downsides of New Guidelines

Nothing May Be Prevented under Broad surveillance authority. During the Hoover years, literally hundreds of thousands of investigations were opened and files compiled on groups and individuals only engaged in lawful speech, protest, civil rights activities, etc. Informants were called "VACUUM CLEANERS" of information. This massive file gathering proved wholly ineffective and even a barrier in thwarting or preventing terrorism---SLA, Urban Disorders in 60s,
Weather Underground. No record of major acts prevented. On the other hand, civil liberties chilled, people intimidated, time and resources wasted. Then, as now, the issue was not information, but analysis. What grounds do we have for believing we are not headed down the same dumb and dangerous road?

An FBI Agent Behind Every WebPages will hinder Intelligence Gathering. The Guidelines now permit the FBI to go to churches, mosques, or surf the web like "any of us." But the FBI could do that under previous guidelines with some indication crime might be detected or prevented. WHY? The FBI is not like any of us. They come with pads and pens, monitoring devices, and the right to question, etc. They can uncover crime but also chill speech. The problem is that if they do the latter, they create distrust among those they want to gather information from. Cops became "Pigs" in earlier eras and that did not help information gathering. Convincing people that there is an agent behind every "WebPages" may dry up sources. What evidence do we have that this intelligence harm will not occur?

Driving the Bad Guys underground: What is the rationale for all the fanfare with the guidelines. The FBI has a lot of authority already under secret foreign terrorism guidelines already. Is the goal to misdirect again public attention from the intelligence failure? But maybe by compounding it. Current targets are difficult to infiltrate. Open sources may be crucial. If possible terrorists now know it is dangerous to mix (seems they knew this already). Because the FBI's presumably their, open discussion by possible terrorists stops. Infiltration becomes

more urgent. But the FBI is going into this game with tradition tied behind its back. The record of US intelligence penetration of foreign terrorist groups is dismal. Thus, potentially clearing out public places and chilling public sources makes intelligence gathering more difficult. Answers?

The Need for Congressional Oversight

In our estimation, congressional oversight is the only real line of defense left for protecting our civil liberties and our security.

1. How is Oversight Possible?

What requires emphasis that the unclassified Criminal and Criminal Intelligence Ashcroft Guidelines was significantly changed with the stroke of a pen without prior notice or consultation with Congress. This is not only unprecedented, but does not bode well for Congressional oversight over FBI investigative activity.

The Levi (1976) and French (1983) Guidelines, which the Ashcroft Guidelines replace or amend, were crafted in consultation with the Judiciary Committees. This consultation tradition was one of the major reasons Congress held back from enacting an Investigative Charter for the FBI, as recommended by the Senate Select Committee on Intelligence in 1976. Flexibility was maintained but the Guidelines treated have been, until now, treated as a quasi legislative document designed to balance liberty and security and to involve the legislative branch in any rebalancing. This tradition is broken.

Congress is going to have to commit the administration to a consultative process or consider legislation requiring prior notice of guideline changes? Ask officials if they are committed to unilateral policy making? Why was Congress cut out of the Process? How can they be cut in?

2. Will the Senate Judiciary Committee engage in parallel build up of analytic capability?

3. More staff devoted to oversight?

4. More reporting requirements of critical data which may yield patterns of Bureau activity requiring oversight and investigation?

If not, what is the alternative for keeping the FBI on the criminal investigative course and our citizens safe?

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

June 14, 2002

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

In the course of the Committee's hearing on June 6, 2002, several members inquired as to the search capabilities of the FBI's Automated Case Support (ACS) system. I am writing to clarify the FBI's testimony in this regard.

The ACS system is the FBI's centralized case management system. ACS was implemented in all Field Offices, Resident Agencies, Legal Attache offices and Headquarters on October 16, 1995. ACS was designed as a comprehensive and integrated system that would automate case management and provide computerized access to investigative information throughout the FBI. It serves as the central electronic repository for the FBI's official investigative textual documents. FBI-generated documents such as Electronic Communications, FD-302 reports of interview, and teletypes are uploadable into ACS; photos, images, audio and video are not.

ACS is a menu-driven system which includes a menu screen in the Electronic Case File titled "Search Document Text." (Copy attached for reference). In the first field of this search menu, the user is asked to enter the "word/phrases" to be searched. When entering these words/phrases, the user has five options for further defining the search using "operators." The five operators are as follows:

AND	**bank and weapon**	**Both words are located in the document**
OR	**drugs or narcotics**	**Either word is located in the document**

NOT	**drugs not cocaine**	**First word is in the document but not the second word**
ADJ	**pizza adj parlor**	**Second word immediately follows the first word**
NEAR	**money near laundering**	**Second word immediately follows or precedes the first word**

The operators may be strung together for a more defined search; for example "hijacker **or** terrorist **and** flight **adj** school."

Another option available in searching the ECF is the "wildcard" search. If the correct spelling of a word is unknown, enter the beginning or ending letters of the word followed by an asterisk (e.g., meth*). This search will return all words beginning or ending with those letters.

On the "Command" line of the "Search Document Text" screen, the user may type "VO" for the Vocabulary Menu which provides the capability to view a list of words that are searchable and words that are not searchable. The two selections are "Inverted Words" (searchable) and "Stopwords" (not searchable).

Inverted Words are listed alphabetically and each word selected by the user will appear in the "Words/Phrases" field to be searched. From the Inverted Words window, a number displayed in the "Syn" column indicates the number of synonyms for the selected word. When "Syn" is selected, the synonyms are displayed and may be selected to appear in the "Words/Phrases" field to be searched. The "or" operator will default between the inverted word and the synonyms selected.

Stopwords are listed alphabetically and are not searchable. These are words that, if searched, would generate a voluminous response (e.g., "and," "bureau," "everyone," "interview."

In addition to completing the "Words/Phrases" field, the user may further define his search by completing one or more of the other fields on the "Search Document Text" screen:

Classification	**This field is used to specify the investigative classification number of the documents to be searched (e.g., "91" for Bank Robberies).**

Honorable Patrick J. Leahy

Case ID	**This field is used to identify the case in which the document is to be or has been filed.**
UCFN Local Office	**This field is used to identify which division's or office's copy of the Universal Case File Number is being referenced (blank will reference the office of origin's copy)**
Orig. Office	**This field is used to identify the division or office in which the document originated.**
To	**The recipient of the document**
From	**The originator of the document**
Document Type	**This field is used to specify the type of document (e.g., Electronic Communication, FD302)**
Document Dates	**These fields are used to specify the date range of the documents to be included in the search**

I hope this better explains the FBI's search capabilities with regard to its investigative files. All of this information is available to FBI employees online in ACS as well as in the ACS Reference Guide.

Please feel free to contact me if you have any questions.

Sincerely yours,

John E. Collingwood
Assistant Director
Office of Public and
Congressional Affairs

Enclosure

1 - Honorable Orrin G. Hatch
United States Senate
Washington, DC 20510

SEARCH DOCUMENT TEXT

To display the **Search Document Text** screen, type **[3]** in the selection field from the **Electronic Case File Menu** and press Enter.

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EXTRA! A - W0473E02

04/07/99                    Search Document Text                    ECFSTOMG
09:12:27

Type the required and any additional search criteria; then press Enter.

Words/Phrases  >> _..................................................... +
                  .......................................................
Classification  > ... + (not for use with Case ID)
Case ID  . . .  > ............................ +  UCFN Local Office > .. +
Orig. Office .  > .. +
To . . . . . .  > .........................
From . . . . .  > .........................
Document Type   > ........ +
Document Dates  > ........ through ........ (required for most searches)


Set  Description                                                Documents


Command . . . > ........................................................... +
F1=Help F2=View F3=Exit F4=Prompt F5=Refresh F12=Cancel
```

The **Search Document Text** screen is used to search the text of documents. To begin a search, type at least one word in the **Words/Phrases** field and press Enter. The remaining search criteria may be used to narrow the search.

06/05/02 WED 19:18 FAX 002

~~UNCLASSIFIED~~

S = secret
SW = sealed
P = protective order

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Suite 1100
111 Washington Avenue South
Minneapolis, MN 55401

May 21, 2002

FBI Director Robert Mueller
FBI Headquarters
Washington D.C.

Dear Director Mueller:

I feel at this point that I have to put my concerns in writing concerning the important topic of the FBI's response to evidence of terrorist activity in the United States prior to September 11th. The issues are fundamentally ones of INTEGRITY and go to the heart of the FBI's law enforcement mission and mandate. Moreover, at this critical juncture in fashioning future policy to promote the most effective handling of ongoing and future threats to United States citizens' security, it is of absolute importance that an unbiased, completely accurate picture emerge of the FBI's current investigative and management strengths and failures.

To get to the point, I have deep concerns that a delicate and subtle shading/skewing of facts by you and others at the highest levels of FBI management has occurred and is occurring. The term "cover up" would be too strong a characterization which is why I am attempting to carefully (and perhaps over laboriously) choose my words here. I base my concerns on my relatively small, peripheral but unique role in the Moussaoui investigation in the Minneapolis Division prior to, during and after September 11th and my analysis of the comments I have heard both inside the FBI (originating, I believe, from you and other high levels of management) as well as your Congressional testimony and public comments.

CLASSIFIED BY: SDP/CIMM
REASON: 1.5 (b,c)
DECLASSIFY ON: X1

I feel that certain facts, including the following, have, up to now, been omitted, downplayed, glossed over and/or mis-characterized in an effort to avoid or minimize personal and/or institutional embarrassment on the part of the FBI and/or perhaps even for improper political reasons:

1) The Minneapolis agents who responded to the call about Moussaoui's flight training identified him as a terrorist threat from a very early point. The decision to take him into custody on August 15, 2001, on the INS "overstay" charge was a

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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deliberate one to counter that threat and was based on the agents' reasonable suspicions. While it can be said that Moussaoui's overstay status was fortuitous, because it allowed for him to be taken into immediate custody and prevented him receiving any more flight training, it was certainly not something the INS coincidentally undertook of their own volition. I base this on the conversation I had when the agents called me at home late on the evening Moussaoui was taken into custody to confer and ask for legal advice about their next course of action. The INS agent was assigned to the FBI's Joint Terrorism Task Force and was therefore working in tandem with FBI agents.

2) As the Minneapolis agents' reasonable suspicions quickly ripened into probable cause, which, at the latest, occurred within days of Moussaoui's arrest [redacted] they became desperate to search the computer lap top that had been taken from Moussaoui as well as conduct a more thorough search of his personal effects. The agents in particular believed that [redacted]

3) The Minneapolis agents' initial thought was to obtain a criminal search warrant, but in order to do so, they needed to get FBI Headquarters' (FBIHQ's) approval in order to ask for DOJ OIPR's approval to contact the United States Attorney's Office in Minnesota. Prior to and even after receipt of information provided by the French, FBIHQ personnel disputed with the Minneapolis agents the existence of probable cause to believe that a criminal violation had occurred/was occurring. As such, FBIHQ personnel refused to contact OIPR to attempt to get the authority. While reasonable minds may differ as to whether probable cause existed prior to [redacted] it was certainly established after that point and became even greater with successive, more detailed information from [redacted] intelligence sources. The two possible criminal violations initially identified by Minneapolis Agents were violations of Title 18 United States Code Section 2332b (Acts of terrorism transcending national boundaries, which, notably, includes "creating a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States") and Section 32 (Destruction of aircraft or aircraft facilities). It is important to note that the actual search warrant obtained on September 11th was based on probable cause of a violation of

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[redacted] (b7E) Notably also, the actual search warrant obtained on September 11th did not include [redacted] (b7E) Therefore, the only main difference between the information being submitted to FBIHQ from an early date which HQ personnel continued to deem insufficient and [redacted] September 11th, was the fact that [redacted] suspected terrorists were known to have hijacked planes which they then deliberately crashed into the World Trade Center and the Pentagon. To say then, as has been iterated numerous times, that probable cause did not exist until after the disastrous event occurred, is really to acknowledge that the missing piece of probable cause was only the FBI's (FBIHQ's) **failure to appreciate** that such an event could occur. The probable cause did not otherwise improve or change. When we went to the United States Attorney's Office that morning of September 11th, in the first hour after the attack, [redacted] (b7E) The problem with chalking this all up to the "20-20 hindsight is perfect" problem, (which I, as all attorneys who have been involved in deadly force training or the defense of various lawsuits are fully appreciative of), is that this is not a case of **everyone** in the FBI failing to appreciate the potential consequences. It is obvious, from my firsthand knowledge of the events and the detailed documentation that exists, that the agents in Minneapolis who were closest to the action and in the best position to gauge the situation locally, **did fully appreciate** the terrorist risk/danger posed by Moussaoui and his possible co-conspirators even prior to September 11th. Even without the knowledge of the Phoenix communication (and any number of other additional intelligence communications that FBIHQ personnel were privy to in their central coordination roles), the Minneapolis agents appreciated the risk. So I think it's very hard for the FBI to offer the "20-20 hindsight" justification for its failure to act! Also intertwined with my reluctance in this case to accept the "20-20 hindsight" rationale is first-hand knowledge that I have of statements made on September 11th, after the first attacks on the World Trade Center had **already occurred**, made telephonically by the FBI Supervisory Special Agent (SSA) who was the one most involved in the Moussaoui matter and who, up to that point, seemed to have been consistently, almost deliberately thwarting the Minneapolis FBI agents' efforts (see number 5). Even after the attacks had begun, the SSA in question

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[1] And both of the violations originally cited in vain by the Minneapolis agents disputing the issue with FBIHQ personnel are among those on which Moussaoui is currently indicted.

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was still attempting to block the search of Moussaoui's computer, characterizing the World Trade Center attacks as a mere coincidence with Minneapolis' prior suspicions about Moussaoui.[2]

4) In one of my peripheral roles on the Moussaoui matter, I answered an e-mail message on August 22, 2001, from an attorney at the National Security Law Unit (NSLU). Of course, with (ever important) 20-20 hindsight, I now wish I had taken more time and care to compose my response. When asked by NSLU for my "assessment of (our) chances of getting a criminal warrant to search Moussaoui's computer", I answered, "Although I think there's a decent chance of being able to get a judge to sign a criminal search warrant, our USAO seems to have an even higher standard much of the time, so rather than risk it, I advised that they should try the other route." Leaked news accounts which said the Minneapolis Legal Counsel (referring to me) concurred with FBIHQ that probable cause was lacking to search Moussaoui's computer are in error. (Or possibly the leak was deliberately skewed in this fashion?) What I meant by this pithy e-mail response, was that although I thought probable cause existed ("probable cause" meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%-80% probability and sometimes even higher[3]), and

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[2] Just minutes after I saw the first news of the World Trade Center attack(s), I was standing outside the office of Minneapolis ASAC M. Chris Briese waiting for him to finish with a phone call, when he received a call on another line from this SSA. Since I figured I knew what the call may be about and wanted to ask, in light of the unfolding events and the apparent urgency of the situation, if we should now immediately attempt to obtain a criminal search warrant for Moussaoui's laptop and personal property, I took the call. I said something to the effect that, in light of what had just happened in New York, it would have to be the "hugest coincidence" at this point if Moussaoui was not involved with the terrorists. The SSA stated something to the effect that I had used the right term "coincidence" and that this was probably all just a coincidence and we were to do nothing in Minneapolis until we got their (HQ's) permission because we might "screw up" something else going on elsewhere in the country.

[3] For instance, last week during the mailbox pipe bomb investigation, when the main suspect was determined to be college student Lucas Helder, of Minnesota, we sought to search his bedroom in his parents' home which his parents had already consented to, but for which we needed a search warrant due to some locked areas in the room not within the parents' authority. Despite significant evidence that Helder was responsible for making and planting the pipe bombs, much of it emanating from his own family and roommate(s), including the fact [redacted]

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depending upon the actual AUSA who would be assigned, might turn us down. As a tactical choice, I therefore thought it would be better to pursue the "other route" (the FISA search warrant) first, the reason being that there is a common perception, which for lack of a better term, I'll call the "smell test" which has arisen that if the FBI can't do something through straight-up criminal methods, it will then resort to using less-demanding intelligence methods. Of course this isn't true, but I think the perception still exists. So, by this line of reasoning, I was afraid that if we first attempted to go criminal and failed to convince an AUSA, we wouldn't pass the "smell test" in subsequently seeking a FISA. I thought our best chances therefore lay in first seeking the FISA. Both of the factors that influenced my thinking are areas arguably in need of improvement: requiring an excessively high standard of probable cause in terrorism cases and getting rid of the "smell test" perception. It could even be argued that FBI agents, especially in terrorism cases where time is of the essence, should be allowed to go directly to federal judges to have their probable cause reviewed for arrests or searches without having to gain the USAO's approval.[4]

5) The fact is that the key FBIHQ personnel whose jobs it was to assist and coordinate with field division agents on terrorism investigations and the obtaining and use of FISA searches (and who theoretically were privy to many more sources of intelligence information than field division agents), continued to, almost inexplicably,[5] throw up roadblocks and

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[redacted] (S//) an Assistant U.S. Attorney declined permission to seek a search warrant unless we could show that we knew that the room had the exact same type of batteries and wire used in the pipe bombs- (this from an AUSA who has no bomb training!).

[4]Certainly Rule 41 of the Federal Rules of Criminal Procedure which begins, "Upon the request of a federal law enforcement officer or an attorney for the government" does not contain this requirement. Although the practice that has evolved is that FBI agents must secure prior approval for any search or arrest from the United States Attorneys Office, the Federal Rule governing Search and Seizure clearly envisions law enforcement officers applying, on their own, for search warrants.

[5]During the early aftermath of September 11th, when I happened to be recounting the pre-September 11th events concerning the Moussaoui investigation to other FBI personnel in other divisions or at FBIHQ, almost everyone's first question was "Why? - Why would an FBI agent(s) deliberately sabotage a case? (I know I shouldn't be flippant about this, but jokes were actually made that the key FBIHQ personnel had to be spies or moles, like Robert Hansen, who were actually working for Osama Bin Laden to have so undercut Minneapolis' effort.) Our best

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undermine Minneapolis' by-now desperate efforts to obtain a FISA search warrant, long after [redacted] and probable cause became clear. HQ personnel brought up almost ridiculous questions in their apparent efforts to undermine the probable cause.[6] **In all of their conversations and correspondence, HQ personnel never**

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real guess, however, is that, in most cases, avoidance of all "unnecessary" actions/decisions by FBIHQ managers (and maybe to some extent field managers as well) has, in recent years, been seen as the safest FBI career course. Numerous high-ranking FBI officials who have made decisions or have taken actions which, in hindsight, turned out to be mistaken or just turned out badly (i.e. Ruby Ridge, Waco, etc.), have seen their careers plummet and end. This has in turn resulted in a climate of fear which has chilled aggressive FBI law enforcement action/decisions. In a large hierarchal bureaucracy such as the FBI, with the requirement for numerous superiors' approvals/oversight, the premium on career-enhancement, and interjecting a chilling factor brought on by recent extreme public and congressional criticism/oversight, and I think you will see at least the makings of the most likely explanation. Another factor not to be underestimated probably explains the SSA and other FBIHQ personnel's reluctance to act. And so far, I have heard no FBI official even allude to this problem- which is that FBI Headquarters is staffed with a number of short term careerists* who, like the SSA in question, must only serve an 18 month-just-time-to-get-your-ticket-punched minimum. It's no wonder why very little expertise can be acquired by a Headquarters unit! (And no wonder why FBIHQ is mired in mediocrity!- that may be a little strong, but it would definitely be fair to say that there is unevenness in competency among Headquarters personnel.) (It's also a well known fact that the FBI Agents Association has complained for years about the disincentives facing those entering the FBI management career path which results in very few of the FBI's best and brightest choosing to go into management. Instead the ranks of FBI management are filled with many who were failures as street agents. Along these lines, let me ask the question, why has it suddenly become necessary for the Director to "handpick" the FBI's management?) **It's quite conceivable that many of the HQ personnel who so vigorously disputed Moussaoui's ability/predisposition to fly a plane into a building were simply unaware of all the various incidents and reports worldwide of Al Qaeda terrorists attempting or plotting to do so.**

*By the way, just in the event you did not know, let me furnish you the Webster's definition of "careerism,- the policy or practice of advancing one's career often at the cost of one's integrity". Maybe that sums up the whole problem!

[6] For example, at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacarias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed in the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.

disclosed to the Minneapolis agents that the Phoenix Division had, only approximately three weeks earlier, warned of Al Qaeda operatives in flight schools seeking flight training for terrorist purposes!
Nor did FBIHQ personnel do much to disseminate the information about Moussaoui to other appropriate intelligence/law enforcement authorities. When, in a desperate 11th hour measure to bypass the FBIHQ roadblock, the Minneapolis Division undertook to directly notify [redacted] FBIHQ personnel actually chastised the Minneapolis agents for making the direct notification without their approval!

6) Eventually on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis Agent, the Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted] Obviously verbal presentations are far more susceptible to mis-characterization and error. The e-mail communications between Minneapolis and FBIHQ, however, speak for themselves and there are far better witnesses than me who can provide their first hand knowledge of these events characterized in one Minneapolis agent's e-mail as FBIHQ is "setting this up for failure". My only comment is that the process of allowing the FBI supervisors to make changes in affidavits is itself fundamentally wrong, just as, in the follow-up to FBI Laboratory Whistleblower Frederic Whitehurst's allegations, this process was revealed to be wrong in the context of writing up laboratory results. With the Whitehurst allegations, this process of allowing supervisors to re-write portions of laboratory reports, was found to provide opportunities for over-zealous supervisors to skew the results in favor of the prosecution. In the Moussaoui case, it was the opposite- the process allowed the Headquarters Supervisor to downplay the significance of the information thus far collected in order to get out of the work of having to see the FISA application through or possibly to avoid taking what he may have perceived as an unnecessary career risk.[7]

[7] Another factor that cannot be underestimated as to the HQ Supervisor's apparent reluctance to do anything was/is the ever present risk of being "written up" for an Intelligence Oversight Board (IOB) "error". In the year(s) preceding the September 11th acts of terrorism.

I understand that the failures of the FBIHQ personnel involved in the Moussaoui matter are also being officially excused because they were too busy with other investigations, the Cole bombing and other important terrorism matters, but the Supervisor's taking of the time to read each word of the information submitted by Minneapolis and then substitute his own choice of wording belies to some extent the notion that he was too busy. As an FBI division legal advisor for 12 years (and an FBI agent for over 21 years), I can state that an affidavit is better and will tend to be more accurate when the affiant has first hand information of all the information he/she must attest to. Of necessity, agents must continually rely upon information from confidential sources, third parties and other law enforcement officers in drafting affidavits, but the repeating of information from others greatly adds to the opportunities for factual discrepancies and errors to arise. To the extent that we can minimize the opportunity for

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numerous alleged IOB violations on the part of FBI personnel had to be submitted to the FBI's Office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists. Since one generally only runs the risk of IOB violations when one does something, the safer course is to do nothing. Ironically, in this case, a potentially huge IOB violation arguably occurred due to **FBIHQ's failure to act**, that is, FBIHQ's failure to inform the Department of Justice Criminal Division of Moussaoui's potential criminal violations (which, as I've already said, were quickly identified in Minneapolis as violations of Title 18 United States Code Sections Section 2332b [Acts of terrorism transcending national boundaries] and Section 22 [Destruction of aircraft or aircraft facilities]). This failure would seem to run clearly afoul of the Attorney General directive contained in the "1995 Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" which **mandatorily** require the FBI to notify the Criminal Division when **"facts or circumstances are developed"** in an FI or FCI investigation "that **reasonably indicate that a significant federal crime has been, is being**, or may be committed." I believe that Minneapolis agents actually brought this point to FBIHQ's attention on August 22, 2001, but HQ personnel apparently ignored the directive, ostensibly due to their opinion of the lack of probable cause. But the issue of whether HQ personnel deliberately undercut the probable cause can be sidestepped at this point because the Directive does not require probable cause. It requires only a "reasonable indication" which is defined as "substantially lower than probable cause". Given that the Minneapolis Division had accumulated far more than "a mere hunch" (which the directive would deem as insufficient), the information ought to have, at least, been passed on to the "Core Group" created to assess whether the information needed to be further disseminated to the Criminal Division. However, (and I don't know for sure), but to date, **I have never heard that any potential violation of this directive has been submitted to the IOB or to the FBI's OPR**. It should be also noted that when making determinations of whether items need to be submitted to the IOB, it is my understanding that NSLU normally used/uses a broad approach, erring, when in doubt, on the side of submitting potential violations.

this type of error to arise by simply not allowing unnecessary re-writes by supervisory staff, it ought to be done. (I'm not talking, of course, about mere grammatical corrections, but changes of some substance as apparently occurred with the Moussaoui information which had to be, for lack of a better term, "filtered" through FBIHQ before **any action**, whether to seek a criminal or a FISA warrant, could be taken.) Even after September 11th, the fear was great on the part of Minneapolis Division personnel that the same FBIHQ personnel would continue their "filtering" with respect to the Moussaoui investigation, and now with the added incentive of preventing their prior mistakes from coming to light. For this reason, for weeks, Minneapolis prefaced all outgoing communications (ECs) in the PENTTBOM investigation with a summary of the information about Moussaoui. We just wanted to make sure the information got to the proper prosecutive authorities and was not further suppressed! This fear was probably irrational but was nonetheless understandable in light of the Minneapolis agents' prior experiences and frustrations involving FBIHQ. (The redundant preface information regarding Moussaoui on otherwise unrelated PENTTBOM communications has ended up adding to criminal discovery issues, but this is the reason it was done.)

7) Although the last thing the FBI or the country needs now is a witch hunt, I do find it odd that (to my knowledge) no inquiry whatsoever was launched of the relevant FBIHQ personnel's actions a long time ago. Despite FBI leaders' full knowledge of all the items mentioned herein (and probably more that I'm unaware of), the SSA, his unit chief, and other involved HQ personnel were allowed to stay in their positions **and, what's worse, occupy critical positions in the FBI's SIOC Command Center post September 11th.** (The SSA in question actually received a promotion some months afterward!) It's true we all make mistakes and I'm not suggesting that the HQ personnel in question ought to be burned at the stake, but, we all need to be held accountable for **serious** mistakes. I'm relatively certain that if it appeared that a lowly field office agent had committed such errors of judgment, the FBI's OPR would have been notified to investigate and the agent would have, at the least, been quickly reassigned. I'm afraid the FBI's failure to submit this matter to OPR (and to the IOB) gives further impetus to the notion (raised previously by many in the FBI) of a double standard which results in those of lower rank being investigated more aggressively and dealt with more harshly for misconduct while the misconduct of those at the top is often overlooked or results in minor disciplinary action. From all appearances, this double standard may also apply between those at FBIHQ and those in the field.

8) The last official "fact" that I take issue with is not really a fact, but an opinion, and a completely unsupported opinion at that. In the day or two following September 11th,

you, Director Mueller, made the statement to the effect that if the FBI had only had any advance warning of the attacks, we (meaning the FBI), may have been able to take some action to prevent the tragedy. Fearing that this statement could easily come back to haunt the FBI upon revelation of the information that had been developed pre-September 11th about Moussaoui, I and others in the Minneapolis Office, immediately sought to reach your office through an assortment of higher level FBIHQ contacts, in order to quickly make you aware of the background of the Moussaoui investigation and forewarn you so that your public statements could be accordingly modified. When such statements from you and other FBI officials continued, we thought that somehow you had not received the message and we made further efforts. Finally when similar comments were made weeks later, in Assistant Director Caruso's congressional testimony in response to the first public leaks about Moussaoui, we faced the sad realization that the remarks indicated someone, possibly with your approval, had decided to circle the wagons at FBIHQ in an apparent effort to protect the FBI from embarrassment and the relevant FBI officials from scrutiny. Everything I have seen and heard about the FBI's official stance and the FBI's internal preparations in anticipation of further congressional inquiry, has, unfortunately, confirmed my worst suspicions in this regard. After the details began to emerge concerning the pre-September 11th investigation of Moussaoui, and subsequently with the recent release of the information about the Phoenix EC, your statement has changed. A 100 degree metamorphosis, the official statement is now to the effect that even if the FBI had followed up on the Phoenix lead to conduct checks of flight schools and the Minneapolis request to search Moussaoui's personal effects and laptop, nothing would have changed and such actions certainly could not have prevented the terrorist attacks and resulting loss of life. With all due respect, this statement is as bad as the first! It is also quite at odds with the earlier statement (which I'm surprised has not already been pointed out by those in the media!) I don't know how you or anyone at FBI Headquarters, no matter how much genius or prescience you may possess, could so blithely make this affirmation without anything to back the opinion up than your stature as FBI Director. The truth is, as with most predictions into the future, no one will ever know what impact, if any, the FBI's following up on those requests, would have had. Although I agree that it's very doubtful that the full scope of the tragedy could have been prevented, it's at least possible we could have gotten lucky and uncovered one or two more of the terrorists in flight training prior to September 11th, just as Moussaoui was discovered, after making contact with his flight instructors. It is certainly not beyond the realm of imagination to hypothesize that Moussaoui's fortuitous arrest alone, even if he merely was the 20th hijacker, allowed the hero passengers of Flight 93 to overcome their terrorist hijackers and thus spare more lives on the ground. And even greater

casualties, possibly of our Nation's highest government officials, may have been prevented if Al Qaeda intended for Moussaoui to pilot an entirely different aircraft. There is, therefore, at least some chance that discovery of other terrorist pilots prior to September 11th may have limited the September 11th attacks and resulting loss of life. Although your conclusion otherwise has to be very reassuring for some in the FBI to hear being repeated so often (as if saying it's so may make it be so), I think both of your statements demonstrate a rush to judgment to protect the FBI at all costs. I think the only fair response to this type of question would be that no one can pretend to know one way or the other.

Mr. Director, I hope my observations can be taken in a constructive vein. They are from the heart and intended to be completely apolitical. Hopefully, with our nation's security on the line, you and our nation's other elected and appointed officials can rise above the petty politics that often plague other discussions and do the right thing. You do have some good ideas for change in the FBI but I think you have also not been completely honest about some of the true reasons for the FBI's pre-September 11th failures. Until we come clean and deal with the root causes, the Department of Justice will continue to experience problems fighting terrorism and fighting crime in general.

I have used the "we" term repeatedly herein to indicate facts about others in the Minneapolis Office at critical times, but none of the opinions expressed herein can be attributed to anyone but myself. I know that those who know me would probably describe me as, by nature, overly opinionated and sometimes not as discreet as I should be. Certainly some of the above remarks may be interpreted as falling into that category, but I really do not intend anything as a personal criticism of you or anyone else in the FBI, to include the FBIHQ personnel who I believe were remiss and mishandled their duties with regard to the Moussaoui investigation. **Truly my only purpose is to try to provide the facts within my purview so that an accurate assessment can be obtained and we can learn from our mistakes.** I have pointed out a few of the things that I think should be looked at but there are many, many more.[8] An honest acknowledgment of the FBI's mistakes in this and other cases should not lead to increasing

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[8] For starters, if prevention rather than prosecution is to be our new main goal, (an objective I totally agree with), we need more guidance on when we can apply the Quarles "public safety" exception to Miranda's 5th Amendment requirements. **We were prevented from even attempting to question Moussaoui on the day of the attacks when, in theory, he could have possessed further information about other co-conspirators.** (Apparently no government attorney believes there is a "public safety" exception in a situation like this?!)

the Headquarters' bureaucracy and approval levels of investigative actions as the answer. Most often, field office agents and field office management on the scene will be better suited to the timely and effective solution of crimes and, in some lucky instances, to the effective prevention of crimes, including terrorism incidents. The relatively quick solving of the recent mailbox pipe-bombing incidents which resulted in no serious injuries to anyone are a good example of effective field office work (actually several field offices working together) and there are hundreds of other examples. Although FBIHQ personnel have, no doubt, been of immeasurable assistance to the field over the years,[9] I'm hard pressed to think of any case which has been **solved** by FBIHQ personnel and I can name several that have been screwed up! **Decision-making is inherently more effective and timely when decentralized instead of concentrated.**

Your plans for an FBI Headquarters' "Super Squad" simply fly in the face of an **honest** appraisal of the FBI's pre-September 11th failures. The Phoenix, Minneapolis and Paris Legal Attache Offices reacted remarkably exhibiting keen perception and prioritization skills regarding the terrorist threats they uncovered or were made aware of pre-September 11th.[10] **The same cannot be said for the FBI Headquarters' bureaucracy and you want to expand on that?!!** Should we put the counterterrorism unit chief and SSA who previously handled the Moussaoui matter in charge of the new "Super Squad"?! You are also apparently disregarding the fact that Joint Terrorism Task Forces (JTTFs), operating out of field divisions for years, (the first and chief one being New York City's JTTF), have successfully handled numerous terrorism investigations and, in some instances, successfully prevented acts of terrorism. There's no denying the need for more and better intelligence and intelligence management, but you should think carefully about how much gate keeping power should be entrusted with any HQ entity. If we are indeed in a "war", shouldn't the Generals be on the battlefield instead of sitting in a spot removed from the action while still attempting to call the shots?

I have been an FBI agent for over 21 years and, for what it's worth, have never received any form of disciplinary

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[9] For example, as a Chief Division Counsel, I am in contact with and receive valuable assistance from the FBI's Office of General Counsel and other FBIHQ entities on a daily basis. Almost all FBI employees assigned to Headquarters are good, decent people and are effectively doing their jobs. But all bureaucracies have their problems and their limitations.

[10] I should detail here the night and weekend hours worked by the Minneapolis agents who, uncovered Moussaoui and who immediately recognized the need to stay on the job with the critical task.

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action throughout my career. From the 5th grade, when I first wrote the FBI and received the "100 Facts about the FBI" pamphlet, this job has been my dream. I feel that my career in the FBI has been somewhat exemplary, having entered on duty at a time when there was only a small percentage of female Special Agents. I have also been lucky to have had four children during my time in the FBI and am the sole breadwinner of a family of six. Due to the frankness with which I have expressed myself and my deep feelings on these issues, (which is only because I feel I have a somewhat unique, inside perspective of the Moussaoui matter, the gravity of the events of September 11th and the current seriousness of the FBI's and United States' ongoing efforts in the "war against terrorism"), I hope my continued employment with the FBI is not somehow placed in jeopardy. I have never written to an FBI Director in my life before on any topic. Although I would hope it is not necessary, I would therefore wish to take advantage of the federal "Whistleblower Protection" provisions by so characterizing my remarks.

Sincerely,

Coleen M. Rowley
Special Agent and
Minneapolis Chief Division Counsel

copies to: U.S. Congressional Special Staff looking into this matter;
FBI Office of Professional Responsibility (re Whistleblower data);
U.S. Senator Dianne Feinstein; and
U.S. Senator Richard Shelby

~~SECRET~~

Department of Justice

WEDNESDAY, JUNE 5, 2002
WWW.USDOJ.GOV

(202) 514-2008
TDD (202) 514-1888

NATIONAL SECURITY ENTRY-EXIT REGISTRATION SYSTEM

Strengthening Our Entry-Exit Registration System To Protect Americans From Possible Terrorist Threats

Understanding the Problem: Congress Has Mandated an Entry-Exit Registration System, Yet Current Regulations and Enforcement Do Not Adequately Track Entry and Exit, Particularly of Individuals Who Pose Potential National Security Risks

Deficiencies in the Immigration System Do Not Allow the Government to Ensure Those Holding Non-Immigrant Visas Are Acting in Accordance with Stated Plans. The events of September 11 highlighted weaknesses in the current immigration system, which does not provide for the collection of information on the activities and whereabouts of aliens holding non-immigrant visas. We do not know whether such aliens follow their stated plans while in the United States, where to find them or when they have overstayed their visas. We collect no fingerprint or other biometric data from the vast majority of aliens.

An Entry-Exit Registration System Already Exists Under Current Law:

- ✓ **Under Current Law It Is the Duty of All Aliens to Register and Be Fingerprinted – However, Regulations Have Often Waived This Legal Duty.** Under the Immigration and Nationality Act, it is the duty of any alien over 14 years old, who remains in the United States more than 30 days to be registered and fingerprinted (INA section 262). Under current law (INA section 263), the Attorney General can require the registration and fingerprinting of any class of aliens, other than those admitted for permanent residence. In most cases, the regulations have waived the fingerprinting requirements.

- ✓ **Current Regulations Have Limited Registration to Aliens from Iraq, Iran, Sudan and Libya.** Because of regulatory exemptions, rigorous registration and fingerprinting is currently required only for nationals of Iraq, Iran, Sudan, and Libya who are required to be fingerprinted and photographed at the port of entry, under 8 C.F.R. § 264.1(f). The Attorney General has the authority to expand this list of countries through the publication of a Federal Register notice.

Taking Steps to Further Protect America: Proposed Registration Under New System

The New System Will Better Track Aliens Who Might Present the Highest Threat - the Initiative Will:

- ✓ Deploy a pilot entry-exit program as quickly as possible, focusing on aliens who present the highest risk of involvement in terrorist organizations.
- ✓ Disrupt the activities of terrorists residing in the United States under false pretenses.
- ✓ Notify the FBI and other law enforcement agencies when aliens purporting to visit the United States for legitimate reasons deviate from their stated plans.
- ✓ Notify the FBI and other law enforcement agencies when aliens overstay the terms of their non-immigrant visas.
- ✓ Match the fingerprints of high-risk aliens entering against the fingerprints of known or suspected terrorists at the port of entry.
- ✓ Obtain fingerprint and photograph data on aliens from high-risk countries for law enforcement use.
- ✓ Obtain current address, telephone, and email information on aliens from high-risk countries.
- ✓ Enforce the law requiring aliens to notify the Attorney General when they change address.

The New System Will Require Additional Registration for Individuals Who Potentially Pose National Security Risks. Individual visitors will be evaluated as to risk of involvement with terrorist activities, and visitors who fall into elevated categories of national security concern will be subject to additional registration requirements. The INS and the State Department will work together to identify these individuals at or prior to entry. The criteria that are used to identify such visitors will be continually updated to reflect our evolving intelligence on terrorist threats. This initiative will require fingerprinting, photographing, and registration requirements on the following:

(1) All nationals of Iran, Iraq, Libya, Sudan and Syria
(2) Certain nationals of other countries whom the State Department and the INS determine to be an elevated national security risk
(3) Aliens identified by INS inspectors at point of entry upon specific criteria to be established by the Department of Justice.

Fingerprint Data to Identify Criminals, Wanted Aliens, or Terrorists Will Be Used at Port of Entry. Two-fingerprint scanning capabilities already exist at all ports of entry. Recently, the Department of Justice has developed an integrated database using two-fingerprint sets derived from approximately 100,000 aliens. The fingerprints of aliens in secondary inspection are currently being matched against the entire database to identify wanted felons in less than two minutes. The early results of this program are extremely promising: the INS is receiving an average of 67 "hits" per week, and over 1,400 individuals have been apprehended from January through May, 2002.

Requires 30-day and Annual Registration with Local INS Offices. The INS will enforce the law that requires aliens who potentially pose national security risks, who remain in the United

States for 30 days or more, to appear in person at an INS field office and register. Aliens will be required to provide:

(1) Proof of tenancy at stated U.S. address (e.g., rental contract, mortgage)
(2) Proof of enrollment at educational institution (for student-visa holders)
(3) Proof of employment (for work-visa holders)

These aliens must visit INS offices at the 30-day point and then every 12 months thereafter until the alien departs from the United States. The 12-month interval between each registration follows the model used in most European countries. Failure to register would result in the alien's name being turned over to law enforcement, and the alien would be subject to a $1,000 fine, incarceration and possible removal from the country.

Requiring Registration of Foreign Visitors Who May Pose a National Security Concern to Provide Any Change in Address Within Ten Days. Aliens who are subject to this special registration will be told at the point of entry that they are required to provide any change of address within ten days. Up until now, this law has rarely been enforced. Aliens will be able to meet this requirement by mailing the required information to the INS.

Collection of Information from a Targeted Category of Aliens from Designated Countries Who Are Already in the U.S. The law requires aliens from designated countries to provide a current address to the INS and to "furnish such additional information as the Attorney General may require." Exercising this provision on a one-time basis, the same information required of incoming aliens at the 30-day registration point may be required of certain aliens from designated countries who are already residing in the United States.

Exit Reporting. The aliens subject to this special registration will also be required to notify an INS agent of their departure from the United States at the exit port. Such exit records are necessary to help identify and apprehend those aliens who overstay their visas. An alien's failure to report his exit would render him ineligible to return the United States.

Putting Our Registration System in International Context: Europeans Already Have Registration Systems

European Countries Already Have Systems to Register Aliens. Our registration system will be similar to those systems already in place in most European countries. Some European countries maintain systems that require even closer tracking:

- **Aliens in France Must Register Within 7 Days.** An alien who stays for an extended period of time in France, for example, must register with the local prefecture of the national police within one week of arriving in the country, every 12 months, and whenever he changes address. Our proposed initiative combines the European

registration model with an entry-exit monitoring system.

- **Aliens in Great Britain Are Required to Register Within 7 Days.** Registration is required within 7 days and whenever an alien changes address, university or job, he must notify the local police station and provide passport, visa, proof of financial means, proof of enrollment in school or employment, and proof of a place to live.

- **Aliens in Germany Must Register and Carry Registration Papers on Their Person at All Times.** In Germany, an alien must register when he establishes residence and whenever he changes address. He must provide his passport and documentation of intended activities while in the country and carry registration papers on his person at all times.

Country	Registration required at time of entry?	Periodic registra-tion?	Registration at other times?	Where regis-tration occurs	What alien must bring to register	Identification card/papers required on person while in country?
Switzerland	Yes—within 8 days.	Yes—ever y 12 months.	Yes—whenever alien changes address, university, or job.	Cantonal police station.	Passport, visa, address information, proof of enrollment or employment.	Not required.
United Kingdom	Yes—within 7 days.	No.	Yes—whenever alien changes address, university, or job.	Local police station.	Passport, visa, proof of financial means, proof of enrollment or employment, proof of accommodation	Not required.
Germany	Yes—when alien establishes residence.	No.	Yes—whenever alien changes address.	Local police station.	Passport, documentation of intended activities while in country.	Yes—must carry registration papers on person at all times.
Spain	Yes—within 10 days to 6 months, depending on nationality.	Yes—ever y 12 months.	No.	Local division of national police.	Passport, address, proof of financial means, letter from university or contract from employer.	Yes—student must carry student identification card; worker must carry work permit.

France	Yes—within 7 days.	Yes—ever y 12 months.	Yes—whenever alien changes address, school, or employer.	Local prefecture of national police	Passport, visa, birth certificate, letter from university or employer, photograph	Yes—alien must carry carte de sejour on person at all times.
Netherlands	Yes—within 3 days (to obtain residence permit).	Yes—ever y 12 months.	Yes—whenever alien changes address, school, or employer.	Local division of national police (aliens police div.)	Passport, birth certificate, apostille stamp on documents, photograph, proof of enrollment or employment, results of TB test, police report from home country.	Not required.

Understanding the Logistics: How the New System Will Work

If an Alien Arrives Who Potentially Could Pose a National Security Risk, He Is Immediately Fingerprinted and Photographed. An alien subject to special registration with a two-year work visa, for example, would be required to do the following: upon arrival at the INS port of entry in the United States, he would be directed to a secondary inspection station. There, he would immediately be fingerprinted (two-fingers only) and photographed.

Alien's Fingerprints Will Be Run Against the IAFIS Database of Known Criminals and a Database of Known Terrorists. His fingerprints would be run against the IAFIS database of known criminals and known terorists, a database of known terrorists, and the INS IDENT database to determine if he had previously entered the country under a different name.

Alien Would Be Asked to Provide Information About His Plans in the U.S. While the computer check was taking place, he would be asked to provide detailed information about his plans in the United States and about his past history in his home country, as well as contact information.

The Process Would Be Quick and Require Follow-Up. The entire process would take 5-10 minutes. Within 30 days, he would have to report to an INS office and provide more detailed information consistent with his visa, including proof of residence (e.g., a rental contract) and proof of employment (e.g., a pay statement from his employer). Twelve months thereafter he would have to return to confirm the information.

An Alien Must Notify The INS:

- ✓ If he changed his address, he would be required to notify the INS by mail.

- ✓ If he left the country, he would have to report briefly to an INS station at the port of departure.

If An Alien Failed To Comply, His Name Would Be Added To "Wants And Warrants" List. If an alien failed to register or overstayed his visa, the INS computer system would immediately alert the INS to the fact. His name and information would then be added to the National Crime Information Center (NCIC) "wants and warrants" list. If local police happened to stop him because of a traffic violation, when they checked the NCIC list they would discover that he was wanted. The police would then be able to detain him, call an INS Quick Response Team, and transfer him to the custody of the INS. Depending upon the nature of his violation, he would at a minimum be removable, and possibly be subject to criminal prosecution.

(01/26/1998)

FEDERAL BUREAU OF INVESTIGATION

Precedence: ROUTINE **Date:** 05/18/1998

To: Oklahoma City

From: SA [redacted]
Squad 4
Contact: Ext. 3753

Approved By: [redacted]

Drafted By: [redacted]

Case ID #: 279-0
199-0

Title: WEAPONS OF MASS DESTRUCTION

Synopsis: Information regarding flight training by Middle Eastern males.

Details: SA [redacted] Chief Pilot, Oklahoma City Division, advised that he has observed large numbers of Middle Eastern males receiving flight training at Oklahoma airports in recent months. SA [redacted] states this is a recent phenomenon and may be related to planned terrorist activity. SA [redacted] speculates that light planes would be an ideal means of spreading chemical or biological agents.

◆◆

(Rev. 08-28-2000)

SECRET

FEDERAL BUREAU OF INVESTIGATION

Precedence: PRIORITY Date: 04/05/2001

To: All Field Offices Attn: ADIC;
SAC
CDC
FCI/IT Supervisors

Counterterrorism Attn: AD Watson
National Security Attn: AD Gallagher
Investigative Services Attn: AD Alba
General Counsel Attn: GC Parkinson

From: Office of the General Counsel
National Security Law Unit, Room 7975
Contact: UC Michael J. Woods, 202-324-3951

Approved By: Freeh Louis J
Pickard Thomas J
Gallagher Neil J
Watson Dale L
Turchie Terry D
Parkinson Larry R
Bowman M C

Drafted By: Woods Michael J:mjw

Case ID #: (U) 66F-HQ-A1247863

Title: (U) FOREIGN INTELLIGENCE SURVEILLANCE ACT
PROCEDURES TO ENSURE ACCURACY

Synopsis: (U) Enacts Bureau-wide procedures to ensure the accuracy of factual submissions to the FISA Court.

(U) Classified By: 39345 NSLB/OGC
Reason: 1.5(c)
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Enclosures: (U) FISA Verification Form

Details: (U) In recent years, applications for electronic surveillance or physical search authority submitted to the Foreign Intelligence Surveillance Court (FISC) have evolved into increasingly complex documents. The heart of these applications is the declaration, signed by a supervisory special agent at FBIHQ, which sets out the factual basis supporting probable cause

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for the requested authority and which conveys to the FISC any other facts relevant to the Court's findings. In particular, the declaration recites the details of any connection between the proposed FISA subject and any ongoing or contemplated criminal investigation/prosecution. This information grounds the Court's finding of probable cause for the requested authority, and allows the Court to confirm that collection of foreign intelligence information remains the FBI's primary purpose.

(U) The information currently required for a FISA declaration, in many cases, is extensive, and often includes descriptions of operations, criminal investigations, or prosecutions well outside the personal, or even programmatic, knowledge of the Headquarters supervisor who will serve as the declarant. The declarant, therefore, relies on the accuracy of the information submitted by the field office; and OIPR, the Attorney General, and the Court rely on the declarant for a complete and accurate recitation of the relevant facts. It is imperative that the facts contained in FISA declarations are accurate. The goal of the procedures set out below is to ensure accuracy with regard to three specific areas: (1) the specific facts supporting probable cause for the authority; (2) the existence and nature of any related criminal investigations or prosecutions involving the subject of the FISA; and (3) the existence and nature of any prior or ongoing asset relationship between the subject and the FBI.

(U) Effective immediately, the following procedures are to be observed in all FBI applications to the FISA Court (including both initiation and renewal applications). These procedures are not intended to alter the existing "pilot project" arrangements in place at WFO and NY. Existing "pilot project" documentation should be adjusted, if necessary, to cover the requirements of these procedures.

Procedures (U)

1. (U) Upon each request for the initiation or renewal of FISA authority, the field office requesting the authority shall conduct the following records searches:

   a. A search for the FISA target in the ACS system. (U)

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i. The purpose of the ACS search is to discover whether the FISA target is also the subject of a documented FBI criminal investigation, past or present. Note, if the FISA target is a group, the field must consult with headquarters to identify which individuals of that group must be vetted to determine whether they are or were the subject of a criminal investigation. (U)

ii. The ACS search should include a search on the target's name, spelling variants of the name, and any other available information (e.g., Social Security number, INS number, etc.) that logically would produce a correct identification of ACS records regarding the target. (U)

iii. The requirement of conducting an ACS search will not apply to cases in which the target is an establishment or a person that, by virtue of their diplomatic status, is immune from criminal prosecution. (U)

b. A search for asset and informant files of that field office (to include 134, 137, and 270 files). (U)

i. The purpose of the asset/informant search is to discover whether or not the target had any current or prior relationship of this type with the FBI. Note that this is a check for the existence of files, any actual review of the files must be coordinated with the case agent and squad supervisor responsible for the relevant files. (U)

c. The field office will document the results of these searches, and transmit this documentation to the headquarters supervisor responsible for the FISA application. (U)

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i. The purpose of transmitting this information to the headquarters supervisor is to provide that supervisor, who will be the declarant on the FISA, with reliable information on these topics to support his/her sworn declaration. (U)

(1) To that end, the field office should take steps to ensure that the search results are updated if a significant amount of time (more than 120 days) has passed between the initial searches and the preparation of the FISA package. (U)

(2) If the field office is aware of information relevant to these topics through means other than the required searches, this information should also be forwarded to the headquarters supervisor. (U)

ii. The results of the searches, including the name of the person who conducted the searches and the date(s) of the searches should be documented. The attached "FISA Verification Form" or an equivalent document will be sufficient to record standard reviews and records checks that produce negative results. More substantive communications, such as that produced by records checks with positive results, should be communicated by EC. The case agent and squad supervisor should review and approve whatever communication is used to transmit this information to Headquarters. The form, or other communications, also can be transmitted to the headquarters supervisor by e-mail or secure fax. (U)

iii. If the results of the search are anything other than negative, the field office should communicate all relevant information to the headquarters supervisor, including the file numbers of any related criminal investigations or number identifying the target's asset/informant status. If the target is, or was, an asset of the field office, or if there is a criminal investigation related to the target in that same field office, it will be the field office's responsibility to forward a full description of the asset relationship/related criminal case to the headquarters supervisor (as noted above, this communication should be coordinated with the squad responsible for the asset/informant). Such descriptions of criminal investigations should not include Grand Jury (Rule 6(e)) information. Any uncertainty as to whether information in the description constitutes Grand Jury information should be addressed by the field office in consultation with the relevant AUSA. (U)

iv. This information should be transmitted to the headquarters supervisor along with the request for FISA initiation or renewal. For field offices that send FISA renewal requests directly to OIPR, the search results must also be transmitted to the headquarters supervisor along with the headquarters notice of renewal. As noted above, field offices with direct OIPR contact should ensure that descriptions of criminal investigations do not include Grand Jury information. (U)

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2. (U) The headquarters supervisor, upon receiving a request for renewal/initiation of FISA authority, shall acquire the following information:

a. The supervisor shall contact the Asset and Informant Unit, Investigative Services Division, and request a check of the target's name for asset/informant status Bureau-wide. (U)

i. If the results of this check are negative, the supervisor shall document the search. (U)

ii. If the results are positive, it shall be the responsibility of the supervisor to contact the relevant field office(s) and obtain a sufficient summary of the target's asset/informant status. (U)

b. The supervisor, based on the results of the field office's records search, shall contact the squad supervisors responsible for any criminal investigations related to the target. The supervisor shall gather information on the extent to which the target is involved in the investigation, the current status of the investigation, the involvement of prosecutors in the investigation, any relevant court proceedings. The supervisor shall summarize this information and communicate it promptly to OIPR. If it has been determined that the FISA target is, or has been an informant or asset of the FBI, a brief description of the relationship will need to be provided to OIPR. However, no such description shall be passed to OIPR without full coordination between the headquarters supervisor, the Asset and Informant Unit, and all relevant components (field office(s), CID) involved in the handling of the asset or informant. The supervisor shall follow up on requests from

OIPR for additional or updated information on any related criminal proceedings. (U)

3. (U) Upon receipt of the draft FISA application from OIPR, the headquarters supervisor shall take the following steps:

a. The headquarters supervisor shall ensure that the entire Declaration, and any other components of the application containing factual information (such as supplemental exhibits, transcripts, etc.), are transmitted to the case agent in the field office as soon as possible. (U)

i. The transmittal may be by secure fax, by GroupWise e-mail (if the documents are available in electronic form and are classified at no higher that the "Secret" level), or by other secure means. (U)

ii. In field offices that receive draft FISA applications directly from OIPR, the headquarters supervisor will not be responsible for transmittal as described in step 3(a). (U)

iii. This step may be revised pending full implementation of the Office of General Counsel FISA Unit (OGCFU). When the OGCFU infrastructure (including secure electronic connectivity) is in place, OGCFU may directly oversee transmittal of draft packages to the field, thus relieving the headquarters supervisor of responsibility for this step. (U)

b. The headquarters supervisor shall, upon receiving his/her copy of the draft FISA application, review the application and determine whether any field offices, other than the originating field office, need to review the declaration to ensure factual

accuracy. The most common situation giving rise to this need will be declarations that contain descriptions of related criminal investigations or prosecutions in other field offices. The headquarters supervisor will then ensure that those field offices receive a copy of the appropriate portions of the draft declaration (or other appropriate parts of the FISA application). (U)

i. In some cases, where the description of the related criminal investigation is brief and self-contained, it may only be necessary to transmit a small portion of the declaration that specifically addresses the criminal investigation and any "wall" procedures governing the passage of FISA information to criminal investigators. In other cases, the supervisor may need to transmit a larger block of the declaration to provide the necessary context. In making this determination, supervisors should bear in mind the security of the information contained in the declaration, the need to know of the recipients, and the possibility of dissemination to prosecutors. (U)

ii. The supervisor should document all such transmittals on the FISA verification form and should retain copies of documents associated with the transmittals (e.g., faxes, e-mails) in the headquarters file. The documentation should specify precisely which portions of the declaration were provided for review to each field office (e.g., entire declaration, pages 1-10, etc.). (U)

4. (U) Upon receipt of a draft FISA declaration (or portion thereof) for review, the case agent in the field office shall do the following:

a. Promptly review the declaration for factual accuracy, make necessary edits, and communicate any revisions to the headquarters supervisor (or to OIPR, in field offices with direct communication to OIPR authorized). (U)

b. The case agent may need to involve others in the review. For example, when the declaration contains a description of a criminal investigation in that field office, the case agent should contact the case agent of the criminal investigation and allow the criminal case agent to review the relevant portions of the declaration. (Note: in some instances, it will be the criminal case agent who receives the portion of the FISA; i.e., in field offices conducting a related criminal investigation). (U)

c. When the declaration or portion of a declaration to be reviewed describes a criminal prosecution or other activities conducted by the Department of Justice or an individual United States Attorney's Office, the case agent for the criminal investigation shall arrange for the relevant Assistant United States Attorney or Department of Justice prosecutor to review that portion of the declaration (including the description of any "wall" procedures). The AUSA or prosecutor may revise the text to ensure that it contains an accurate and up-to-date description of the criminal proceedings. The AUSA or prosecutor should then sign the appropriate block in the FISA verification form (or provide an equivalent document). (U)

d. The field office case agent(s), and the relevant squad supervisor(s) will document their review on the FISA verification form and will transmit that form (or equivalent

description of their review) to the headquarters supervisor. (U)

e. In disseminating portions of the declaration to criminal investigators and/or prosecutors for this review, the field office must not disseminate any information derived from the actual FISA coverage, as such information remains subject to the "wall" procedures described in the FISA. (U)

5. (U) Prior to submitting the final FISA application package for the Director's certification, the headquarters supervisor will do the following.

a. Collate all responses from field reviews and records checks and ensure that the procedures described above have been performed and documented. Copies of the FISA Verification Form(s) or other documentation should then be attached to the FISA package before it is submitted for certification. (U)

b. In reviewing the documentation, the headquarters supervisor should evaluate whether or not certain reviews or records checks need to be updated given the passage of time between the review/records check and the production of the final version of the FISA package. (U)

c. A copy of all records check and verification documentation should accompany the final version of the FISA package and be available to the declarant and the OIPR attorney during the actual Court session. (U)

6. (U) The headquarters supervisor shall not sign, nor shall his or her supervisors approve, any FISA application for which these procedures have not been completed or in which there is information that the supervisor cannot verify either through his or her personal knowledge, through the means described in these procedures, or through some other reliable means.

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In such cases, either the unverified information must be removed from the declaration prior to signature, or the FISA application will be held until the necessary verification procedures are complete.

7. (U) In emergency situations, the Assistant Director, NSD and the Assistant Director, CTD, personally may waive specific requirements imposed by these procedures in individual FISA applications, provided that this waiver is documented in the case file and is communicated immediately to OIPR.

(U) In approximately 180 days, these procedures will be submitted for incorporation into the National Foreign Intelligence Program Manual (NFIPM). During that time, headquarters divisions and field offices should closely monitor the implementation and operation of these procedures. Suggestions for changes or refinements in the procedures should be submitted to Headquarters within that time. A copy of all such feedback should be forwarded to the Unit Chief, National Security Law Unit, OGC, who will be collating all such responses.

(U) Recipients should arrange for appropriate training of affected components on the new procedures and FISA matters generally. Requests for training should be directed to NSD or CTD; legal training will be available from the NSLU, OGC.

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Enclosure:

DRAFT FISA VERIFICATION FORM

FISA Target Name: _____

Records Check:

ACS: By: _____ _____ _____
(print name/title) (initials) (date)

Asset Files: By: _____ _____ _____
(field) (print name/title) (initials) (date)

Asset and Informant Unit By: _____ _____ _____
(FBIHQ) (print name/title) (initials) (date)

Review of Draft FISA Application:

FBIHQ Supervisor:

Draft FISA Package Received: _____
(date)

Field Office Review:

_____ _____ _____ _____
(office) (case agent) (date) (supervisor/date)

Reviewed Entire Declaration/Pages _____ to _____ of Draft

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Additional Review (if applicable)

Criminal Case Description, "Wall" Procedures Reviewed by:

_____ _____ _____ _____
(office) (case agent) (date) (supervisor/date)

Reviewed Entire Declaration/Pages _____ to _____ of Draft

U.S. Attorney's Office/Department of Justice Review:

_____ _____
(name/title/office) (date)

Reviewed pages _____ to _____ of Draft Declaration

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LEAD (s):

Set Lead 1:

ALL RECEIVING OFFICES

(U) Distribute to all FCI or IT supervisory personnel and any other personnel involved, or potentially involved, in the use of Foreign Intelligence Surveillance Act (FISA) authorities.

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TESTIMONY OF GLENN A. FINE
Inspector General, U.S. Department of Justice

Before the Senate Committee on the Judiciary
June 6, 2002

Mr. Chairman, Senator Hatch, and Members of the Committee on the Judiciary:

I appreciate the opportunity to appear before the Committee to discuss the work of the Office of the Inspector General (OIG) relating to counterterrorism and national security issues in the Department of Justice (Department).

This morning, I plan to highlight several ongoing and recently completed OIG reviews in the Immigration and Naturalization Service (INS), the Federal Bureau of Investigation (FBI), and other Department components that relate to counterterrorism. In addition, I will describe a review we have initiated that will examine the FBI's handling of information and intelligence prior to the September 11 terrorist attacks, including a document known as the "Phoenix EC," and issues raised in a May 21, 2002, letter to Director Mueller from FBI Special Agent Coleen Rowley. Finally, I will address the importance of creating a culture in the FBI that encourages employees to report problems or misconduct in their agencies, and I will discuss the OIG's role in investigating complaints of whistleblower retaliation.

Since the September 11 terrorist attacks, the OIG has shifted many of its oversight resources to match the Department's priority on counterterrorism issues. We are expending significant resources examining programs and operations that relate to the Department's ability to detect and deter terrorism in the United States.

At the outset of my remarks, let me express my respect for many the employees in Department components like the FBI and the INS who serve on the front lines in our nation's counterterrorism efforts. While the OIG has found significant deficiencies in INS and FBI systems and operations over the years, this should in no way diminish the important contributions that thousands of employees at these agencies make on a daily basis. I offer my comments and concerns today in the same vein that we present findings from our audits, inspections, and special reviews – with the intent to help improve the Department's ability to better accomplish its critical mission.

I. OVERSIGHT OF INS PROGRAMS AFFECTING COUNTERTERRORISM AND NATIONAL SECURITY

A. INS Contacts with Two September 11 Terrorists

Less than three weeks ago, the OIG released a 188-page report that examined why the INS mailed forms notifying a Florida flight school that two September 11 terrorists had received approval to change their immigration status from "visitors" to "students" six months after the terrorists attacks. The mailing of these forms raised questions about the INS's handling of change of status applications for Mohamed Atta and Marwan Alshehhi and their three admissions into the United States in 2000 - 2001. The incident also raised serious concerns about the INS's monitoring and tracking of foreign students in the United States.

The OIG found that the INS's adjudication of Atta's and Alshehhi's change of status applications and its notification to the flight school were untimely and significantly flawed. First, the INS took more than 10 months to adjudicate the two men's applications. As a result, Atta's and Alshehhi's applications were not adjudicated until July and August 2001, respectively, well after they had finished their flight training course at the Florida flight school. Second, the INS adjudicator who approved their applications did so without adequate information, including the fact that Atta and Alshehhi had left the country two times after filing their applications, which meant they had abandoned their request for a change of status. And third, even after the INS took 10 months to approve the applications, the notification forms were not sent to the Florida flight school for an additional seven months because the INS failed to adequately supervise a contractor who processed the documents.

Atta's and Alshehhi's cases highlight important weaknesses in the INS's handling of foreign students. Historically, the INS devoted insufficient attention to foreign students, and its current, paper-based tracking system is inefficient, inaccurate, and unreliable. SEVIS, the new Internet-based system the INS is developing, has the potential to dramatically improve the INS's monitoring of foreign students. But we found that it will not solve all the problems in the INS's monitoring system.

Unless the INS devotes sufficient resources and effort to implement and use SEVIS effectively, many problems will continue to exist. Among other things, the INS must ensure that it fully reviews the schools certified to enroll foreign students (currently more than 70,000), make certain that accurate and timely information is entered into SEVIS, provide and enforce clear guidance for INS officers and schools about their responsibilities and the procedures related to foreign students, require that school officials and INS employees are trained properly on these requirements and procedures, and ensure that

information in SEVIS about schools and students is used effectively by the INS to detect and deter abuse.

Our report offers 24 recommendations to help address the problems that Atta's and Alshehhi's cases highlighted and that our review of the INS foreign student program revealed. We believe these recommendations will improve the usefulness of SEVIS and help address the serious deficiencies we found in our review. While many of these recommended changes will require additional resources, we believe these efforts are necessary for the INS to improve its handling and monitoring of foreign students.

B. Automated I-94 System

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 directed the INS to develop an automated entry and exit control system that would collect a record for every alien departing the United States and automatically match these departure records with the record of the alien's arrival. This automated system was envisioned to replace the manual system of collecting I-94 cards and to enable the INS, through on-line searching procedures, to identify lawfully admitted nonimmigrants who remain in the United Sates beyond the period authorized.

In response to this requirement, the INS introduced a pilot system in 1997 to automate the processing of air passenger I-94 forms. This automated I-94 system captured arrival and departure data electronically and uploaded non-U.S. citizen data to an INS database.

In August 2001, the OIG issued an audit of the design and implementation of the automated I-94 system and found that the INS had not properly managed the project. Despite having spent $31.2 million on the system from fiscal year (FY) 1996 to FY 2000, the INS: (1) did not have clear evidence that the system meets its intended goals; (2) had won the cooperation of only two airlines; (3) was operating the system at only a few airports; and (4) was in the process of modifying the system. INS officials estimated that an additional $57 million would be needed for FY 2001 – FY 2005 to complete the system. These projections include development, equipment, and operation and maintenance costs.

As a result of our concerns, we made a series of recommendations to help ensure that the INS rigorously analyzes the costs, benefits, risks, and performance measures of the automated I-94 system before proceeding with further expenditures. Subsequent to our audit and the September 11 attacks, the INS decided that resources should be devoted to developing the entry-exit system required by the USA Patriot Act rather than continuing to spend money

revamping the automated I-94 system. Consequently, the INS officially terminated the automated I-94 project on February 18, 2002.

C. Follow-up Reviews

In the six months following the September 11 attacks, the OIG initiated and completed a series of follow-up reviews that examined the INS's efforts to address national security deficiencies identified in previous OIG inspections. The OIG examined the INS's progress in securing the northern border, linking INS and FBI automated fingerprint identification systems, improving the Visa Waiver Program, addressing security concerns regarding the Transit Without Visa Program (TWOV), and tracking nonimmigrant overstays. In each of these follow-up reviews, the OIG found that many of the security concerns we identified in our original reports continued to exist.

- **The Border Patrol's Efforts to Improve Security Along the Northern Border:** We examined the progress the Border Patrol had made in improving the security of the northern border since the OIG issued an inspection report on the subject in February 2000, *Border Patrol Efforts Along the Northern Border.* Our follow-up review found that the INS had made some improvements that enhanced border security, including increased international and multi-agency cooperation. However, we found that northern border sectors had received a minimal number of additional Border Patrol agents and no new support staff. Consequently, many Border Patrol stations still could not operate 24 hours a day, 7 days a week. In addition, the Border Patrol's communications system remained inadequate, and a critical shortage of air support continued. We concluded that increased staffing and resources for the northern border continues to be a critical priority to help control illegal immigration and enhance national security.

- **Status of IDENT/IAFIS Integration:** We reviewed the status of efforts to integrate the INS's automated biometric fingerprint identification system (IDENT) and the FBI's integrated automated fingerprint identification system (IAFIS). This review, conducted in response to a request by the Senate Judiciary Committee's Subcommittee on Technology, Terrorism, and Governmental Information, followed up on two prior OIG reviews, *Review of the Immigration and Naturalization Service's Automated Biometric Identification System (IDENT)* (March 1998), and *The Rafael Resendez-Ramirez Case: A Review of the INS's Actions and the Operation of its IDENT Automated Fingerprint Identification System* (March 2000). The primary finding of our follow-up review, similar to our prior reports' conclusions, was that the Department and its components have moved slowly toward integrating the two fingerprint systems and that full integration of IDENT and IAFIS remains years

away. We recommended that the Department continue to seek linkage of the FBI and INS biometric identification systems and continue to use IDENT while this integration is proceeding. We concluded that IDENT workstations should be deployed to additional INS sites pending full integration with IAFIS because IDENT allows a rapid check of aliens seeking entry into the United States. As an interim measure, we also recommended adding fingerprint records for aliens wanted in connection with crimes to the IDENT lookout database.

- **Visa Waiver Program:** The Visa Waiver Program (VWP) allows citizens from 28 countries to enter the United States, as temporary visitors for business or pleasure, without a visa. We evaluated the INS's progress in implementing recommendations contained in the OIG's March 1999 report, *The Potential for Fraud and INS's Efforts to Reduce the Risks of the Visa Waiver Pilot Program.* Our follow-up review found that the INS had distributed guidance to improve the collection and dissemination of information about missing VWP passports but did not take appropriate measures to ensure the guidance was followed at ports of entry. Therefore, the INS did not have a mechanism that provides systematic, consistent, and timely information about missing VWP passports to its immigration inspectors. We concluded that the failure to make this information available to INS immigration inspectors could contribute to the admission into the United States of criminal aliens or terrorists fraudulently using passports from VWP countries. We urged the INS to reissue the guidance and to take aggressive follow-up actions to ensure that inspectors follow the guidance.

- **Improving the Security of the Transit Without Visa Program:** The TWOV Program allows certain nonimmigrants to transit through the United States en route to a destination in another country. Visa requirements are waived for eligible nonimmigrants in TWOV status; they can remain in the United States for up to eight hours awaiting departure on connecting flights to their final destination. We found in our follow-up review that many of the security concerns identified in our March 1993 report, *Transit Without Visa Program,* continued to exist. Specifically, the INS had not taken adequate measures to improve airlines' supervision of TWOV passengers, and the INS could not verify departure of TWOV passengers. Prior to September 11, 2001, TWOV passengers were permitted to wait for their connecting flights in "in-transit lounges" (ITL) without having to undergo INS examination of their travel documents. The INS temporarily suspended the ITL program after the terrorist attacks but resumed operations in November 2001 after enhancing security by requiring that all ITL passengers undergo more rigorous inspection. Still, the TWOV program continued to offer an avenue for aliens to enter the United States illegally.

- **INS Efforts to Improve its Control of Nonimmigrant Overstays:** In a fifth follow-up review, we found that the INS had made little progress in addressing the important issue of nonimmigrant overstays since our 1997 report, *Inspection of Immigration and Naturalization Service Monitoring of Nonimmigrant Overstays*. The terrorist attacks of September 11 focused renewed attention on the importance of knowing when nonimmigrant visitors enter and depart the United States. The INS must be able to identify individual overstays, collect aggregate information on overstays, and develop an effective interior enforcement strategy for pursuing overstays who are identified as representing the greatest potential risk to the security of the United States. Our original report focused on the weaknesses of the Non-Immigrant Information System that was, and still is, the INS's principal means of identifying overstays. At the time of our original report, the INS expected that its automated I-94 system would provide the necessary arrival and departure information to identify overstays and help in the development of an effective enforcement strategy. However, as discussed previously in this statement, the INS terminated the automated I-94 system in February 2002 after concluding that it would not be able to identify overstays or meet the requirements of the USA Patriot Act that mandate development of an integrated entry-exit control system. As a result, the findings from our 1997 report still apply, and the INS does not have a reliable system to track overstays.

D. "Bombs in Brooklyn" Report

In a report issued in March 1998, the OIG examined how two individuals, Gazi Ibrahim Abu Mezer and Lafi Khalil, entered and remained in the United States before their July 1997 apprehension in Brooklyn for allegedly planning to bomb the New York City subway system. Mezer was subsequently convicted and sentenced to life imprisonment. Khalil was acquitted of charges stemming from the bombing plot but found guilty of immigration violations.

In our report, we described how both men were able to enter the United States and remain here. Khalil, who had a Jordanian passport, applied to the U.S. Consular Office in Jerusalem for a visa to travel through the United States en route to Ecuador. The consular official gave him a 29-day, C-1 transit visa after a three-minute interview. When Khalil arrived in New York on December 7, 1996, an immigration inspector mistakenly granted him a B-2 tourist visa valid for six months. He overstayed that visa and was arrested in Brooklyn, along with Mezer, in July 1997.

Mezer, who claimed Jordanian nationality, received a visa from the Canadian Embassy in Israel to study in Canada. Shortly after arriving in

Canada in September 1993, he applied for convention status, which is similar to political asylum in the United States, based on his claimed fear of persecution in Israel. Mezer later admitted that he had traveled to Canada with the intent to reach the United States.

In 1996, Mezer was detained by the Border Patrol twice while attempting to cross the border illegally into Washington State. Each time the Border Patrol allowed him to voluntarily return to Canada. In January 1997, the Border Patrol apprehended Mezer in Washington a third time and initiated formal deportation proceedings. Mezer then filed an application for political asylum in the United States and was later released on a $5,000 bond. In his asylum application, Mezer claimed that Israeli authorities had persecuted him because they wrongly believed he was a member of Hamas. The immigration court requested comments from the State Department about Mezer's asylum application, and the State Department returned the application with a sticker indicating that it did not have specific information on Mezer. Mezer's attorney later withdrew the asylum application, stating that Mezer had returned to Canada. Mezer was arrested shortly thereafter in Brooklyn for plotting to bomb the subway system.

During our review, we did not find any information that Mezer was a known terrorist. However, we found that his case revealed serious systemic problems. Mezer entered and remained in Canada despite two criminal convictions there, which highlighted the ease of entry into Canada and the difficulty of controlling illegal immigration from Canada into the United States. We also noted the inadequacy of Border Patrol resources to address illegal immigration along the northern border. In addition, Mezer's case reflected confusion between U.S. government agencies as to which agency would conduct a check for information on whether an asylum applicant was a terrorist. We recommended that the INS and the State Department coordinate more closely on accessing and sharing information that would suggest a detained alien or asylum applicant may be a terrorist.

II. OIG REVIEW OF STATE AND LOCAL DOMESTIC PREPAREDNESS GRANTS

The Department's Office of Justice Programs (OJP) awards grants for specialized training and equipment to fire and emergency service departments to enhance their ability to respond to domestic acts of terrorism. In our audit of this program, we found that grant funds had not been awarded quickly, and that grantees were slow to spend available monies. We found that as of January 15, 2002, more than half of the total funds appropriated for equipment under the grant program from FY 1998 through FY 2001 – $141 million out of $243 million – still had not been awarded. About $65 million in grant funds awarded was still unspent. We also found that

nearly $1 million in equipment purchased with grants was not available for use because grantees did not properly distribute the equipment, could not locate it, or had not been trained adequately on how to operate it.

III. OVERSIGHT OF FBI PROGRAMS AFFECTING COUNTERTERRORISM AND NATIONAL SECURITY

The Department's counterterrorism and law enforcement responsibilities require timely access to automated information and effective systems for sharing that information. OIG reviews in the FBI have identified mission-critical computer systems that were not adequately planned; experienced long delays in implementation; or failed to share information with other FBI systems. In addition, OIG reviews have disclosed serious problems in computer security that could lead to the compromise of sensitive systems and data.

The OIG has initiated a wide range of reviews in the FBI that examine information technology (IT), counterterrorism, and national security issues.

A. Belated Production of Documents in the Oklahoma City Bombing Case

I testified before this Committee in March of this year about the OIG report on the belated production of documents in the Oklahoma City bombing case (OKBOMB). The disclosure of documents one week before the scheduled execution of Timothy McVeigh raised questions as to whether the FBI had intentionally failed to disclose documents to the defense before trial, and why the failure to produce documents occurred.

Our investigation found that widespread failures by the FBI led to the belated disclosure of more than 1,000 documents in the OKBOMB case. We traced the failures to a variety of causes, including individual mistakes by FBI employees, the FBI's cumbersome and complex document-handling procedures, agents' failures to follow FBI policies and directives, inconsistent interpretation of policies and procedures, agents' lack of understanding of the unusual discovery agreement in this case, and the tremendous volume of material being processed within a short period of time. The failures were widespread and not confined to either the FBI field offices or the OKBOMB Task Force; we found that both share responsibility. Importantly, though, we did not find that any FBI employees intentionally withheld from the defense any documents they knew to be discoverable.

This review highlighted the significant weaknesses in the FBI's computer systems which we found to be antiquated, inefficient, and badly in need of improvement. Although we do not believe the failures in this case were caused

by the computer systems, these systems cannot handle or retrieve documents in a useful, comprehensive, or efficient way, and they do not provide FBI employees with the type of support they need and deserve.

The problems encountered in this case shine light on several of the FBI's long-standing problems: antiquated and inefficient computer systems; inattention to information management; and inadequate quality control systems. And although the belated documents issue was presented as a discovery problem, the FBI's troubled information management systems are likely to have a continuing negative impact on its ability to properly investigate crimes and analyze information throughout the FBI. At the end of our report, we set forth recommendations to help address these systemic weaknesses, most of which relate to FBI computer systems and document management.

B. FBI Information Technology

Following up on several of the findings in our OKBOMB report, the OIG is currently reviewing the FBI's management of its IT investments. This audit will examine whether the FBI is adequately managing the acquisition of its IT systems.

To conduct this audit, the OIG is assessing both the FBI's current IT investment management practices and its new IT investment and management strategy. We are interviewing personnel within the FBI's Information Resources Division, the Criminal Justice Information Services Division, the Laboratory Division, the Inspections Division, the Finance Division, and the Strategic Planning Office. In addition, we are conducting a case study of Trilogy, the FBI's comprehensive initiative to upgrade the agency's IT systems.

C. The FBI's Management of its Counterterrorism Resources

Another ongoing OIG review in the FBI examines the counterterrorism funding provided to the FBI since FY 1995. In addition to identifying total dollar amounts of funding dedicated to counterterrorism, we plan to examine how the FBI has spent its counterterrorism resources since FY 1995, including the extent to which resources have been reallocated since September 11, 2001. As part of this review, we are also evaluating the process by which the FBI determines its counterterrorism resource requirements and manages it counterterrorism resources.

Specifically, this review will examine:

- Evaluation of Terrorist Threats: The FBI committed itself in 1999 to formally assess the threat and risk of chemical and biological terrorism and also to conduct a national level threat and risk assessment of terrorism in general. We plan to determine the FBI's progress toward

completing the assessments, evaluate the process used, identify the reasons for the delays in completing the assessments, and identify any changes contemplated in the assessments since September 11.

- Strategic Planning and Performance Measures: The OIG will evaluate the FBI's progress in meeting the action items established in the Attorney General's Five Year Interagency Counterterrorism and Technology Crime Plan, the Department's Strategic Plan, the FBI's own strategic plan, and the strategic and program plans of the FBI's Counterterrorism Division. We will review the FBI's planning process, including, for example, the comprehensiveness of the planning and whether goals, measurable outcomes, and resource requirements are included.

D. FBI Casework Audit

This ongoing OIG review is examining the FBI's allocation of resources to investigate the varied crimes under its jurisdiction. Our objectives are to determine the types and number of cases the FBI investigates; assess performance measures for FBI casework; and determine if the mix of cases investigated by the FBI comports with FBI priorities. This review will evaluate trends in various types of cases worked by the FBI over the past six years and evaluate any disparities among different geographic regions and FBI field offices. In addition, in a second and separate part of this review, we plan to obtain opinions from other federal, state, and local law enforcement agencies about FBI support on joint cases and their reliance on FBI resources.

E. Review of FBI Legal Attaché Program

The OIG recently initiated a review to examine the costs of maintaining the FBI's overseas presence at 44 legal attache offices. As part of our review, we will examine the FBI's process for determining where new legal attaché offices should be established and the FBI's coordination with other agencies during this decision-making process. In addition, we plan to examine the types of activities performed by the legal attaché offices. Finally, we plan to assess the FBI's coordination with U.S. and foreign law enforcement agencies and identify any duplication of effort with law enforcement agencies and legal attaché offices from other U.S. government agencies.

F. Campaign Finance

Several findings from a July 1999 OIG report, *The Handling of FBI Intelligence Information Related to the Justice Department's Campaign Finance Investigation,* are particularly relevant in light of the FBI's counterterrorism mission.

The FBI must be able to rapidly identify, analyze, and disseminate pertinent intelligence of law enforcement information in its possession. In this 1999 review, the OIG examined why classified intelligence information pertaining to the Department's Campaign Finance Task Force investigation was not appropriately disseminated within the FBI and the Department and subsequently to congressional oversight committees. The OIG found that a series of problems, including the National Security Division's failure to disseminate information in a consistent manner, ultimately contributed to this failure.

The review also found deficiencies in the FBI's use and maintenance of its computer database systems. A key feature of the FBI's Automated Case Support (ACS) system – the FBI's primary case management database that contains leads and other FBI documents – is a user's ability to retrieve information regarding particular individuals, including whether they have been the subjects of other investigations. However, we found that FBI agents often did not enter important information into the database and that agents often did not conduct appropriate searches for information using the database. The end result was that the FBI could not be confident that a search for information in the ACS databases would, in fact, provide all pertinent information in the FBI's possession. We found that the FBI's information management problems were caused by a variety of factors, including inappropriate policies and insufficient training, and we made recommendations to address these issues. However, two years later we found that many of these same shortcomings had not been corrected and contributed to the shortcomings identified during our review of the FBI's belated production of documents in the OKBOMB case.

G. Phoenix EC/Rowley Letter

Last week the OIG initiated an investigation that will examine aspects of the FBI's handling of information and intelligence prior to the September 11 terrorist attacks. The investigation will focus on, among other things, how the FBI handled an electronic communication written by its Phoenix Division in July 2001 regarding Islamic extremists attending civil aviation schools in Arizona ("the Phoenix EC") and issues raised in the May 21, 2002, letter to the FBI Director from Special Agent Coleen Rowley, the Minneapolis Chief Division Counsel.

The OIG had conducted a preliminary inquiry in the fall of 2001 into the handling of the Phoenix EC at FBI Headquarters. We decided to refer that matter to the Senate and House Intelligence Committees September 11 Joint Inquiry (Joint Inquiry), the congressional committee established to review the intelligence and law enforcement information related to the September 11 attacks. Our decision to refer the matter to the Joint Inquiry was based on our belief that the Phoenix EC needed to be analyzed in the context of other

information available to the FBI and other intelligence agencies at the time. However, in light of recent events and several requests for the OIG to conduct a review of how intelligence information was handled at the FBI prior to September 11, including a specific request from Director Mueller, we have agreed to undertake a full investigation of the Phoenix EC, the important issues raised by Special Agent Rowley's letter, and the FBI's handling of other intelligence information prior to the September 11 attacks. Director Mueller also has asked the OIG to provide any recommendations, based on our review, as to how the FBI can best handle its counterterrorism responsibilities.

We are presently assembling a team composed of OIG attorneys, investigators, and other staff to conduct this investigation. To the extent possible, we will coordinate our investigation with the Joint Inquiry's investigation.

IV. OVERVIEW OF FBI WHISTLEBLOWER PROTECTIONS

One of the most important changes the FBI can make as it looks to the future is to foster a culture in which employees are able to identify deficiencies in programs or operations and bring their concerns to management without fear of retaliation. The OIG supports strong protections for FBI whistleblowers as a way to improve agency operations. FBI whistleblowers have been the impetus for significant change in the FBI, such as improvements made in the FBI Laboratory.

A great deal of confusion continues to exist about the protections afforded FBI employees and the procedures employees must follow to activate these protections. In this statement, I will provide a brief overview of the whistleblower rules that apply to FBI employees and the OIG's role in this process.

Most federal employees who believe they have been subjected to reprisal for making a protected disclosure under the Whistleblower Protection Act of 1989 may request an investigation by the Office of Special Counsel or, in appropriate circumstances, pursue an individual right of action before the Merit Systems Protection Board. See sections 1214 and 1221 of title 5 of the United States Code. However, FBI employees are exempted from the Whistleblower Protection Act. Instead, they are covered by a policy developed by the Department pursuant to a delegation of authority from the President to the Attorney General in April 1997 to provide protections for FBI whistleblowers "in a manner consistent with applicable provisions of sections 1214 and 1221 of [title 5]."

The Department has therefore established procedures under which FBI employees may make protected disclosures and processes by which allegations

of reprisal against such FBI employees will be investigated. Under these regulations, FBI employees must bring their complaint to one of several specified individuals or organizations for the complaint to be considered a "protected disclosure." Presently, these individuals include the Attorney General, Deputy Attorney General, FBI Director, FBI Deputy Director, OIG, the Department's Office of Professional Responsibility (DOJ OPR), or the highest ranking official in any FBI field office.

Second, the FBI employee making the disclosure must reasonably believe that the disclosure evidences a violation of any law, rule or regulation or mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to the public health or safety.

Once a protected disclosure has been made to one of the specified entities, the regulations prohibit any FBI or Department employee from taking, directing others to take, recommending, or approving any personnel action with respect to the disclosing employee as a reprisal for the protected disclosure. If the employee believes that he or she has been the subject of a personnel action as a reprisal for making a protected disclosure, the employee may report the alleged reprisal to either the OIG or DOJ OPR. As is the case with non-FBI employees, to sustain a case of reprisal for a protected disclosure FBI employees ultimately must show that the protected disclosure was a contributing factor in the personnel action about which they complain.

The OIG and DOJ OPR share the responsibility for investigating allegations of whistleblower retaliation against FBI employees. If no finding of retaliation is made, FBI whistleblowers may still present their claim to the Director of the Office of Attorney Recruitment and Management at the Department (Director). If the OIG or DOJ OPR finds retaliation, the report is transmitted to the Director who has the authority to order remediation unless the FBI can show by clear and convincing evidence that retaliation did not occur. A decision by the Director may be appealed to the Deputy Attorney General.

The OIG has handled various allegations of reprisal raised by FBI whistleblowers. Moreover, in a matter initially raised to the OIG by an FBI whistleblower, we are nearing completion of our review of whether the FBI imposes a "double standard" in its discipline process – specifically, whether the FBI disciplines its senior managers less harshly than other employees.

This concludes my prepared statement. I would be pleased to answer any questions.

from the office of

Senator Edward M. Kennedy

of Massachusetts

FOR IMMEDIATE RELEASE
June 6, 2002

CONTACT: Stephanie Cutter
(202) 224-2633

STATEMENT OF SENATOR EDWARD M. KENNEDY AT THE SENATE JUDICIARY COMMITTEE OVERSIGHT HEARING ON COUNTERTERRORISM

No challenge we face today is more important than dealing effectively with the terrorist threat facing the nation, and reform of the Federal Bureau of Investigation is an essential part of meeting that challenge.

In the past few weeks, the FBI, along with other agencies and branches of government, has been subject to intense scrutiny. Specifically, in relation to the September 11th attacks, the Bureau has been criticized for failing to act on the information that it had and to coordinate effectively with other agencies. To Director Robert Mueller's credit, he has acknowledged the existence of serious problems within the Bureau and has committed himself to addressing them.

In particular, I commend Mr. Mueller for his commitment to shifting the FBI's management and operational culture to emphasize the goals of flexibility, efficiency, and accountability. More than twenty years ago, I introduced legislation to establish an FBI Charter to clearly articulate the Bureau's duties and give it the organizational capacity to manage itself. Although Congress failed to enact that legislation, the need for management reform has only increased over the years. I am encouraged by Mr. Mueller's plans to restructure and expand the Bureau's counterterrorism division, develop its intelligence analytic capabilities, and become more flexible and collaborative in its approaches to criminal investigations.

As we take steps to improve the FBI's performance and strengthen the nation's other defenses against terrorism, however, we must do so in a way that preserves the basic constitutional rights that are at the heart of our democracy. In this regard, I am concerned by some of the changes announced last week by the Justice Department to the guidelines on FBI operations. These guidelines were first established by Ford Administration Attorney General Edward Levi, in response to the many abuses documented by the Church Committee in 1975. This committee found that the FBI's internal security and domestic intelligence programs had compiled hundreds of thousands of files on Americans – including Dr. Martin Luther King Jr., Senator Adlai Stevenson, and Justice William O. Douglas – engaged in lawful political expression and association.

The Justice Department's new guidelines will make it easier for agents to search publicly available records and web sites, conduct undercover operations, and use confidential informants. Some of these changes may be appropriate in light of the terrorist threat and the FBI's refocused

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mission and priorities. It is clearly important to give agents the authority and flexibility not only to investigate terrorism and other criminal acts, but to anticipate and prevent such acts from occurring in the first place.

At the same time, I am concerned that some of the changes to the FBI guidelines may undermine the First Amendment rights of persons involved in lawful political dissent and lawful protest activities. FBI agents should not monitor individuals and groups simply because they disagree with particular laws, government policies, or court rulings. Nor should they infiltrate and monitor churches, synagogues, and mosques to compile information about people with no apparent ties to terrorism.

In response to a question I asked at the time of his nomination, Mr. Mueller stated, "Respecting the lawful exercise of First Amendment rights is essential and we must never let our zeal to investigate and fight crime undermine those rights. I commit to being vigilant to ensure that investigations do not interfere with such rights." More recently, at a luncheon yesterday Mr. Mueller informed reporters and editors from the *Washington Post* that the FBI has no plans to infiltrate mosques or other houses of worship, and that he wants "to make absolutely certain that we don't repeat those abuses of the past." While I am encouraged by Mr. Mueller's statements, I believe that Congress has a heightened obligation to continue its oversight to ensure that the FBI protects political and religious freedoms. To this end, I strongly support Chairman Leahy's call for future hearings on this and related civil liberties issues.

I am also very concerned by the Justice Department's announcement yesterday that it will require tens of thousands of Muslim and Arab visa holders – students, workers, researchers, and tourists – to register with the government and be fingerprinted and photographed. INS inspectors will apply secret criteria and their own discretion in deciding which visa holders will be subject to this registration requirement. This sweeping measure, proposed without any consultation with Congress, will do little to provide real protection against terrorism, but will instead stigmatize innocent Muslims and Arabs who have committed no crime and pose no danger to us and alienate those who want to support our law enforcement and counterterrorism efforts.

We need to recognize that immigration is not the problem – terrorism is. The recently enacted Enhanced Border Security and Visa Entry Reform Act provides balanced and targeted measures to identify and isolate potential terrorists, without violating fundamental constitutional principles. We must take care not to implement new measures in haste, undermining current law in critical respects. An essential part of winning the war on terrorism and protecting the nation is protecting the ideals that America stands for around the world.

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U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

OPENING STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON
OVERSIGHT OF DOJ COUNTERTERRORISM EFFORT
FBI OVERSIGHT SERIES
JUNE 6, 2002

Last week FBI Director Mueller and Attorney General Ashcroft made extraordinary and, in the case of the Attorney General, unexpected announcements of changes in the organization of the FBI and the guidelines for its investigations. As the oversight committee for the Department of Justice and its agencies, including the FBI, this committee shares the common goal with the Department of Justice of ensuring the safety and security of the American people. I look forward to hearing from the Department and the FBI why these changes, in the forms announced, are necessary to prevent future terrorist attacks. This oversight Committee has both the duty and the responsibility to the American people to evaluate these changes and their justification.

Ten days earlier Inspector General Glenn Fine issued a critical report on the handling of visas of two 9/11 hijackers by the Immigration and Naturalization Service and made 24 recommendations to address deficiencies in INS practices and procedures. These suggestions, too, may be justified, and this oversight Committee has the job of examining whether identified deficiencies are being fixed.

At the same time, the American people have been barraged with new reports about the government's performance before the 9/11 attacks, including charges and countercharges of mistakes by the FBI and CIA, the handling of the Phoenix Electronic Communication, the critical letter from FBI Agent Coleen Rowley in the Minneapolis FBI office, and a report that the Attorney General turned down a proposal to increase the FBI Counterterrorism budget by $58 million shortly before the 9/11 attacks. Director Mueller has confronted this mounting evidence and candidly admitted what we all now realize – that no one can say for sure whether the 9/11 attacks might have been disrupted if all the dots had been connected and all the leads been followed. I commend the Director for the candor of his recent statements. We do not want a return to the worst aspects of J. Edgar Hoover's FBI when no one at the FBI could admit or learn from mistakes and anyone who raised a question did so at his or her personal peril.

The Judiciary Committee is the standing committee of the Senate responsible for oversight of the Justice Department. We are accountable to the Senate and the American people for ensuring that FBI, the INS and other Department components are effectively organized with adequate resources under proper policies and leadership. This committee considered the nominations of the FBI Director, the INS Commissioner, the Inspector General, and the Attorney General. This committee has a continuing responsibility to examine the stewardship of these agencies. I noted at our May 8 hearing that the first hearing I announced and chaired as the new chairman of the Judiciary Committee was our June 20 hearing on FBI oversight last year, which began our series of FBI oversight hearings. Now, more than ever, in the age of terrorist attacks on our shores, close oversight of the FBI and our other law enforcement and intelligence agencies is not an option; it is an imperative.

I wrote to the Attorney General and the Director on October 25 last year, as we were enacting the USA PATRIOT Act, to ask what internal reviews they were conducting in connection with the events of September 11 and counterterrorism efforts. I told both the Attorney General and the Director to preserve documents and information from before September 11 and that they share with us important matters they uncover as they conduct an internal review of the events leading up to the tragedy of 9/11. I was disappointed to learn only this week that the Justice Department Inspector General conducted an inquiry into the FBI's Phoenix Electronic Communication as early as last October. We will want to hear from Inspector General Fine about the circumstances and results of his earlier inquiry about the handling of the Phoenix E.C.

Even more disappointing was the Justice Department's failure to advise the Committee that its review of FBI Guidelines after 9/11 had uncovered issues that called for revision. Instead, the Committee is presented with a fait accompli reflecting no congressional input whatsoever. From his comments over the weekend, it seems that Chairman Sensenbrenner and our counterparts on the House Judiciary Committee were likewise surprised by the unilateral actions taken by the Attorney General in revising these longstanding guidelines.

ATTORNEY GENERAL'S FBI GUIDELINES. After the Attorney General's news conference last week, the Department did post the 100 pages of new investigative regulations on its web site. While the Department may tell us that these changes are relatively straightforward and reflect good common sense, we will need to examine the fine print to determine whether that is indeed the case. Of course, had we been consulted by the Department earlier in the process, that examination would have likely been concluded by now. I understand the need to re-examine policies, but caution that we should not throw out decades of wisdom just because of a bad week or two in the press. I agree with Chairman Sensenbrenner that, "These important safeguards of American privacy and freedom should not be significantly altered without careful consideration and a full explanation of the reasons for any changes."

We in Congress have shown in our bipartisan work on the USA PATRIOT Act, the Aviation and Transportation Security Act, the Border Security and Visa Reform Act and the Bioterrorism Preparedness Act that the Congress is committed to working together with the Administration in

the best interests of the nation. Why the Department of Justice continues to insist on acting unilaterally and without consulting with the Congress is a mystery to me, and it is needlessly disruptive to the overall effort.

The regulations on surveillance of Americans not suspected of any crime are there for a reason. They were intended to change the "culture of the FBI"-- something Members of Congress from both sides of the aisle and the Administration have all recently emphasized.

The regulations on the handling of confidential informants were also carefully crafted. Just last month, a Boston FBI Agent was convicted of federal crimes based on his improper handling of Mob informants that directly contributed to two men spending years in jail for a murder that the FBI knew they did not commit – just to protect that informant. Now, two weeks later, we are planning on simultaneously loosening both the headquarters control and the rules for handling informants. These controls are there for a reason. Again, while we still need to read the fine print, I think that we should be very careful about just calling a big press conference and discarding hard-learned lessons. This hearing is just the beginning of oversight on these issues.

FBI REORGANIZATION. I appreciate Director Mueller's consultation with the leaders of the House and Senate Judiciary Committees and with other Members of Congress before he announced Phase 2 of his reorganization last week. I look forward to hearing from Director Mueller more details of the reorganization plan. I believe that the steps he is taking to refocus and redesign the operational structure of the FBI to prevent terrorist attacks are the right ones. I want to commend the hard-working men and women of the Bureau and of the other agencies of the Department of Justice who are working tirelessly and conscientiously, in the best traditions of patriotism and public service, to protect the American people and our way of life.

No flow chart or press conference can fully reassure the American people that our government institutions are up to the present challenges, particularly in the face of new and daily revelations of past lapses. The job of proving to the American people that our government institutions are up to the job is a process that involves responding to legitimate questions posed by the oversight committees of the Congress.

The Director has outlined 10 clear priorities for the FBI. I agree with the Director that the Bureau cannot continue to devote scarce manpower and technical surveillance resources to cases that properly fall within state and local jurisdiction. An example is the report this week of an extensive, year-long Department of Justice and FBI investigation of the operators of a brothel and prostitution ring in New Orleans. According to press reports, FBI agents were listening to 90 calls a day on wiretaps that continued for months and amounted to more than 5,000 phone calls. The U.S. Attorney reportedly claimed it was a Federal case because prostitutes flew in and out of town and some lived in other cities. Clearly, there are plenty of state and local laws against prostitution. The local prosecutor has apparently declined the Federal prosecutor's offer of the embarrassing list of wealthy establishment "johns" to prosecute and has decided to spend his resources elsewhere. Director Mueller's new priorities make clear that the FBI also has more urgent things to do at the moment, and I would encourage the Department of Justice to do the

same.

Reform of the FBI and of other DOJ components to deal more effectively with counterterrorism is an important and immense task. The problem is not going to be solved by any one branch of government. We need to carefully look at what went wrong in the past and roll up our sleeves together and work together to address these problems. Congress must be a full partner in that effort.

Two months before the 9/11 attacks, this committee began comprehensive oversight of the FBI. This series of hearings, of which today's hearing is a part, have focused on problems and constructive solutions to those problems, many of which are reflected in the FBI Reform Act reported unanimously by the Committee. These problems included the gross inadequacy of the FBI's information management and computer systems, the massive security failure in the Hanssen case, the resistance of Bureau officials to admitting mistakes and acting to correct them, and the problem of a double-standard in Bureau discipline for senior executives. Senior FBI managers testified at those public hearings and laid out in detail the measures needed to get the Bureau back on track, including wholesale revamping of FBI internal security practices and the design, development, and execution of a new FBI-wide computer network. The idea on both sides of the aisle was that by examining the mistakes of the past, we could avoid repeating them. That effort is more vital today than ever before.

The Department of Justice, the FBI, this committee and others must stay the course in making the FBI as effective in the war on terrorism as the American people are depending on it to be.

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PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

October 25, 2001

The Honorable John Ashcroft
Attorney General
10th and Constitution Ave. NW
Washington, D.C. 20530

The Honorable Robert Mueller
Director, Federal Bureau of Investigation
J. Edgar Hoover Bldg.
Room 7176
9th and Pennsylvania Ave.NW
Washington, D.C. 20535

Dear Gentlemen:

I write to each of you to ask what efforts you have taken to preserve records and information that existed on and before September 11, 2001 regarding terrorist cells, networks and actions. I also ask what internal reviews you are conducting in connection with your counterterrorism efforts, the events of September 11, 2001, and their aftermath.

As we in Congress fulfill our oversight responsibilities, it will be important for us to have access to all the documents and information relevant to this effort. On behalf of the Senate Judiciary Committee, I request that all documents and information related to your knowledge, activities and efforts regarding terrorism and counterterrorism before, on, and after September 11, 2001 be preserved.

Sincerely,

PATRICK LEAHY
Chairman

02/25/02 MON 20:59 FAX

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 25, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter to the Attorney General and the Federal Bureau of Investigation (FBI) Director, dated October 25, 2001, which asked about Department efforts to preserve records and information that existed on and before September 11, 2001, regarding terrorist cells, networks, and actions. I apologize for the delay in responding to your letter.

We believe that the Department's usual records retention policies will assure that records responsive to your interests will be preserved so that the Department can respond effectively to future oversight requests regarding the events of September 11. Additionally, your letter was provided to the Criminal Division, the FBI, and the Immigration and Naturalization Service, the Department components most likely to have relevant records. The FBI, including its field offices, legal attaches offices, and headquarters divisions has established mechanisms to ensure compliance with its obligations to maintain and preserve "records" as that term is defined in the Federal Records Act. Additionally, subsequent to the belated discovery of documents relating to the Oklahoma City bombing investigation, FBI employees received mandatory refresher training on the existing records policy, including the creation, maintenance, retrieval and dissemination of documents.

Due to the volume of documents being generated as a result of the PENTTBOM investigation, the FBI is in the process of creating an automated document management system that will log, identify, scan, store, and make these documents available for electronic retrieval. While an automated solution is being developed, FBI field offices have been instructed to retain original investigative documents in the offices where they are created or collected.

In response to your question about internal reviews in the wake of the events of September 11, I can advise you that the Department has been engaged in an evaluation of how we can more effectively fulfill our counterterrorism responsibilities. For example, it was as part

of that evaluation that the Department developed a number of suggested legislative proposals, some of which were enacted in October as part of the USA Patriot Act. Additionally, the Department has created Anti-Terrorism Task Forces in each Federal judicial district to improve coordination among Federal, State, and local authorities relating to counterterrorism. As part of that program, a national conference was held in November. Additionally, six regional training conferences will be conducted during the next six months, to be followed in September by another national conference. The Department continues to assess its counterterrorism efforts and will not hesitate to make adjustments designed to enhance their effectiveness.

I hope that this information is helpful. Please do not hesitate to contact this office if you would like additional assistance regarding this or any other matter.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

PATRICK J. LEAHY, VERMONT, CHAIRMAN

EDWARD M. KENNEDY, MASSACHUSETTS
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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 8, 2001

The Honorable John Ashcroft
Attorney General
Department of Justice
950 Pennsylvania Ave, NW
Washington, DC 20530

Dear General Ashcroft:

The Strategic Plan you announced today correctly seeks to focus the Department of Justice on the critical mission of protecting "our nation and its citizens from a serious, immediate and ongoing threat of terrorism" by realigning resources and improving operational efficiency and effectiveness. I concur with your call for reform of the FBI and for prioritizing its counter terrorism mission, and look forward to hearing from you more specific proposals in that regard. You and Director Mueller should devise a counterterrorism strategy that is based on lessons learned from recent experience. You cannot plan for the future effectively without knowing what went wrong in the past.

On October 25, 2001, I wrote requesting the preservation of records and information that existed on and before September 11, 2001, regarding terrorist cells, networks and actions. Since then, I have given considerable thought to the best way of examining what the FBI did and could have done to prevent the attacks on that date. You have stressed the need to focus on prevention. An essential element in framing our strategy for prevention is to look carefully at what was done with the tremendous investment in FBI counterterrorism resources that the Congress made over the past decade. Just as the lessons of Pearl Harbor led to the creation of the CIA, a review of what happened before September 11 may provide decisive guidance for our future efforts.

Fortunately, and to your credit, you have already established an advisory body that is exceptionally qualified to perform this task. On March 9, 2001, you asked Judge Webster's special commission to review and make recommendations on the adequacy of the FBI's internal security procedures in the wake of the Hanssen espionage case. The distinguished members bring a unique combination of experience at the highest levels of our government. Judges Webster has formed a small, well-qualified staff under the direction of a former Justice Department Counsel for Professional Responsibility. I urge you to ask the Webster Commission to complete promptly its review of FBI internal security procedures and turn its attention to a review of the FBI's counterterrorism performance prior to and bearing on the attacks of September 11, 2001, and lessons learned for future efforts to prevent terrorist attacks.

Over the past two months I have been asked repeatedly what the Congress will do to find out if there was something that could have prevented those attacks and that consequently could prevent

future attacks. You have a tremendous opportunity to assist the Congress and, of course, the Administration in answering this question in a responsible manner. Without such a careful review by a body with the stature of Judge Webster's commission, the government will lack an indispensable ingredient in designing our strategy to win cur war against terrorism. Please advise me whether you will expand the mandate and parameters of the Webster commission to review the FBI's counterterrorism performance in connection with the events of September 11, 2001.

Sincerely,

PATRICK LEAHY
Chairman

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

December 4, 2001

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter, dated November 8, 2001, regarding the prevention of future terrorist attacks on this country and, particularly, your suggestion that Judge Webster's panel conduct a review of the FBI's counterterrorism performance prior to September 11, 2001.

As you know, Attorney General Ashcroft and then-FBI Director Louis Freeh requested that Judge Webster conduct a review of the FBI's internal security procedures in the wake of the arrest of FBI Special Agent Robert Hanssen in February. We believe that Judge Webster has established an effective team to examine the FBI's security program and to recommend changes for strengthening that program. While this review remains pending at this time, Department representatives are looking forward to receiving Judge Webster's report when it is completed. At that point, the Attorney General will consider whether further requests along the lines that you suggest would be the most effective means for reviewing the FBI's counterterrorism program. A number of factors may be relevant to that consideration including, but not limited to, the progress and intensity of the Department's law enforcement efforts to prevent and disrupt further terrorist attacks and the scope and status of other ongoing reviews of the Bureau. As reflected in his November 8th reorganization announcement, the Attorney General shares your interest in prioritizing the FBI's counterterrorism mission and in making the Bureau's reform one of the Department's top management initiatives.

As always, we appreciate your views and look forward to working with you as our response to the terrorist attacks of September 11 continues.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

May 29, 2002

The Honorable John Ashcroft
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Ashcroft:

Special Agent Coleen Rowley, Chief Division Counsel ("CDC") from the Minneapolis, Minnesota Field Office sent a letter, dated May 21, 2002, to the Director of the FBI and various Members of the Senate asserting a number of claims regarding the mishandling of the Zacarias Moussaoui investigation prior to September 11, 2001. Among her claims is that the handling of this incident illustrates a "double standard" inside the FBI, where lower ranking FBI employees are evaluated and disciplined more harshly than senior FBI officials, particularly those at Headquarters.

At the conclusion of her letter, SA Rowley expresses the hope that her 21 year career at the FBI is not adversely effected by this matter. As you know, despite federal statutes that protect individuals from retaliation based upon their assistance in Congressional or other federal investigations, testimony presented at Senate Judiciary hearings over the past year has indicated that in the past, the careers of Bureau employees who have participated in internal investigations or revealed internal problems have in fact suffered as a consequence. In addition, under current law, there is some ambiguity as to the precise type of disclosure or report that would trigger complete whistleblower protections for an FBI employee. That is the reason that S. 1974, the FBI Reform Act, seeks to clarify and expand such protections.

Director Mueller has forwarded CDC Rowley's letter to DOJ Inspector General Glenn A. Fine for a complete review and investigation. We commend him for that action and concur that this is clearly the type of allegation which must be fully investigated by an independent body, such as the Office of the Inspector General. We trust that the Director will instruct FBI employees to cooperate fully with any IG investigation in this matter, if he has not already done so.

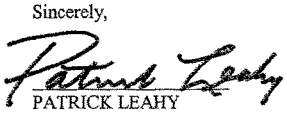
We write to seek your personal assurance that there will be no retaliation of any type in the specific case of SA Rowley or with respect to any FBI employee who comes forward with information pertinent to any Executive Branch or Congressional inquiry, hearing, or investigation regarding the FBI or Department of Justice's performance prior to or since the September 11 attacks.

The Honorable John Ashcroft
May 29, 2002
Page Two

Given her level of concern, we suggest that it might also be advisable for you also to advise SA Rowley of your commitment to protect whistleblowers.

Thank you for your prompt attention to this important matter.

Sincerely,



PATRICK LEAHY
Chairman

CHARLES E. GRASSLEY
U.S. Senator

cc: The Honorable Robert Mueller, FBI Director

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

June 6, 2002

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your letter of May 29, 2002, to Attorney General Ashcroft requesting the Attorney General's personal assurance that there will be no retaliation of any type in the case of Special Agent Rowley or with respect to any FBI employee who comes forward with information pertinent to any Executive Branch or Congressional inquiry, hearing, or investigation regarding the FBI or Department of Justice's performance prior to the September 11 attacks. We appreciate this opportunity to clarify the Attorney General's views and respond to your concerns. An identical letter will be sent to Senator Grassley, who joined in signing your letter.

The Attorney General shares your view that there should not be retaliation against whistleblowers who may bring to light important information about government agencies and institutions. In this specific case, there should be no cause for concern because the Attorney General has made it clear that there will be no retaliation in any form, against Ms. Rowley for the letter she sent to FBI Director Robert Mueller. The Attorney General and Director Mueller have both said they welcomed Ms. Rowley's letter. In fact, the Attorney General's sentiments on this matter were clarified earlier this week. On Monday, June 3, 2002, *The New York Times* reported this same response to Senator Grassley's concerns:

> "'The attorney general has made it clear that there will be no retaliation against Ms. Rowley,' said Barbara Comstock, the [Justice Department] spokeswoman. 'Both he and Mr. Mueller welcomed Ms. Rowley's letter.'" (David Johnston and Elizabeth Becker, "CIA Was Tracking Hijacker Months Earlier than It Had Said," *The New York Times*, June 3, 2002)

The Department appreciates this opportunity to respond to your concerns. Please do not hesitate to contact us if we may be of further assistance.

Sincerely,

Daniel J. Bryant
Assistant Attorney General

cc: The Honorable Orrin G. Hatch
Ranking Minority Member

Statement of

Robert S. Mueller, III
Director
Federal Bureau of Investigation

before the

Committee on the Judiciary
United States Senate

June 6, 2002

Good morning Chairman Leahy, Senator Hatch, and members of the Committee. I appreciate this opportunity to appear before the Committee today and discuss the recently announced FBI reorganization plan that was submitted to the Congress.

When I appeared before the Committee in early May, I was able to discuss in only the most general terms some of the ideas, concepts, and proposals that were being considered for refocusing the FBI's mission and priorities and restructuring the Bureau. I am pleased that the second phase of my on-going reorganization has been cleared by the Attorney General and the Administration and transmitted to the Congress for review.

A New FBI Focus

Since becoming Director, I have been able to observe firsthand the volatile environment in which the FBI is called to operate. I have become increasingly convinced that success in the post-9/11 environment depends upon the FBI

becoming more flexible, agile, and mobile in its capacity to respond to the array of difficult and challenging national security and criminal threats facing the United States. The FBI must become better at shaping its workforce, collaborating with its partners, applying technology to support investigations, operations, and analyses protecting our information, and developing core competencies.

I am equally convinced that success demands that the FBI become more proactive in its approaches to dealing with the threats and crime problems facing the United States, especially in the areas of counterterrorism, counterintelligence, and cyber-crime/infrastructure protection. And, I believe it will become even more important for the FBI to continue to develop and maintain close working relationships with international law enforcement partners if we are to prevent terrorist groups from gaining footholds and bases of operation for launching attacks against the United States. Protecting America in this new environment requires the FBI undertake a series of management actions built upon three key inter-related elements: (1) refocusing FBI mission and priorities; (2) realigning the FBI workforce to address these priorities; and (3) shifting FBI management and operational cultures to enhance flexibility, agility, effectiveness, and accountability. This new focus and the accompanying organizational changes being proposed are intended to strengthen and guide the Bureau through these uncertain and challenging times and are in direct response to the shortcomings and issues that have been identified over the last several months. More importantly, they are in direct response to the tragic events of 9/11 and the

clearly charted new course for the FBI mandated by the paramount mission of prevention.

1. Refocusing Mission and Priorities

Even though the external environment in which the FBI operates is volatile and uncertain, the basic mission of the FBI remains constant. First, and foremost, the FBI must protect and defend the United States against terrorism and foreign intelligence threats. Second, the FBI must uphold and enforce the criminal laws of the United States. And third, the FBI must provide and enhance assistance to its federal, state, municipal, and international partners.

While the FBI's core missions remain constant, its priorities have shifted since the previous FBI Strategic Plan was issued in 1998 and the terrorist acts of September 11, 2001. Under the new alignment, the FBI's focus is to:

1. Protect the United States from terrorist attack.
2. Protect the United States against foreign intelligence operations and espionage.
3. Protect the United States against cyber-based attacks and high-technology crimes.
4. Combat public corruption at all levels.
5. Protect civil rights.
6. Combat transnational and national criminal organizations and enterprises.
7. Combat major white-collar crime.
8. Combat significant violent crime.

9. Support federal, state, municipal, and international partners.

10. Upgrade technology to successfully perform the FBI's mission.

These are the FBI's priorities, not only for the Bureau in its role as a national agency, but also for each local FBI field office. The first eight priorities reflect the core of the FBI's national security and criminal investigative responsibilities. The last two, while not investigative in nature, are equally critical to enabling the FBI to successfully achieve its goals and objectives.

In pursuing these priorities, I expect the FBI and its employees to be true to, and exemplify, certain ***core values***. These core values are:

- adherence to the **rule of law** and the rights conferred to all under the United States Constitution;
- **integrity** through everyday ethical behavior;
- **accountability** by accepting responsibility for our actions and decisions and the consequences of our actions and decisions;
- **fairness** in dealing with people; and
- **leadership** through example, both at work and in our communities.

These missions and priorities are consistent with the *existing* authorities conferred and jurisdictions established by law and executive order for the FBI. I believe these missions and priorities represent the expectations that the

American people, the law enforcement community, the Congress, and the Administration hold for the FBI.

2. Realigning the Workforce to Address Priorities

In recognition of the continuing terrorist threat facing the United States from the Al-Qaeda network and of the urgent need to continue building the FBI's capacity to prevent future terrorist acts through improved analytical and intelligence information sharing capabilities, I am proposing a permanent shift of 518 field agents from criminal investigations to augment our counterterrorism investigations and activities (480 agents), implement critical security improvements (13 agents), and support the training of new Special Agents at the FBI Academy (25 agents). The FBI will need to sustain its present level of commitment to combating and preventing terrorism for the foreseeable future and be sufficiently flexible to quickly shift whatever additional resources are necessary to meet any counterterrorism investigative demand that materializes. These 518 agents will be taken primarily from FBI drug investigations (400), although there will be some shift from white-collar (59) and violent crimes (59 agents).

The decision to propose reducing the FBI's level of involvement in drug investigations came after careful consultation with FBI Special Agents in Charge

(SACs), United States Attorneys, state and municipal law enforcement, Members of Congress, and others - including DEA Administrator Hutchinson who also sits on the Department of Justice Strategic Management Council. The FBI will still participate in Organized Crime Drug Enforcement Task Forces (OCDETF) with other federal, state, and municipal law enforcement. Our resources for OCDETF cases are not affected by the realignment of drug resources. Even after the proposed reduction of 400 agents, the FBI will still be devoting nearly 1,000 agents to drug-related cases.

What I am asking our SACs to do is reevaluate the level of FBI involvement in other drug cases and, where possible and without jeopardizing current investigations, reduce FBI resources. Where in the past we might have contributed 10 to 12 agents for day-to-day involvement in a task force or investigation, we might contribute 5 to 6. SACs may augment that day-to-day commitment with additional resources to meet special needs, such as the execution of search warrants or coordination of multiple arrests. We will also be more deliberate in opening cases involving drug cartels and drug trafficking organizations and making sure our efforts do not overlap or duplicate those of the DEA. As a result of the realignment of 400 FBI Special Agents, I believe the FBI and the DEA working together can ensure that federal resources are appropriately applied so that the critically important war on drugs is not impaired in any way and that support to state and local agencies is not diminished.

Similarly, in the areas of White-Collar Crime and Violent Crime, I am proposing relatively modest reductions of agent personnel – roughly 2.5 percent

in White-Collar and 3 percent in Violent Crime. Again, I will expect SACs to evaluate day-to-day levels of commitment to Safe Streets Task Forces and make adjustments. In the area of white-collar crime, we may adjust some of the thresholds used for determining whether to proceed with an investigation and defer other cases to agency inspector generals who posses the necessary expertise to handle criminal investigations. But, I expect the impact on our state and municipal partners in these two areas to be relatively minor. Let me assure you of one thing: if a state and municipal law enforcement agency does not possess a needed expertise, the FBI will provide the assistance and expertise needed.

This reallocation of field agent staffing should enable each SAC to satisfy both the near-term investigative requirements and the national programmatic objectives for the top three priorities - counterterrorism, counterintelligence/espionage, and cyber-crime/infrastructure protection. Our foremost mission is to protect the United States from terrorist attacks, foreign intelligence operations, and cyber attacks. These are dynamic challenges that threaten the very security of the Nation and the safety of the American public. Consequently, I consider the Agents provided to each field office for these three priorities to be the minimum level of investigative effort for these programs for the foreseeable future. Moreover, it is my expectation that in addition to these resources, each SAC will, on an ongoing basis and in consultation with national Counterterrorism, Counterintelligence, and Cyber executive management at FBIHQ, be prepared to devote whatever additional resources are necessary to

fully address and resolve every emerging threat and every situation that may arise in these three critical areas.

3. Shifting FBI Management and Operating Culture to Enhance Flexibility, Agility, and Accountability

Implementing the revised FBI priorities outlined above and redirecting the FBI workforce toward these priorities requires a concurrent shift in how the FBI manages these cases from a national perspective. These changes will also require changes in how we operate within our offices and perform our work.

In support of our top three priorities, I am directing a series of changes to strengthen the FBI's national management and oversight of counterterrorism, counterintelligence, and cyber-crime investigations and programs. These cases and investigations are critical to the very foundation of the FBI's ability to protect national security. These cases often involve parallel efforts in multiple locations within the United States and foreign countries and require extensive coordination and collaboration with other Intelligence Community, state, municipal and international partners. These cases also are complex in terms of inter-relationships among groups and individuals, a complexity that requires continuity and specialized expertise and tradecraft. Most importantly, these cases require an organizational capacity to quickly respond and deploy personnel and technology to emerging and developing situations.

These changes are also intended to create a centralized body of subject matter experts and historical case knowledge that, in the past, has been largely

resident in a few FBI field offices. While this field-based concentration of such expertise and knowledge often worked well in terms of contributing to successful prosecutions of terrorists and spies, such expertise and knowledge was often not available or easily shared with other FBI Field Offices and our partners. The FBI's shift toward terrorism prevention necessitates the building of a national level expertise and body of knowledge that can be accessed by and deployed to all field offices and that can be readily shared with our Intelligence Community and law enforcement partners.

Counterterrorism Division. A significant restructuring and expansion of the Counterterrorism Division at FBI Headquarters is being proposed for three basic reasons. First, the more direct role envisioned for the Counterterrorism Division in managing investigations, providing operational support to field offices, and collaborating with law enforcement and Intelligence Community partners requires additional staff at Headquarters. Second, implementing a more proactive approach to preventing terrorist acts and denying terrorist groups the ability to operate and raise funds requires a centralized and robust analytical capacity that does not exist in the present Counterterrorism Division. Third, processing and exploiting the information gathered domestically and from abroad during the course of the PENTTBOM and related investigations requires an enhanced analytical and data mining capacity that is not presently available.

Among the significant features and capabilities of the enhanced Counterterrorism Division will be:

- establishment of a new, expansive multi-agency National Joint Terrorism Task Force at FBI Headquarters to complement task forces established in local FBI field offices and to improve collaboration and information sharing with other agencies;
- establishment of "flying squads" at Headquarters and specialized regional assets to better support field investigative operations, deployments of FBI Rapid Deployment Teams, and provide a surge capacity for quickly responding to and resolving unfolding situations and developments in locations where there is not an FBI presence or there is a need to augment local FBI resources with specialized personnel;
- augmentation of FBI capabilities to perform financial, communications, and strategic analyses of terrorist groups and networks; and
- support for the Department of Justice's Foreign Terrorist Tracking Task Force and terrorism prevention outreach efforts.

Many of you had the opportunity to visit the FBI Strategic Information Operations Center after the terrorist acts of September 11 and were able to witness firsthand a true inter-agency, collaborative environment where information flowed quickly between agencies. Others of you saw a similar environment created at the field office level in Salt Lake City to coordinate security and intelligence for the Winter Olympic Games.

What we must do in our new Counterterrorism Division is create a similar collaborative and information sharing environment. Preventing future terrorist acts necessitates that the Counterterrorism Division operate at a near-SIOC like capacity for the foreseeable future. Any less of an effort is not acceptable. Maintaining such an operating capacity, however, is extremely labor intensive and well beyond the pre-9/11 resource levels, capacity and structure of the Counterterrorism Division. The proposed Counterterrorism Division reorganization is my commitment to establishing the necessary organizational

environment and framework where such a level of commitment can be sustained and where necessary cultural and behavioral changes can become institutionalized over time.

Equally important to the success of the Counterterrorism Division reorganization is changing the underlying operations of the division to emphasize the importance and necessity of sharing information on a timely basis, creating an intelligence awareness among employees – FBI and other agency – so that we look at not only the case-related value of information, but also its relevance to the larger, strategic view of a group or organization, and developing and sustaining bodies of knowledge and expertise that can be made available at a moments notice to any FBI Field Office and our partners.

Finally, with respect to Counterterrorism, I cannot overstate the importance of building and maintaining effective international partnerships to combating terrorism. Our Legal Attaches played an extremely valuable role in the PENTTBOM investigation and continue to be critical to our ongoing efforts to deny Al-Qaeda the ability to mount future attacks. These partnerships will only grow more important in the future. Consequently, I believe it may be necessary for the FBI to consider additional Legal Attache offices in key locations, especially in Africa.

Counterintelligence Division. Within our Counterintelligence Division, the FBI is proposing a new espionage section that will focus on the so-called "811" referrals and investigations of espionage. This will allow our operational

counterintelligence sections to concentrate solely on detecting and countering foreign intelligence operations, focus on emerging strategic threats, and protecting United States secrets from compromise. Additionally, the management of our Counterintelligence Division is reorienting the focus of the FBI counterintelligence program to work more closely with other government agencies, sensitive facilities, and the private sector to identify and protect United States secrets from being compromised by foreign agents and spies. As with Counterterrorism, success in the counterintelligence area will depend upon the ability of the FBI in acquiring agents, analysts, translators, and others with specialized skills and backgrounds and training existing counterintelligence personnel. The FBI is also establishing a career path for counterintelligence agents to encourage retention of personnel in this highly specialized field. In the end, we will have a new structure operating pursuant to a new, differently focused strategy that recognizes the critically important CI-21 approach.

Office of Intelligence. The December 2001 reorganization created a new Office of Intelligence to support our counterterrorism and counterintelligence programs. Building a strategic and tactical intelligence analytical capacity is critical if the FBI is to be successful at pulling together bits and pieces of information that often come from separate sources and providing analytic products to policy makers and investigators that will allow us to prevent terrorist acts.

This Congress is all too familiar with the FBI's analytical shortcomings. These shortcomings have been documented by the FBI and others, discussed in prior hearings and briefings and need not be restated again. Fixing these shortcomings is going to require investments in additional personnel, basic and advanced training, technology, and, perhaps most importantly, time. Building subject area expertise or developing an awareness of the potential value of an isolated piece of information does not occur overnight; it is developed over time. That is why I am grateful to DCI Tenet for his willingness to detail experienced CIA analysts to the FBI to work at both the field and Headquarters level, and to set up and manage our Office of Intelligence. These personnel, expected to arrive over the next several weeks, are needed to provide the FBI with a critical near-term analytical capacity while we recruit, hire, train, and build our analytic cadre.

Cyber Division. Last December, the Administration and Congress approved the establishment of a Cyber Division at FBI Headquarters. The Cyber Division will coordinate, oversee, and facilitate FBI investigations in which the Internet, on-line services, and computer systems and networks are the principal instruments or targets of foreign intelligence or terrorists and for criminal violations where the use of such systems is essential to the illegal activity. The FBI will consolidate under a single national program manager headquarters and field resources associated with the National Infrastructure Protection Center (NIPC), the Internet Fraud Complaint Center, and cyber-related criminal

investigations delegated to the FBI for investigation, such as intellectual property rights-related investigations involving theft of trade secrets and signals; copyright infringement investigations involving computer software; and Innocent Images National Initiative investigations and training. The new division will continue a direct connection between NIPC and the Counterterrorism and Counterintelligence Divisions regarding national security cases. Additionally, the division will work closely with the proposed Investigative Technologies Division regarding support for the Computer Analysis Response Team program and deployment of Regional Computer Forensic Laboratories.

Dealing with the problem of cyber-crime requires skills and understanding of technology that the FBI does not possess in great numbers. Consequently, the FBI will develop new and expand existing alliances with other federal, state, and municipal agencies, academia, and the private sector.

At the field level, the approach the Cyber Division is considering is inter-agency Cyber Task Forces. In large FBI Field Offices, I envision the FBI maintaining existing stand-alone National Infrastructure Protection Center (NIPC) squads to handle computer intrusions, critical infrastructure protection issues, and the INFRAGARD program. Complementary Cyber Crime Squads will be established to consolidate management and investigation of cyber-related violations currently handled under the White-Collar and Violent Crime programs, as well as investigate non-terrorist and non-intelligence computer hacking and intrusion cases. In small or medium FBI Field Offices, the FBI will either use the above model or create hybrid cyber squads that consolidate NIPC and criminal

resources into a single squad. Regardless of the size of office, the FBI will reach out to invite participation from other federal, state, and municipal agencies on Cyber Crime Squads to reduce duplication of effort and maximize resources. FBI Cyber Crime Squads and task forces will be allied with Department of Justice Computer Hacking and Intellectual Property (CHiP) units in those 13 United States cities where CHiP units are being established. The FBI will continue its partnership with the National White-Collar Crime Center to operate the Internet Fraud Complaint Center.

Investigative Technologies Division. I am proposing to split the current Laboratory Division into two divisions: Laboratory and Investigative Technologies. Recent growth in the mission, staffing, and funding of the programs encompassed by the Laboratory Division presents potential problems in the areas of management span of control and effective project management. The technical nature of many of the multi-year projects being carried out by division project leaders requires a degree of management oversight and involvement that can be best achieved by splitting the current division.

The Laboratory Division will continue to focus upon the collection, processing and analysis of evidence, training, and forensic research and development. The proposed Investigative Technologies Division will concentrate on providing technical and tactical services in support of investigators and the Intelligence Community, such as electronic surveillance, physical surveillance, cyber technology, and wireless and radio communications, as well as the

development of new investigative technologies and techniques and the training of technical agents and personnel.

Criminal Investigations. The American people look to the FBI for leadership in investigating the most serious national and international crimes and criminal enterprises and for cooperating and assisting other federal, state, municipal and foreign law enforcement authorities. As a *national* law enforcement agency, FBI Field Offices should draw upon *national* criminal investigative priorities to develop local crime-fighting strategies. The national priorities I have identified will serve the FBI as a critical common denominator that links criminal investigative activities across field offices.

In developing local criminal priorities and resource allocation plans, each SAC should also take into account the ability of state, municipal, and other federal law enforcement to handle the full range of criminal violations which may vary widely among jurisdictions and agencies. This requires the FBI to be more flexible and collaborative in its approaches to its criminal investigative mission. At the same time, SACs should, in consultation with the United States Attorney and appropriate state and municipal authorities, develop and implement appropriate strategies and resource allocations for addressing the FBI's other criminal investigative priorities. These five areas are: public corruption, civil rights, transnational and national criminal organizations, major white-collar crime, and significant violent crime.

Given the near-term requirement to ensure the resource needs of our top three priorities are satisfied, SACs must be more focused and deliberate in his/her management of resources allocated to criminal priorities. Consequently, it is imperative that SACs avoid duplicating the efforts of other agencies or direct resources against crime problems that can be more appropriately handled by other agencies. We must be prepared, for the time being, to defer criminal cases to others, even in significant cases, if other agencies possess the expertise to handle the matter adequately. In situations where other federal, state, and municipal capabilities are not sufficient to handle a case or situation, SACs should be prepared to step in and provide FBI resources as needed. However, once the immediate situation is under control or resolved I expect SACs to reevaluate the level of FBI commitment and make necessary adjustments.

Within the conduct of our criminal investigative mission and in our day-to-day interactions with state and municipal law enforcement partners, all FBI personnel must remain alert for indications of criminal or suspicious activities that might be precursors of possible terrorist operational and logistical activities. The PENTTBOM investigation has demonstrated how a group of terrorists were able to infiltrate our country and carry out extensive planning, operational, and logistical activities without apprehension by law enforcement. Other terrorist investigations have revealed patterns of low-level criminal activity by terrorists. It is the duty of every FBI employee to remain vigilant for suspicious activity or informant information that could be a tip-off to a future terrorist attack.

Closing

Mr. Chairman, the unpredictable and unconventional threats to our national security and the serious crime problems that often reach beyond our borders necessitate changes in the FBI, changes in our priorities, changes in our workforce, and changes in our approach to performing our mission. Critics often characterize the FBI as being resistant to change, citing an "insular" culture. I have had the opportunity to work closely with the fine men and women of the FBI under the extreme circumstances of the last nine months. I am confident of their recognition of the importance of this critical moment in our history and I am confident that change is being embraced. I will not pretend it will be easy but I also do not doubt that a different FBI is emerging post-9/11.

What I am proposing is an evolving road map for moving the FBI forward through this time of uncertainty and unpredictability. As an evolving strategy, it will be adjusted to meet changes in the world in which we must operate. Our adversaries, whether they are terrorists, foreign intelligence agents, or criminals, are not static or complacent and we must not be either. The challenges facing the FBI requires a workforce that possess specialized skills and backgrounds, that is equipped with the proper investigative, technical, and analytical tools, and possesses the managerial and administrative competencies necessary to deal with a complex and volatile environment. Beyond the changes and proposals I have outlined today are changing and revitalizing internal processes are also

necessary to eliminate internal "stove-pipes" and barriers that prevent us from being more collaborative among ourselves and with our external partners.

I welcome your comments and suggestions relative to the management and organizational changes that I have submitted to the Congress. I appreciate the support that this Committee has given to what we are trying to accomplish and I particularly appreciate the recognition of the urgency with which I believe these issues must be addressed.

Lotus cc:Mail for Beryl Howell

Date: 6/6/2002 7:48 AM
Sender: Liz McMahon
To: Bruce Cohen; Beryl Howell; Steven Dettelbach; John Elliff; Robyn Schmidek
Priority: Normal
Subject: NYT: Op-ed "Role of Congress"

June 6, 2002

The Role of Congress

Robert Mueller's planned appearance before the Senate Judiciary Committee today ought to be the occasion for a tough grilling of the beleaguered director of the Federal Bureau of Investigation. The immediate issues before the committee are the bureau's mishandling of warnings last summer about terror threats and the steps Mr. Mueller is taking to reorganize his agency. Members of the committee should use the opportunity to demand that Mr. Mueller explain why Congress was not consulted before Attorney General John Ashcroft granted the F.B.I. new domestic spying powers last week. The senators should also ask for a detailed report on how the administration has used other law enforcement tools it sought after Sept. 11.

The performance and powers of the F.B.I. are not trivial matters. They demand the kind of close scrutiny that the Judiciary Committee has sometimes failed to muster on civil liberties matters since the terror attacks. Ever since Mr. Ashcroft cowed the committee in December with a bombastic lecture about security, there has been a distressing timidity in the Senate about the Bush administration's aggressive expansion of federal investigative powers.

Patrick Leahy, the chairman of the Judiciary Committee, and his colleagues have a constitutional obligation to speak out on these issues and exercise the powers of the Senate to maintain an appropriate balance between liberty and security in America. Curiously, Republicans have shown a greater willingness to challenge the administration's actions, particularly Representative James Sensenbrenner, chairman of the House Judiciary Committee, and Senators Charles Grassley and Arlen Specter, both members of the judiciary panel.

The Judiciary Committee has kept abreast of Mr. Mueller's plans to turn the F.B.I. into a counterterrorism organization, and much of today's hearing is likely to be devoted to the bureau's fumbling of information from its Arizona and Minnesota offices last summer that pointed to the possibility of a terrorist plot involving hijacked airliners. Mr. Mueller has acknowledged these mistakes, which is welcome, but has yet to make clear that he intends to discipline those found responsible. He will never be able to transform the bureau into an effective antiterror outfit if he excuses the egregious failure of subordinates. Any obfuscation by Mr. Mueller today about last summer's decisions is sure to be exposed later in the day when the committee hears from Coleen Rowley, the courageous whistle-blower from the F.B.I.'s Minneapolis office.

Looking beyond the failures of last summer, the committee must press Mr. Mueller to provide Congress with a full report on how the F.B.I. has employed the additional powers awarded to it under the U.S.A. Patriot Act, which Congress passed in a stampede last fall.

The nation needs an accounting of the array of measures covered in the law, including expanded latitude to conduct searches, wiretap suspects and engage in other forms of electronic surveillance.

The administration has often been quick to accuse its critics of playing politics with the war on terrorism, or even of lending indirect support to terrorists. Responsible questioning and dissent are essential elements of our democracy. As Senator Charles Schumer has properly noted, there is no subject more suited to public debate and legislative oversight than the tension between liberty and security.

Statement of Coleen M. Rowley
FBI Special Agent and Minneapolis Chief Division
Counsel

Before the Senate Committee on the Judiciary
"Oversight Hearing on Counterterrorism"
June 6, 2002

Members of the Senate Judiciary Committee:

Thank you for allowing me this opportunity. I never anticipated that my letter to Director Mueller would have this kind of impact. The letter was not the result of any lengthy planning or preparation but was written from the heart over the course of a fairly sleepless three day period after being notified that I was to be interviewed by the "Special Staff" of the 9/11 Joint Intelligence Committee. An additional impetus was the fact that I knew the FBI's plans for a so-called "Super Squad" were on the verge of being implemented.

As you may know, my acceptance of Senator Leahy's invitation to address your committee was conditioned upon FBI (Bureau) approval and the caveat that I cannot speak on any of the events of September 11th nor on the inquiry commenced by the Department of Justice's Office of Inspector General. Public discussion of those topics could have adverse affects upon the Moussaoui prosecution as well as adverse national security implications and is properly before the (closed) Joint Intelligence Committee. I am only here to comment generally on some of the problems endemic to the FBI Bureaucracy and to the federal law enforcement/ national security process as a whole. I do not presume to speak for all FBI agents, however, in the past week I have noticed some common themes in the numerous e-mails, letters and telephone calls I have received from FBI agent and support employee ranks. A fair number of retired FBI leaders have also acknowledged the truth of some of the criticisms expressed in my letter.

I will therefore strive to briefly describe some of these bigger problems as well as some possible solutions. They are as follows:

I. (Ever)growing bureaucracy

At least three negative aspects to the FBI's ever growing bureaucracy can be identified:

a) Careerism/ risk aversion

I've heard there is a saying at FBI Headquarters, "Big cases, big problems; little cases, little problems; no cases, no problems." The idea that inaction is somehow the key to success manifests itself repeatedly because up to now the consequences of inaction have not been that apparent while the opposite has been true for instances when FBI leaders did take some action. Despite what one may see on the "X-files," FBI agents are only human. As humans, we all make mistakes. Mistakes are inevitable. But a distinction can and should be drawn between those mistakes made when trying to do the right thing and those mistakes caused due to selfish motives.

b) Too many approval levels which impede effective decision making

I have been told there are between seven and nine management levels at FBIHQ: Supervisory Special Agent (SSA); Unit Chief; Assistant Section Chief; Section Chief; Deputy

Assistant Director; Assistant Director; (and in terrorism matters) Deputy Executive Assistant Director, and Executive Assistant Director; and finally Director. The resulting cumbersomeness of getting approval(s) for even the smallest decisions is obvious. Past Directors have tried to eliminate some of the Headquarters layers, but each time, their meager efforts have, in no time at all, been totally erased. Like the plant in the "Little Shop of Horrors" movie, the bureaucracy just keeps saying, "Feed me, feed me." Ironically, even with all the management layers at FBIHQ, it often appears that there is little or no real supervision of the mid-management levels.

c) Make work- paperwork

One Sunday, approximately three months ago, I happened to come into our office in Minneapolis for some reason. I bumped into a supervisor who, after only about one year on the desk, told me he was reluctantly going to have to "step down". He had spent several weekends in the office completing "crime surveys," Annual Field Office Reports (AFORs), pre-inspection program descriptions and other miscellaneous paperwork. The long hours were taking a toll on his family- (he's the father of four little girls). His anguished decision to step down was, however, not solely due to the time spent away from his family but was more because of the exasperating purposelessness of the endless "reports" that were occupying his time. It's one thing to work around the clock on a breaking kidnaping, armored car robbery, terrorist incident, etc., but it's quite another to have to spend hours engaged in completing the myriad of required "reports" the FBI bureaucracy has spawned in order (at least in part), to justify its existence! This Supervisor who is, in fact, now relinquishing his management position, happened to be one of very few who, prior to becoming a supervisor, had a long and successful background (approximately fifteen years) as a stellar investigator. The endless, needless paperwork and writing exercises were actually preventing him from doing his job of supervising the agents on his squad. I think this supervisor's experience is a common problem which has been echoed by many in the FBI who say it reminds them of the old story, "The Emperor has no Clothes".

The bureaucracy problem is huge and I have only touched upon it. It did not get this bad overnight nor can it be quickly cured. It may even be presumptuous to think it can be cured when so many earlier efforts have failed. But it may be possible to trim it some through: 1) reduction of the levels of management at FBIHQ to three or four; 2) delegation of authority to the lowest possible level in the field and/or at FBIHQ- (it appears that FBI Director Mueller has already made a good start in this direction with the portion of the AG Guidelines that delegate authority to field SACs to open terrorism investigations); and 3) strict compliance with the Paper work Reduction Act eliminating all unnecessary paperwork.

As I mentioned earlier, one of the things (kind of the "straw that broke the camel's back," you might say), that prompted me to write to Director Mueller was this notion of a FBI Headquarter's "super squad" that, according to the early information being given out, would be an expert team of terrorism managers assigned to FBIHQ who would be quickly dispatched to a field division experiencing a terrorist threat or incident. For a number of reasons, no one I know in the field thinks such a plan will work and, as I said in my letter, it flies in the face of went wrong pre September 11th. But the term "flying squad" has also now been used somewhat interchangeably to describe this initiative. If that means, as the name implies, that a contingent

of additional expertise and resources, (such as translators, computer forensic investigators, surveillance experts, etc.), stands ready to come in a supportive role upon a field division's request, then I think the idea may have some merit.

II. Roadblocks

It should be acknowledged that the events of September 11th themselves have greatly dislodged the idea of inaction having no consequences. All Americans, including FBI agents, are very aware now of the real dangers facing our citizenry. The alert actions of the various passengers and flight personnel on the Richard Reid flight are but one example of this new mind set. In the FBI we have been told that prevention is now more important than prosecution. This is pure common sense and, as such, predated the recent terrorist events, especially with respect to violent crimes. Continual reminders are, however, in order especially if the country is able to go for a time without another terrorist event and begins to lapse back into complacency; and the FBI and federal attorneys offices lapse back into a career risk-adverse culture. Finally it should be noted that there may still be some who have not yet made the transition.

Hopefully, then, it will be the rare case, (at least in the near future) of encountering unjustified roadblocks in seeking to investigate concrete indications of terrorism. In those rare cases, I would propose we implement a mechanism that is rather novel to the attorney profession but is well-established in other professions, namely in the medical field, that of seeking a "second opinion." Just as a person diagnosed with a serious medical problem often obtains a second opinion before embarking on a course of treatment, FBI investigators ought to be able to pursue a second opinion from a cadre of federal attorneys with greater expertise in terrorism matters than the average assistant United States attorney when the potential consequences are serious and substantial disagreement exists between the investigators and the lawyers. I will just add that it appears that Director Mueller has again beaten me to this idea, (at least to a partial extent with respect to the FISA process) with his recent directive that all FISA requests which are turned down by mid-managers are to be then reviewed by himself. Consideration should also be given to applying the "second look" idea to the criminal route, at least in terrorism cases- (kind of an aggressive DOJ "super squad" which can be directly accessed from the field).

As I mentioned in my letter, it should go without saying that affidavits, whether criminal or FISA, should only be corrected for grammatical or format type errors. Substantive changes by those who are not in first hand positions must be avoided or at least minimized. Field office agent affiants could easily travel to Washington D.C. to personally present their affidavits to the FISA Court, if necessary, in conjunction with a Bureau supervisor. Neither the Court nor attorneys in the Department of Justice should elevate a particular desired style over the substance of an affidavit.

III. Intelligence gathering/handling

Hopefully my letter did not give a wrong impression, but in truth I do not have any great expertise in either foreign counter intelligence or international terrorism investigations. Again however, I have heard from many others who do. By and large, it seems that the Director's

requests for enhancements for intelligence gathering and analysis are needed and well founded. The need for people at FBIHQ who can connect the dots is painfully obvious. In addition to the beefing up generally of the FBI's intelligence and analytical ability, the following suggestions (many of which do not cost much) should also be considered:

1) Administration: Lift some of the administrative burden from the line field supervisor, by reducing outdated rules, regulations, forms, policies, and procedures, which will enable them to focus on field operations and mentoring new agents.

2) Guidance: Revamp our manuals (especially the National Foreign Intelligence Program [NFIP] one [dated 6/95]) by developing a clear concise operational guidebook to aid investigators, rather than the current outdated ones which are used on occasion to punish agents for minor infractions and require cumbersome compliance.

4) Culture: Transition from the risk averse to a proactive atmosphere by changing our evaluation process, i.e., inspection, performance evaluation, oversight (IOB, OPR, IG). Reward innovation.

5) Management of Intelligence: Centralized intelligence is required. However, it must be properly analyzed, evaluated and disseminated in a timely fashion to the field. Recently, the state and locals officials (as well as the media) have frequently received more information than FBI field divisions.

6) Technology: Continue technology upgrades and integration projects linking the FBI with other agencies.

7) Enhance authority: The Patriot Act and the revised Attorney General Guidelines were long overdue. FBIHQ should not undercut the new Attorney General Guidelines by creating overly restrictive Bureau policy. Consideration should by given to grant some Title 8 (Immigration and Naturalization Service [INS]) authority to enhance field operations and provide on the spot administrative detention authority that is currently lacking.

8) DOJ: Consider creation of a DOJ "super squad" with experts in terrorism to provide consistent, aggressive, coordinated prosecutions as part of a comprehensive national strategy to neutralize and dismantle terrorist operations and fund raising activities. In the interim, eliminate the need for field agents to go to FBI and DOJ Headquarters in order to contact their respective local United States Attorney's Office to discuss the most effective strategies.

9) Development of Confidential sources and assets: Just recently, in the wake of the Whitey Bulger scandal, the guidelines for development of confidential sources and assets have become extremely restrictive and burdensome. While some of the measures undertaken to monitor the informant process were necessary, they have now gone too far and if not reviewed/trimmed, may result in reduced ability on the part of the FBI to obtain intelligence.

10) Leadership: Executive level management, in the field and at the highest level of

FBIHQ, must support future investigative activities in the "intelligence world", which is frequently less than "probable cause". To be effective, this support must be apolitical, consistent, and resolute. All promotions in the FBI, and especially those to the highest positions, must be more than "legally defensible;" they must be designed to select those personnel with the most investigative experience or expertise in their area and those with real leadership abilities.

IV. Other legal issues

This is an area which is more in line with my personal background as a division legal counsel. And it is something that Congress can perhaps do something about directly! I will limit myself to two of the most important legal issues, the so-called "McDade law" making federal prosecutors subject to the attorney ethics provisions of the states they practice in (and/or are licensed in); and the "public safety" exception to Miranda which I alluded to in a footnote in my letter to Director Mueller. Although I'm not sure all of you were fully aware of the adverse ramifications to law enforcement when the McDade law was passed in 1999, I believe many of you have since been advised at various times by the FBI and the Department of Justice of how this law has come to be applied and of the serious adverse ramifications it has had upon law enforcement. Although I would like to provide you with some cogent examples of how this law, (the application of which arguably violates the Supremacy Clause of the Constitution), has resulted in case after case being stifled, I hesitate to do so here in open session for fear of instructing the criminals and even the terrorists in our country on the power of this law and how they can use it to avoid effective investigation. Perhaps I and/or other FBI agents can be given a chance in the future to more fully describe the problem to members of the Committee in a private forum. I think some of you may be shocked to discover what has transpired. I think most of you will, at the very least, agree that these consequences were not what was envisioned when the law was passed. At the present time, the adverse impact is greatest upon all forms of white collar crime including Ponzi schemes, other types of frauds, public corruption, etc., but all types of other criminal enterprises, organized crime/drug cartels, and even violent criminals have benefitted from the law. It is only a question of time until terrorists also learn to take advantage of this law, as they apparently have with other facets of our American laws and privileges.

The second legal issue, involving the "Quarles public safety exception," is something that I attempted to call in to some of your staffers on the eve of the Patriot Act becoming law. I also alluded to the issue in one of the footnotes to my letter. In a nutshell, here's the issue. There was a Supreme Court decision almost two decades ago, in 1984, New York v Quarles, 467 U.S. 649, wherein the Court decided that an exception to the Miranda rule should exist when the questioning was designed to protect the public safety. In that case, the Court found that a police officer who was concerned that a criminal subject may have left a loaded gun in a grocery store, was permitted to question the subject without first providing Miranda warnings nor obtaining a Miranda waiver. Although this "public safety exception" is taught to new FBI agents at the FBI Academy, it seems to have been largely ignored and/or forgotten by prosecutors and courts. Some courts limit the Quarles decision strictly to its facts- that is, you have to have a possibility of a loaded gun in a grocery store in order to fall under the Quarles exception when any number of other situations could pose equally dangerous consequences. There is actually a decision by a state appellate court in Illinois that refused to apply the Quarles exception to a situation wherein

a kidnapper had left an 11 month old baby in a duffel bag in the middle of a forest. The baby would probably have died if the FBI agents had not deliberately disregarded the dictates of Miranda in favor of interrogating the kidnapper, but the Court was apparently not convinced and refused to apply the Quarles exception to the case. As I said in the earlier footnote, with the focus now on preventing acts of terrorism, the law in this area needs to be clarified. It may be possible to enact legislation amending 18 U.S.C. 3501 on the admissibility of confessions by at least providing a defense from civil liability for federal agents who must, under these type of situations, violate the Miranda rule in good faith, in order to protect public safety.

INTEGRITY

Back in the week prior to September 11th, I gave a "power point" ethics presentation twice to personnel in our Division as part of the "Back to Basics" training which the FBI's prior Director mandated for every field division in the wake of the newly discovered "OKBOMB" documents. One of the frames of the ethics presentation said, "DO NOT: Puff, Shade, Tailor, Firm up, Stretch, Massage, or Tidy up statements of fact." Another frame, entitled "Misplaced Loyalties," stated, "As employees of the FBI, we must be aware that our highest loyalty is to the United States Constitution. **We should never sacrifice the truth in order to obtain a desired result** (e.g. conviction of a defendant) **or to avoid personal or institutional embarrassment**." To be honest, I didn't think a whole lot about the slide show at the time I was giving it, but since September 11th, I've been forced to do a lot of thinking about this. There are at least four good reasons for this tenet as it applies to the FBI.[1]

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[1] (Only one footnote!) After I had already jotted down my thoughts on the integrity issue, I received an e-mail from FBI Supervisory Special Agent Patrick J. Kiernan who testified before your Committee last July, 2001. Coincidentally, his statement to you also covered the ethics/integrity issue, and is probably better than mine. I e-mailed him back that I would just ditto the end of his prior statement, but since I had already jotted down my own, I came up with the footnote idea. Here is how SSA Kiernan aptly put it:

"Director Freeh made a great start in 1996 by significantly expanding the ethics program for the new Agents of the FBI. But the same message needs to be provided to the leadership of the organization. I do not believe that people intentionally want to make unethical decisions. However, everyone, myself included, needs the occasional reminder of why we joined the FBI. In almost all cases, it was to make a positive difference in the lives of American citizens. It was certainly not to make money. Nor should it have been to acquire power and influence. Unfortunately, sometimes career advancement at any cost becomes the ultimate goal and decisions are made for selfish interests, as opposed to the good of the organization or the country. This certainly is not unique to the FBI, but because of the FBI's considerable powers, it can have significant detrimental effects for the public.

I would suggest consideration be given to establishing an Ethics Czar at FBIHQ, who would have input into every high-level policy or operational decision. This input would be based solely on an ethical perspective. Not legal, administrative, or procedural, as there are already people in place to answer those issues. But simply to step back from all the other pressures of a high profile criminal investigative agency and ask "Is this the right thing for the FBI to do?" Consideration should also be given to creating a similar position in every field Division of the FBI. If the FBI is really serious about implementing its fifth core value, that being "uncompromising personal and institutional integrity," then we need to do more than teach it to the new Agents and never talk about it again.

Finally, once the ethical message is out there, it must be backed up by action. Rhetoric alone will not suffice to truly change any ingrained cultural problems at the FBI. Those who fail to live up to the high standards expected of FBI employees must be disciplined appropriately, including demotions and dismissals. Only by sending

Foremost, we owe it to the public, especially the victims of terrorism, to be completely honest. I happen to be pretty well acquainted with the Minnesota family of a young man who was killed in the Khobar Towers terrorist bombing and have been able to glimpse a little of their feelings in the years that have transpired since that 1996 event. I know that theirs is an ongoing struggle to learn and try to understand what happened to their son/husband. I can only imagine what these crime and terrorism victims continue to go through. They deserve nothing but the complete, unfettered truth.

Secondly, as was identified in my letter, it is critical for the FBI to identify its mistakes, if it truly is to learn from them. This applies equally to the other involved federal agencies who also made mistakes. It applies to United States Attorneys Offices, Department of Justice personnel, and everyone else involved in our law enforcement/national security process who made, makes and will continue to make mistakes. We all share some of the blame. We will never eliminate mistakes; we can only minimize them. But we must try to learn from our mistakes so we can do better.

Thirdly, if the FBI does not adhere to the highest standards of integrity, it will quickly lose the best and brightest of its employees and leaders. In my 21 plus years with the FBI, I have seen tremendous agents and support employees working diligently and selflessly to thwart crimes and protect the country. I don't believe that any computer will ever match the value of human personnel and in this respect, the FBI has always been very lucky in attracting top caliber men

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a strong message, through both words and action that unethical behavior will not be tolerated, can we hope to prevent such misconduct. Attempting to cover-up investigative miscues from the American public or protect colleagues from career embarrassment, no matter how noble the intentions, should be the quickest way to get fired in the FBI. This is one of the classic law enforcement dilemmas my unit teaches the new Special Agents of the FBI, "Honesty versus Loyalty." Unfortunately, the loyalty in that equation is misplaced. Loyalty should be to the country and the United States Constitution, not to your colleagues and friends who helped promote you. I am not saying allegiance and fidelity to your associates is wrong. Camaraderie is very important, especially in a law enforcement agency where Agents on a routine basis risk their lives for each other. However, when the choice is between those two worthy moral goals, an FBI employee must choose "principles over persons."

During a recent visit with my family to the United States Naval Academy, we stopped in at the chapel. Over the entrance doors was a Latin phrase that I am sure every Naval Academy graduate knows, "Non Sibi, Sed Patriae" which means "Not for self, but for country." That phrase succinctly summarizes what needs to be done at the FBI. That is the tone which needs to be set. Each person here today before your committee has attempted to do that in the FBI. Countless other FBI employees live out that philosophy every day, with some having paid the ultimate sacrifice. It is for those heroes and others to come, why we, before you today, could not simply sit idle and allow these problems to continue. We all care too much about this organization. Sometimes you have to endure short-term pain for long-term health and vitality. Hopefully, with your Committee's oversight, a new administration, and a new Director, the FBI can begin its journey back toward the goal of being the premier law enforcement agency in the world, one which the American people can be proud."

and women. We need to avoid the climates that gave rise to Robert Hansen, Aldrich Ames and other personnel failures and adhere to complete integrity in order to retain the FBI's new "top guns" as well as the FBI's seasoned career veterans.

The fourth and final reason I can think of for the FBI to adhere to the highest standards of integrity is another self-serving one. Since joining the FBI, I can't tell you how many debates, both public and private, I've engaged in about where the line should be drawn between the needs of effective criminal investigation and preserving the rights of innocent citizens. The trick is to be as surgical as possible in identifying the criminals and those dangerous to our country's security without needlessly interfering with everyone else's rights. From what I've seen in the last 21 ½ years, I can safely assure you that the FBI usually does a pretty darn good job of this. Although such debates, (and the last one I had was with a Minnesota criminal law professor just after passage of the Patriot Act), always begin with addressing specific provisions of the policy or law in question, they almost always boil down, in the final analysis, to one thing: trust. It's hard to win the debate if the person on the other side simply refuses to trust what you're saying about how the law or policy is applied in practice. The Government, in fighting the current war on terrorism, has already asked for and received further investigative powers. Although it can be argued that many of the new powers are simply measures to apply prior law to new computer technology or (as with some of the modifications to the Attorney General Guidelines) are things that any private citizen can do, some members of the public remain apprehensive that the FBI will go too far and will end up violating the rights of innocent citizens. It may be necessary to ask for certain other revisions of policy or even law. The only way the public's distrust can be alleviated, to enable us to do our job, is for the FBI, from the highest levels on down, to adhere to the highest standards of integrity.

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Suite 1100
111 Washington Avenue South
Minneapolis, Minnesota 55401

June 14, 2002

Senator Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
Washington D.C. 20510-6275

Dear Senator Leahy:

Thank you again for inviting me to appear before your Committee last Thursday, June 6, 2002. The following are a few things that, if possible, I would like to correct and/or amplify on for the record concerning some of the topics in my statement and testimony:

Current text searching capability of FBI computer system

My testimony concerning the FBI's current text search capabilities was not completely accurate. Apparently FBI Director Mueller also erred in his earlier response to this question. I have been told by the FBI's Office of Public and Congressional Affairs that they are therefore preparing a more detailed explanation of the FBI's current computer searching capability so I would defer to that forthcoming explanation as the most complete and accurate. In a nutshell, though, I have been advised that within the FBI's Electronic Case File (ECF) system, it is possible to search for multiple terms and words. Although not of the sophistication of a system, for example, like "Lexis-Nexis", Boolean connectors such as AND, OR, NEAR and NOT are available as search limiters in the ECF. There are significant limitations upon this capability, however, that make the system difficult to use, including: 1) certain common words are "stop" words which the system will not search; 2) prior to September 11th, many classified documents were "blocked" so that only certain persons (usually those with "a need to know") were given access to the documents retrieved from such searches; and 3) document text uploading was not initiated until about 1995 so prior documents are not retrievable. I should also mention that the specifics of the ECF search capability are not widely known within the FBI. The way of searching the FBI's central record system that most agents and other FBI employees are familiar with, (which, as I testified to, is also the way we search in response to a Freedom of Information/Privacy Act request), is by

searching a name through the automated indices of the FBI's central record system which has existed since about 1988. The names of the subjects of investigations are mandatorily indexed in this system. Many, but not all "references"- those persons not listed as a subject but just mentioned in a document, are indexed depending upon the need for retrieval.

National Foreign Intelligence Program (NFIP) Manual

I mentioned that the FBI's NFIP Manual (from 1995) needed to be updated and made more concise in order to provide clear, simple guidance to aid investigators. The good news is that a couple of days after my testimony, the long-awaited updated NFIP Manual was provided eletronically to all field offices. The bad news is that it is less than concise. It's over 350 pages long with two appendices, the first being 252 pages and the second consisting of 165 pages. There's no denying that intelligence work is difficult and complex, but perhaps further efforts to distill and simplify the necessary guidance for this type of work should be made.

Too many approval levels/ too much bureaucracy

Following my testimony to your Committee wherein I stated that there are generally between seven and nine approvals that are necessary for most directives/decisions emanating from FBI Headquarters, someone brought to my attention an example of one that came out in August of 2000 which apparently necessitated eighteen officials' approvals, not including the drafter's, all of whom dutifully initialed off! Since the document, which concerns a change in shipping procedures, so graphically illustrates the problem with the FBI's bureaucracy having too many approval levels, I have asked the Director to have the first page of this document released to your Committee, if need be, in redacted form.

As evidenced by the many comments I've received and continue to receive from others, the FBI's ever growing bureaucracy is (as I said) a huge problem (see Appendix A for a sampling). All new initiatives should therefore be scrutinized with this in mind, to see if: 1) any newly proposed body is really necessary to address a problem or just window-dressing; and 2) can we place the responsibility at a lower level and, if so, what is the lowest appropriate level?

Even though cutting the bureaucracy will be difficult, there is some hope. And there are precedents to follow. In recent years when the responsibility for such things as Title IIIs, certain tort claims, and (most recently) National Security Letters has been delegated from FBI Headquarters to the field, significant efficiencies and reductions of delays have occurred.

Unduly high standards and other issues negatively affecting the FISA process

I only touched upon this topic in my statement and testimony to your Committee. The truth is (consistent with how I answered a question from Senator DeWine) that a smaller field office such as Minneapolis does not, for a lot of reasons, usually become involved in large numbers of FISA warrants. I also advised that I have never served at FBI Headquarters. Consequently, I did not have the clearest insights as to past occurrences or directives that may be negatively impacting upon the FISA process. But in the time since my testimony, many agents from larger offices, both those experienced in seeking FISA warrants as well as a few who had unique inside perspectives of the process, have filled me in on some of the issues that served as a backdrop to September 11th and perhaps remain problems. I have learned that, at some point a few years ago, the goal was articulated of not having any FISA application ever denied by the FISA Court. This goal may have originally emanated from the Department of Justice's Office of Intelligence Policy and Review (OIPR), but it was then subsequently adopted by the FBI's National Security Law Unit and the FBI's substantive units involved in FISA processes. This objective was apparently even announced in FBI training sessions. I don't know if OIPR was completely successful in not having ever been denied by the FISA Court, but it's my understanding that very few, if any FISA applications presented to the Court were denied. That fact alone, if true (and I'm told by reliable sources that it is true), speaks volumes about the unreasonably high proof standards that would have to be required in order to attain that lofty (but somewhat warped) goal.

I also touched upon the "pecking order" problem that affects getting not only FISAs but most other things done in the FBI. I commented that the Minneapolis Division is staffed with many top-notch agents, some with intelligence backgrounds, who have keen investigative and prioritization skills. Unfortunately in the FBI, those things, and even an abundance of probable cause, may not be enough to "push" a FISA through. That is because a certain amount of clout, unrelated to the merits of the case, also seems to be required. Higher level officials of course carry more clout but so do larger offices who have more opportunity to interact with the pertinent FBI headquarters officials who must approve one's FISA application before it can be seen by OIPR and who then must "push" the FISA with the OIPR officials. FBI agents speak of having to "cultivate relationships" with the pertinent FBI officials in order to get anything achieved. Unfortunately I do not doubt for a moment the fact that these comments accurately describe reality (see Appendix B for a sampling of comments regarding FISA problems).

I just don't think it should be this way. It shouldn't matter whether agents are of a lower rank or from a distant field office with less opportunity to "cultivate relationships" with FBI Headquarters officials when it comes to addressing matters of national security.

It should be noted (as I stated to your Committee last week) that Director Mueller's initiative mandating further review of all FISA applications previously rejected by Headquarters supervisors is a positive step. Consideration should be given to expanding this higher-level-further-review idea to other critical areas where Headquarters functions as a gatekeeper. It should also be noted that Director Mueller has announced his intention to cut some of the Headquarters' approval levels and reduce some of the bureaucracy. Hopefully your Committee will closely monitor the FBI's progress on this important (perhaps most important) initiative.

Conclusion

One of the Senators on your Committee opined that my comments could have been written by any number of field agents due to agents' growing frustrations with the FBI bureaucracy. I should add that a great deal of frustration exists as well with other roadblocks in the larger criminal justice system, such as the McDade rule, that I also testified about. It's simply very hard for those of us who deal personally with crime victims and the ravages of crimes upon the public to feel as if we can not do anything to stop, deter or prevent those crimes from occurring.

As I testified, I do not presume to speak for all agents. Of the many e-mails, letters and telephone calls I have directly received (well over two hundred) from current and retired FBI personnel, three have been quite negative. But even these three negative letters did not take issue so much with the points being made but rather the bringing of the problems to the attention of anyone outside "The Bureau". It is also possible that certain FBI managers assigned (or previously assigned) to FBI Headquarters may have misconstrued my comments as personal criticism which I never intended. My remarks were wholly intended to focus attention upon some of the Bureau's most serious, endemic problems and not to add to any divisiveness that may already exist. The comments attached hereto, although strongly worded, were obviously also written by FBI employees (past and present) who not only care about the FBI, their chosen profession, but about right and wrong and our country's security. Some may be interpreted as insults but they should be seen as insulting the problems not the people in the FBI. The bureaucracy is the problem; it's a monster that sucks in even good people.

In any event, in addition to the outpouring of comments from other FBI employees (some of which are attached hereto), I have also seen many of the same issues and criticisms echoed in recent years in position papers of the Special Agents Advisory Committee and the FBI Agents Association. I would recommend that your Committee consider requesting these position papers for a fuller understanding of the problems (for example, regarding the FBI's loss of mission, failed promotional system, disincentives to entering management, etc.).

Just as the members of your Committee and the Government in general have tried to put partisan politics to the side in dealing with the sensitive issues involved in most effectively confronting the ongoing threat of terrorism, FBI field, Headquarters and management personnel should put aside their differences to do what is right for this country. All components of our nation's intelligence, security and criminal justice systems must do so if we are to learn from our mistakes and do our best in confronting future threats

Sincerely,

Coleen Rowley

Coleen M. Rowley
Special Agent and Chief Division Counsel
Minneapolis Division

REPORTER

STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE SENATE JUDICIARY COMMITTEE, REGARDING COUNTER-TERRORISM EFFORTS AT THE FEDERAL BUREAU OF INVESTIGATION, THURSDAY, JUNE 6, 2002, SH-216, 9:30 AM.

Mr. Chairman:

Thank you for holding this important hearing on counter-terrorism activities at the Federal Bureau of Investigation. Recent press reports have indicated that mistakes may have occurred at the FBI in the weeks and months leading up to September 11th. For example, it has been reported that FBI agents in the Minneapolis field office were unable to gain search warrants to investigate Zacarias Moussaoui, who is facing terrorist conspiracy charges and who has been referred to as the "20th hijacker." There have also been reports that the FBI did not act on information received from the Central Intelligence Agency regarding one of the known hijackers. Given the seriousness of these charges, it is imperative that this committee carefully examine the facts. We should not rush to judgment, but we should engage in an honest discussion about what happened and how the FBI can improve its ability to combat terrorism.

I would like to welcome Director Mueller here today and complement him for the hard work that he is doing to

protect all Americans from future terrorist attacks. He has done an excellent job since assuming the helm at the FBI, and he is taking the necessary steps to improve and reform the Bureau. I would also like to welcome Inspector General Glenn Fine and Special Agent Coleen Rowley, and I look forward to hearing their testimony. I appreciate their candor and willingness to help us examine the effectiveness of counter-terrorism procedures at the FBI.

At the outset, I would like to note that it is very difficult, if not impossible, to determine whether the attacks of September 11th could have been prevented. After witnessing the horror and the devastation at the World Trade Center and the Pentagon, Americans have a new way of thinking. We should be careful about imposing a post-September 11th outlook on those who made decisions before the attacks. That said, we should not shy away from determining areas of improvement, and we should vigorously seek to implement all necessary reforms.

Today, we will hear from Ms. Coleen Rowley, Chief Division Counsel in the Minneapolis division. She is the author of the May 21 letter to Director Mueller that expressed frustration with Headquarters regarding the

Moussaoui investigation. According to media reports, Minneapolis agents sought search warrants under the Foreign Intelligence Surveillance Act (FISA) in order to access Moussaoui's computer, only to be rebuffed by Headquarters.

This committee should examine the process of obtaining a FISA search warrant and how that process affected the Moussaoui investigation. In order to get a FISA search warrant under current law, there must be probable cause to believe that the target of the surveillance is the agent of a foreign power. The warrant is issued by a FISA court that is designed to handle sensitive intelligence information. A FISA warrant is obtained for intelligence purposes and therefore does not have to meet the stricter requirements for criminal search warrants. For instance, agents are not required to demonstrate that probable cause exists to believe that the surveillance would result in evidence of a criminal offense.

There are a host of questions raised by the failure of the FBI to obtain a warrant for Moussaoui. While the particulars of this investigation are sensitive, this committee should nevertheless consider some of the issues surrounding the investigation. For example, we should

examine the legal standard required for a FISA search. An agent seeking a warrant must be able to show that there is probable cause to believe that the target of the surveillance is the agent of a foreign power. In the present case, it is entirely possible that headquarters determined that probable cause did not exist to believe that Moussaoui was an agent of a foreign power. If this were the case, Headquarters made a judgment call, a legal determination based on the evidence available at the time. If the problem lies there, we should be wary of placing blame on any individual about an honest interpretation of FISA requirements. Rather, we should examine whether changes should be made to the legal standard required to obtain a FISA warrant. It may be necessary to change the standard to require only probable cause to believe that a person is connected with activities of international terrorism.

Additionally, we should study the actual process used by the FBI in approving FISA warrants. If warrant applications are rejected by officials at Headquarters, it may be wise to establish a review process of that decision. In that way, multiple persons at various levels would be

able to form an opinion on whether probable cause exists to issue the warrant. I hope that this hearing will shed light on some of these issues surrounding FISA, and I am committed to making any reasonable and appropriate reforms.

I would also like to say a few words about the recent changes that the Attorney General made to the guidelines governing FBI investigations. These changes have been subject to a significant amount of criticism. However, I believe that these new guidelines are not only constitutional, but are absolutely necessary to the counter-terrorism efforts at the FBI.

The central mission of the FBI is to prevent terrorist attacks against the United States. If the Bureau is to accomplish this mission, it must take proactive steps. We cannot afford to limit the FBI to reaction alone if terrorist activity is to be detected before it occurs. We must unshackle the hands of law enforcement officers so that they can be truly vigilant in their efforts to protect American lives.

The guideline changes made by the Attorney General are common sense approaches to fighting terrorism. The guidelines allow for FBI agents to access publicly available

information to search for leads. In the past, agents were unable to access many of the same types of records that are easily available to private persons. In this age of information technology where research tools are readily available, it defies reason to deny the FBI access to publicly accessible information. For example, the FBI will now be able to conduct online searches regarding general topics "on the same terms and conditions as members of the public generally." As long as this research is adequately supervised, I feel that this is an appropriate and reasonable tool to help the FBI fight terrorism.

Another guideline change would allow the FBI to visit a public place or event "on the same terms and conditions as members of the public generally." Far from being a radical shift in policy, this guideline would allow FBI agents to walk into any public place with an eye towards preventing terrorism. Some critics have suggested that this new power will enable the government unfettered access to places of worship and other gatherings, thereby chilling First Amendment speech. In my view, this concern is overblown for two reasons. The first is that any private person could access these public areas. Therefore, any expectation of

privacy at these gatherings and events is lessened. Second, the guidelines provide protections to prevent abuse. For example, an agent would be prohibited from retaining information gathered during one of these visits unless the information is related to "potential criminal or terrorist activity."

I would also like to stress that these guidelines specify that files cannot be kept on individuals "solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of any other rights secured by the Constitution or laws of the United States." By including this language, the Attorney General has made it clear that abuses of the past will not be repeated. I feel confident that these new rules have been carefully tailored to provide the FBI with new abilities to fight terrorism and at the same time protect the civil liberties of all Americans.

Mr. Chairman, thank you for holding this hearing. I know that all my colleagues wish to develop policies that will provide security for all Americans. I feel confident that the Attorney General and Director Mueller are on the right track. They are carefully examining how to improve

our domestic security, and that is exactly what they should be doing. The terrorist attacks of September 11th served as a wake-up call, and I am pleased to see that the FBI is responding in responsible and appropriate ways.

- END -

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New Orleans Brothel Made a Federal Case

FBI Wiretap Finds Elite Clientele, No Mob Ties

By Adam Nossiter
Special to The Washington Post
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NEW ORLEANS -- The calls from wealthy men to the white-columned Victorian house were about women: who was available, what they looked like and what they would do for top dollar. The callers were bankers, stockbrokers, a telecommunications mogul, a member of one of the city's leading restaurant families, a former head of the prestigious Mardi Gras society Rex, an ex-pro football star, a partner in a prominent local law firm -- and they all wanted discretion.

But FBI agents were listening. Hour after hour, month after month, 10 agents recorded the men's demands, the brothel keepers' deals and the prostitutes' complaints. The agents were listening on Sept. 11, in the days before and in the days after. With 90 calls a day to monitor, the listening post was busy.

"Okay, Joe, let's go over this again, she's light-skinned, she's young, she's pretty," a government agent dutifully recorded last April 24. "Joe asks how she's built. Taylor says she's built real nice, but not too chesty. Joe says all right, he'll be there at 3:45."

With great care, the agents documented the secret life of a high-end brothel. Through more than 5,000 phone calls, they kept listening to the madams, the hookers and the johns, even though the conversations never turned up mentions of mob bosses or hard-core drug dealing -- both cited in the FBI's initial wiretap application 13 months ago.

They heard the madam, Jeanette Maier, telling a subordinate to "blow off" calls from Holiday Inns and Ramadas; working to meet customers' needs ("George wants an appt with a large woman. Jeanette doesn't have one"); drumming up business ("She tells Steve to bring some extra money and see both girls"); and being warned by her mother about a new recruit ("Don't book this little girl, she's going to need some training").

The result is an unusual federal prostitution case that has set New Orleans abuzz. Who are the johns in the FBI's 200-plus pages of phone transcripts? And why did the bureau pursue with such energy what is a misdemeanor in state courts, and rarely a federal crime? After an investigation lasting more than a year, 12 alleged prostitutes and madams were indicted in April on conspiracy and racketeering charges; three others, including two men, were accused of helping the operation.

Federal statutes applied because the prostitutes flew in and out of New Orleans and were part of a national prostitution ring, according to the local U.S. attorney. Several of the alleged madams indicted live in other cities, including New York and Chicago. Only one man accused of being a client was charged -- he was also accused of assisting the New Orleans madam -- but defense attorneys vow to put plenty of johns on the witness stand if prosecutors go to trial.

In a city where turning tricks has been part of the culture since Louis XIV shipped over fallen women to entertain the French colonists, the unveiling of a brothel might have been greeted with a yawn. But this was different. The keen interest of the federal government in prostitutes, in pre- and post-Sept. 11 America, has baffled the local legal community.

"The whole thing is an incredible waste of federal resources," said Arthur A. "Buddy" Lemann III, one of the most experienced of the city's criminal defense lawyers. "To make a federal offense out of it is like using an elephant gun to kill a fly."

Jonathan Turley, an expert on constitutional criminal procedure at George Washington University, said: "It's extremely unusual for federal prosecutors to pursue a prostitution case. It's particularly curious in an administration that is built on respecting traditional areas of state authority."

Turley added that the FBI and federal prosecutors "often covet the crimes that fall to state authorities" because they "are a great deal more interesting than pursuing white-collar criminals and tax evaders."

The U.S. attorney in New Orleans, Jim Letten, rejected the criticisms. "The day what I do as a public servant is driven by the self-serving statements of defense attorneys is the day I have to quit," Letten said. "Whether or not they're common is almost of no moment," he said, referring to federal prosecutions of prostitutes. "We have a duty not to turn our heads away when there is a violation of federal law."

There are plenty in the city's fancier neighborhoods who wish he had done just that, say defense attorneys in the case.

At $300 an hour, the impeccably furnished brothel on upper Canal Street -- "everything in that place was from Pottery Barn," a neighbor said -- was strictly off-limits to the boozy French Quarter crowd. Lexuses were parked under the gnarled live oaks outside, and the men emerging warily from them were sometimes in business suits. Callers made it clear they were fitting a brothel visit into a busy work day.

"You're hitting the cultural substructure of the community," said a lawyer involved in the case. At lunch counters downtown, the gag greeting has been, "Are you on the list?" But elsewhere, those words are not considered funny.

"I understand they [the prostitutes] were at every stag party uptown," Lemann said. The madam has been besieged by anxious calls from former clients, according to her attorney. "There are men on that list that are more afraid of their wives than of the federal government," said Laurie White, another attorney for one of those charged.

Anxiety increased in late May when Maier, an angular career prostitute, demurely told reporters outside federal court here that she would name names, after pleading guilty with her mother to one count of prostitution conspiracy.

Her mother, Tommie Taylor, also pleaded guilty to a money-laundering count for paying $695 in expenses -- a rent check, said her attorney -- with brothel money; the government dropped 15 other counts on Maier and 14 on Taylor.

"This cuts across your upper echelon of men," White said. "Obviously, men are the partakers. It makes everybody just a little bit nervous."

Particularly puzzling to the lawyers is that government agents couldn't have known much more when they stopped listening than when they started -- that they were eavesdropping on a tightly run, profit-maximizing operation. Drinking was not allowed, and the women were pushed to see as many men as possible, at one-hour intervals ("I like to get it to seven to ten a day"). Men who called from pay phones or who refused to give last names were turned away. Important customers got special treatment ("Get the house clean because the judge will probably be coming").

Maier was proud of her work. "The 300 sometimes scares the customers because they can get it for 100 in some places -- but they come to us. That is why we have a good clientele. We have chosen our profession and we are good at it. Tommie says, she always says, I don't care what you do, just do it well."

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Paul Wellstone

Statement of Senator Paul D. Wellstone
U.S. Senate Judiciary Committee
on "FBI Counter-Terrorism Efforts; Agency Reorganization"
June 6, 2002

Mr. Chairman. I would like to note for the Committee's record my support for Minneapolis Special Agent and Chief Counsel Coleen Rowley. I know Coleen to be a person of singular courage and integrity, who has performed an extraordinary service for our country. Not only did she and Minneapolis FBI agents respond quickly when alerted to the suspicious activities of Zacarias Moussaoui by vigilant flight instructors, but she has recently raised a set of important questions about how we might make our nation more secure by making law enforcement more effective in the wake of September 11.

By raising tough questions about how to ensure that key FBI officials might communicate more effectively with one another, she is playing an enormously constructive role. As Director Mueller has begun to acknowledge, it is clear that the FBI must become more responsive and must communicate more effectively internally, as well as with other agencies, to increase our chances of avoiding future terrorists acts.

For her service to the FBI and our country, Special Agent Rowley deserves our heartfelt appreciation. She and other FBI agents who are now coming forward with important information about what the FBI knew and did not know before the September 11th attacks must be protected from any reprisals. She and other courageous agents should be assured that the FBI, the Justice Department and the nation will learn from their experience.

Thank you.

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