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MISUSE OF PATRIOT ACT POWERS: THE INSPECTOR GENERAL'S FINDINGS OF IMPROPER USE OF THE NATIONAL SECURITY LETTERS BY THE FBI

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UNITED STATES SENATE

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WEDNESDAY, MARCH 21, 2007

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:07 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feinstein, Feingold, Schumer, Durbin, Cardin, Whitehouse, Specter, Hatch, Grassley, Kyl, and Cornyn.

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

Chairman LEAHY. Good morning. I want to welcome Inspector General Fine to the Committee's hearing today.

The Inspector General has been here many times, and he has earned the respect of people on both sides of the aisle for the important work his office has done in shining a light in a number of areas, but especially one that has concerned me—the abuses of the broad powers that we in Congress gave the FBI to obtain information through National Security Letters. We all know how important National Security Letters can be. We also know how easy it is and how great the temptation can be to abuse them.

Six years ago, in the wake of the September 11th attacks, when I was Chairman of this Committee, I worked very hard with members on both sides of the aisle to ensure that the Government had the powers it needed to protect us from terrorism. I knew that we had to balance our rights so that the Government did not abuse its powers or needlessly invade the privacy of Americans.

In the years since, the Government's powers have increased steadily. One safeguard I fought hard to keep in the 2005 PATRIOT Act reauthorization was a mandate for this review by the Department of Justice Inspector General of the FBI's use of National Security Letters. Some of us wanted more safeguards, but this was the best we could get to at least have a review so we would know how they were used. So keeping the PATRIOT Act's sunset provisions and adding new sunshine provisions to improve oversight and accountability were among my highest priorities during that reauthorization process. Fortunately, the then-Chairman

of the Committee, Senator Specter, felt the same way, and we insisted together on this Inspector General review.

I am glad we insisted on the review. It is good news and bad news, though. The good news is I am glad we insisted on it. The bad news is what came out in the review. We actually would not know of the errors and violations that have been documented—extending back years—if not for the sunshine requirements we put in.

So now we have to get to use our oversight to find out what went wrong, what needs to be done to prevent them from recurring. We have scheduled an oversight hearing with the FBI Director for March 27th. We are planning a hearing with the Attorney General in April. And, of course, we will hold whatever hearings are necessary.

I am troubled by the scope of the National Security Letters and the lack of accountability for their use, and these concerns appear to be well founded. The NSLs, the National Security Letters, allow the FBI—for those who are not familiar with what they are, they allow the FBI to request sensitive personal information—phone toll records, e-mail transaction records, bank records, credit records, and other related records—without a judge or a grand jury or even a prosecutor evaluating the requests. And Congress expanded the scope of the information the FBI could request and reduced the procedural and substantive requirements for the FBI to use them. So we have to ask: Did the Congress go too far?

Now, the Inspector General's report found that of the more than 143,000 National Security Letter requests the FBI issued from 2003 to 2005, the FBI field divisions in their self-reporting said there were only 26 possible violations of the law and policy. The Inspector General found almost as many violations in his review of just 77 of them. None of the errors the Inspector General found had been self-reported by the FBI, and the FBI has massively failed to find or report its own mistakes. Documentation was missing or inadequate in 60 percent of the files the Inspector General looked at.

I was particularly distressed by the Inspector General's findings about the FBI's use of so-called exigent letters. The FBI sent these letters, which are not authorized anywhere in any statute, in at least 739 instances to telephone companies in place of NSLs or grand jury subpoenas. Basically, they told the telephone companies: This is an emergency, so give us these records voluntarily, without the regular process. And they went on to say, "Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally." The point is that was not honest. No subpoenas had been submitted. Sometimes the letters were followed up with an NSL, sometimes they were not, and sometimes the FBI did not know one way or the other. The letters were often sent by FBI personnel who were not even authorized to sign NSLs.

These abuses are unacceptable. We cannot have the FBI requesting information under false pretenses and proceeding with total disregard for the law. Nobody is above the law, especially those in charge of law enforcement, sworn law enforcement officers. They, of all people, have to follow the law. And that continued into 2006

despite the FBI's Office of General Counsel becoming aware of it in 2004. That is unacceptable.

So I want to make clear that it is not a matter of technical violations. These were private and personal information about Americans and others, including phone numbers, bank records, and credit information. We may not be able to get the genie back in the bottle, but we are going to see what we can do.

When I voted against the PATRIOT Act reauthorization, I explained, "Confronted with this administration's claims of inherent and unchecked powers, I do not believe that the restraints we have been able to include in this reauthorization of the PATRIOT Act are sufficient." I wish I could say I was wrong. I do not think I was.

I will put the rest of my statement in the record, and I am sorry I did not notice the clock.

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

Chairman LEAHY. I will yield to Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman.

Before taking up the issue at hand, I think it important to make a few comments about the pending investigation by this Committee on the issue of United States Attorneys.

First, I thank the Chairman for calling me yesterday to bring me up to date on his conversation with the Attorney General yesterday, and the issues came into different focus with the President's statement on television yesterday afternoon at 5:45. And I would urge my colleagues to rethink the issue as to how we are going to proceed with this investigation as to the request for resignations of the eight United States Attorneys.

It is obviously indispensable to find the facts to see if the Department of Justice acted properly or improperly. That raises the issue as to what is the best way to find those facts.

We have had an offer from the President to submit the three key White House officials under a less formal process than having them before the Committee sworn in regular order. I think it is important to note the letter that Senator Leahy and I sent to the three individuals on March 13th, where we said we would like to work out a process for interviews, depositions, or hearing testimony on a voluntary basis. The President has responded, taking us on the suggestion, by way of interviews on a voluntary basis.

The Chairman has responded that he believes it necessary to have the witnesses before the Committee in regular order and under oath. And that is the prerogative of the Judiciary Committee, as any Congressional Committee can vote subpoenas out on a majority vote.

The question is: What will that do for us on our effort to find the facts and deal with a very, very serious problem in the Department of Justice as to how they handle U.S. Attorneys? There has been an obviously major impact on the morale of the U.S. Attorneys across the country. There is obviously a question as to their authority and how they are going to function with respect to the risk of being asked to resign. So that is a matter which involves the ad-

ministration of justice in this country on a daily basis and is of the utmost importance.

Now, if we have a confrontation between the President and the Congress and we go to court, which is the way these matters have been resolved if there cannot be an accommodation, we face very, very long delays. The most recent landmark decision on the scope of Executive privilege and what Congress may do by way of compelling testimony is the circuit court opinion In Re Sealed Case, D.C. Circuit of 1997. And without going into any detailed analysis of that case, the Office of Independent Counsel filed a motion to compel documents on June 7th of 1995, and it was not until June 17, 1997, 2 years later, that the District of Columbia Circuit ruled on the matter. And that did not even take into account the petition for cert.

So, in the normal course of litigation process, if we go to court, have the confrontation, very serious constitutional confrontation, we will be looking at the year 2009, in the midst of the next Presidential term, before we will have judicial resolution. And the judicial resolution is uncertain.

Our preliminary research on the scope of Executive privilege deals with two items: the deliberative process and the Presidential communication privilege. And the courts have said that it depends upon the facts. So it is unpredictable whether the President will prevail or the Congress will prevail.

Now, it had been my hope—and, frankly, it still is—that we will not have a constitutional confrontation. And I have made the point, both publicly and privately, that there are precedents for people similarly situated to come forward and testify on a voluntary basis. In somewhat different circumstances, National Security Counselor Condoleezza Rice appeared before the National Commission on Terrorist Attacks, and National Security Counselors Berger and Brzezinski did it on a couple of occasions, and there are many, many precedents for not challenging on the basis of Executive privilege.

At the same time, I think it is important to note that if these individuals come forward voluntarily, they do not do so without risk if they do not tell the truth. The criminal statutes under 18 U.S. Code 1001 provide a tough penalty—I think it is equivalent really to the perjury statute—for making a false statement.

Now, it would be preferable to have the matter transcribed, but the FBI has brought many cases for false official statements just with note taking. And on the President's suggestion, there is nothing to stop the Congress from having a stenographer present, although not the traditional court reporter, to make a record.

My own preference is that it be public because I think the public has a very deep-seated interest and a right to know what is going on. Also, if it is done behind closed doors and then Senators emerge and are interviewed, you are likely to get conflicting accounts as to what was said.

Well, those are all matters that I think ought to be considered and ought to be the subject of discussion and accommodation if we can find it.

I am going to await judgment on my own vote in Committee—we will be taking this up tomorrow—until I have a chance to re-

flect on it further and talk to my Committee colleagues on both sides of the aisle.

But I come back to the essential question of finding the facts, and I would not like to see a 2-year delay or more before we find these facts because the efficiency and the viability of our United States Attorneys hangs in the balance until we clear this up.

Well, it seems we go from one crisis to another. Last week, the crisis was the National Security Letters, and that was superseded by the U.S. Attorneys, and I do not know what will supersede it the balance of this week. But this issue is one of enormous importance.

Yesterday in the House of Representatives, both Republicans and Democrats chastised the FBI, the sternest warnings coming perhaps from Republicans, that the FBI was in danger of losing the National Security Letters. The Chairman is exactly right that it was only the foresight of this Committee which authorized the Inspector General's reports so we know what is going on. It is very hard to understand why the FBI has not acted. It is a little hard to understand why the FBI is only now moving for internal audits on these National Security Letters. And I would suggest that the FBI faces a greater risk on its investigative authority in intelligence matters than losing National Security Letters. I think the FBI is at risk of losing its jurisdiction on the entire field.

There has been a lot of debate as to whether the FBI is competent to handle these matters in terms of training all the agents that start off on law enforcement. And the scholars and members are taking another look at the issue of going to the British model of MI5, so that when we have Director Mueller next week, we will be looking for some firm answers if we are to leave National Security Letters available to the FBI and if we are to leave the FBI in charge of a facet of U.S. intelligence.

Mr. Chairman, I regret going over time.

Chairman LEAHY. No, no, no. Senator Specter, you are one of the longest-serving members of this Committee, like me, and we have worked very closely together over the years to try to get the answers to these issues, whether it has been Republican or Democratic administrations. You speak of possibly it taking until the year 2009, but you and I will still be here.

Senator SPECTER. But who will be the Chairman, Mr. Chairman?

[Laughter.]

Chairman LEAHY. One of us will.

[Laughter.]

Senator SPECTER. I think either way the Committee will be in good hands.

Chairman LEAHY. Well, thank you. I appreciate that.

But, you know, the concern I had on the question you raised, I will just briefly -and I know Senator Feinstein wanted to say something. But we saw the offer. Mr. Fielding and I met for the first time yesterday. He seems like a very experienced and fine lawyer. And we talked about this, and I received the offer he made. But that is still an offer to talk to a few Members of Congress behind closed doors, with no record for the public to see, not under oath, on a very limited number of issues.

My proposal is to have it in public with both Republicans and Democratic members of this Committee, and we have superb members on both sides of the aisle who can ask the questions, and the public will know what is going on. There have been too many closed-door hearings where we have gotten inadequate and many times misleading information. Let's have it in public. Let's find out what is going on, allow both Republicans and Democrats to ask the questions, have them under oath, and clear this matter up. It is far too important for law enforcement and our country to know what is going on. The Chairman and I are both former prosecutors. We know the importance of independence of the prosecutor's office.

We want to get to Mr. Fine, but Senator Feinstein asked to make a short comment.

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

Senator FEINSTEIN. If I may, Mr. Chairman, and I apologize to Mr. Fine, who is here. But this is a big issue, I think far bigger than we have ever seen up to this point.

Mr. Chairman, you have negotiated with Mr. Fielding. I have read his letter. Frankly, it is not acceptable. You have made very clear statements which have been carried on nationwide television about where this Committee is, that any testimony will be done in public, under oath, and recorded. I think that is appropriate. And I believe very strongly that we should stand by that statement.

Tomorrow we will have a chance to do so. I very much hope we will.

I remember a private interview sitting at this table down here with Mr. McNulty when the issue was the performance of these U.S. Attorneys. I recall what he said. In many respects, I wish that could have been public because then the performance reports were revealed, and it turned out that the performance reports of the very people he was saying were being terminated on the basis of performance were all excellent.

Well, the public is entitled to know that information, I believe. And now the issue has been joined, and the White House is in a bunker mentality, won't listen, won't change. I believe there is even more to come out, and I think it's our duty to bring that out.

I happened to hear my very distinguished colleague from Texas on the floor speaking about the President's right to make appointments. And, yes, we all know the President has the right to make these appointments. But pattern and practice plays a role, and virtually every administration has fired U.S. Attorneys of a prior administration and put in their own. But once they are in, by and large they have remained. There never in history has been a time when the phone was picked up on 1 day and a number were fired and no cause was given. They were fired and terminated, essentially. They were told to leave office by January the 15th, and no explanation was given. And then we were given one explanation, and then that explanation changed. Well, the performance may be good, but we do not have confidence. And then that explanation was changed to we can do better. And it has been a slippery slope of explanations. And I think we need to look more deeply into this.

Six of the seven who were called on that very day—and there are others—were involved in public corruption cases, either the investigation or the carrying out of open public corruption cases. And I think we have an obligation to know what was the genesis of this move. Why was this put together in the way in which it was? I do not believe we will get that in a private interview, unrecorded, with people not under oath. I really do not.

And, yes, I am angry because we have had the San Diego U.S. Attorney, an excellent one, terminated. Shortly during that time, the Los Angeles U.S. Attorney resigned. I do not know whether she was asked to resign or not, but the fact is she did. We are a big State. These are big jurisdictions with big cases ongoing. And I care very much that the right reasons prevailed here.

So my point is that I am one that urges you to be strong. You have laid out the parameters. I think they are the correct parameters, and we should issue those subpoenas.

Chairman LEAHY. Thank you. Well, the subpoenas will be voted on tomorrow, and I have tried to be very clear in what I intend to do. And I think after 32 years here, people know that I do what I say I am going to do.

Only because Senator Cornyn was mentioned in this, I will yield just briefly to him, in fairness to Senator Cornyn, and then we must get to Mr. Fine.

STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS

Senator CORNYN. Mr. Chairman, thank you very much, and I will try to be brief.

You know, what seems surreal about this is that the Clinton administration terminated 93 U.S. Attorneys in one fell swoop, and no one suggested—even though they were appointees of a Republican administration. No one said this is dirty politics. But when the Bush administration terminates eight U.S. attorneys that are Bush appointees, then it is claimed to be dirty politics.

I do not know what the facts are, and I will join the Chairman, as we have talked about, and the Ranking Member and all members of the Committee, in an inquiry into the facts. I think we owe that to the country and to all of our constituents. But I would just ask my colleagues to be careful that this does not take on the attributes of a political circus or witch hunt because, frankly, I think that undermines the credibility of our attempt to look into the facts.

I would just point out that Senator Specter cited an authority, In *Re Sealed Case*. On the issue of whether we ought to issue subpoenas tomorrow or not, I would just point out that in *United States* v. *AT&T*, D.C. Circuit Court, the court said, "Judicial intervention in Executive privilege disputes between the political branches is improper unless there has been a good-faith but unsuccessful effort at compromise." What I hear Senator Specter saying is that is what we ought to be engaged in, good-faith discussions and compromise, not shoot first, ask questions later. So I would welcome that.

Chairman LEAHY. I should note on that to the Senator, I met for an hour with Mr. Fielding yesterday in that regard. I also found

they had already issued or had the press release out about what was going to be their bottom line before he even talked to me and what would be the only thing they would accept before he even came in to talk to me about what they might accept. So it is not really what I have thought of as seeking an area of compromise.

We will vote on the subpoenas tomorrow. Obviously, anybody can appear voluntarily, and we would not have to issue the subpoenas if they do.

I would also note I have been here with six Presidential administrations. In all six, all the U.S. Attorneys that were there from the previous administration were let go, which is assumed will happen when a new administration came in. President Reagan did with President Carter's, President Clinton did with former President Bush's, this President Bush did with President Clinton's, and on and on.

Senator CORNYN. Mr. Chairman, would you give me 5 seconds to say that—

Chairman LEAHY. I am counting.

Senator CORNYN. You and I have worked together on open government issues. I am very sympathetic to what you said a moment ago about the importance of the public seeing and hearing what is going on. And I would like to work with you on that.

Chairman LEAHY. Thank you.

All right. Mr. Fine, I hope you have enjoyed this.

[Laughter.]

Chairman LEAHY. Please stand and raise your right hand. Do you solemnly swear that the testimony you will give in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. FINE. I do.

Chairman LEAHY. Thank you. You have been a patient man. Please go ahead.

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

Mr. FINE. Thank you. Mr. Chairman, Senator Specter, and members of the Committee, thank you for inviting me to testify about our report about the FBI's use of National Security Letters. The PATRIOT Reauthorization Act required the Office of the Inspector General to examine the FBI's use of these authorities, and on March 9th, in accord with the statute, we issued a report detailing our findings.

Our review examined the FBI's use of National Security Letters, NSLs, from 2003 through 2005. As required by the Act, the OIG will conduct another review on the FBI's use of NSLs in 2006, which we must issue by the end of this year.

Before highlighting the main findings of our report, I would first like to recognize the hard work of the OIG team that conducted this review, particularly the leaders of the effort: Roslyn Mazer, Patty Sumner, Michael Gulledge, and Carol Ochoa. They and their colleagues worked tremendously hard to report on this important subject on a tight deadline. I want to thank them and the other team members for their outstanding work on this report.

Our report describes widespread and serious misuse of the FBI's National Security Letter authorities. In many instances, the FBI's misuse violated NSL statutes, Attorney General guidelines, or the FBI's own internal policies. We also found that the FBI did not provide adequate guidance, adequate controls, or adequate training on the use of these sensitive authorities. However, I believe it is also important to provide context for these findings.

First, we recognize the significant challenges the FBI faced during this period covered by our review. After the September 11th terrorist attacks, the FBI implemented major organizational changes while responding to continuing terrorist threats and conducting many counterterrorism investigations, both internationally and domestically.

Second, it is also important to recognize that in most, but not all, of the cases we examined, the FBI was seeking information that it could have obtained properly through the National Security Letters if it had followed applicable statutes, guidelines, and internal policies.

Third, although we could not rule it out, we did not find that FBI employees sought to intentionally misuse NSLs or sought information that they knew they were not entitled to obtain. Instead, I believe the misuses and the problems we found generally were the product of mistakes, confusion, sloppiness, lack of training, lack of adequate guidance, and a lack of adequate oversight. But I do not believe that any of my observations excuse the FBI's misuse of National Security Letters. When the PATRIOT Act enabled the FBI to obtain sensitive information through the NSLs on a much larger scale, the FBI should have established sufficient controls and oversight to ensure the proper use of these authorities. The FBI did not do so. The FBI's failures, in my view, were serious and unacceptable.

I would now like to highlight our review's main findings. Our review found that after enactment of the PATRIOT Act, the FBI's use of National Security Letters increased dramatically. In 2000, the last full year prior to passage of the Act, the FBI issued approximately 8,500 NSL requests. After the PATRIOT Act, the number of NSLs requests increased to approximately 39,000 in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005. In total, during the 3-year period the FBI issued more than 143,000 NSL requests. However, we believe that these numbers, which are based on information from the FBI's database, significantly understate the total number of NSL requests. During our file reviews in four FBI field offices, we found additional NSL requests in the files that were not contained in the FBI database. In addition, many NSL requests were not included in the Department's reports to Congress.

Our review also attempted to assess the effectiveness of National Security Letters. NSLs have important uses, including to develop links between subjects of FBI investigations and other individuals, and to provide leads and evidence to allow FBI agents to initiate or close investigations.

Many FBI headquarters and field personnel, from agents in the field to senior officials, told the OIG that NSLs are indispensable investigative tools in counterterrorism and counterintelligence in-

vestigations, and they provided us with examples and evidence of their importance to these investigations.

The OIG review also examined whether there were any improper or illegal uses of NSL authorities. From 2003 through 2005, the FBI identified, as the Chairman stated, 26 possible intelligence violations involving the use of NSLs. We visited four field offices and reviewed a sample of 77 investigative case files and 293 NSLs. We found 22 possible violations that had not been identified or reported by the FBI. We have no reason to believe that the number of violations we identified in the field offices was skewed or disproportionate to the number of violations in other files. This suggests that a large number of NSL-related violations throughout the FBI have not been identified or reported by FBI personnel.

And in one of the most troubling findings, we determined that the FBI improperly obtained telephone toll billing records and subscriber information from three telephone companies pursuant to over 700 so-called exigent letters. These letters generally were signed by personnel in the Communications Analysis Unit and FBI headquarters.

The exigent letters were based on a form letter used by the FBI's New York Field Division in the criminal investigations related to the September 11th attacks. Our review found that the FBI sometimes used these exigent letters in non-emergency circumstances. In addition, the FBI failed to ensure that there were authorized investigations to which these requests could be tied. The exigent letters also inaccurately represented that the FBI had already requested subpoenas for the information when it had not.

In response to our report, we believe the Department and the FBI are taking our findings seriously. The FBI concurred with all our recommendations, and the Department's National Security Division now will be actively engaged in oversight of the FBI's use of NSLs. In addition, the FBI's Inspection Division has initiated audits of a sample of NSLs issued by each of its 56 field offices. The FBI also is conducting a special investigation of the use of exigent letters to determine how and why the problems occurred there.

The OIG will continue to review the FBI's use of National Security Letters, and we intend to monitor the actions that the FBI and the Department are taking to address the problems we found in our review.

Finally, I want to note that the FBI and the Department cooperated fully with our reviews, agreed to declassify information in the report, and appear committed to addressing the problems we identified. We believe that significant efforts are necessary to ensure that the FBI's use of National Security Letters is conducted in full accord with the statutes, Attorney General guidelines, and FBI policy.

That concludes my testimony. I would be pleased to answer any questions.

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

Chairman LEAHY. Thank you very much, Mr. Fine. I could not help but think, when I was reading over your testimony earlier, I wish the findings were not as they are, because I feel the FBI is

very important to this country, but it also is very important to have a lot tighter control.

I was disturbed by your finding that the FBI sent out more than 700 so-called exigent letters asking telephone companies to immediately provide records without a subpoena or a National Security Letter saying it was an emergency. They said that subpoenas would follow, but apparently there was no real emergency. And the FBI had not actually requested subpoenas.

How can the FBI send out hundreds of such letters over the years with basically false statements in them?

Mr. FINE. Well, Mr. Chairman, we believe it was an incredibly sloppy practice, and that what they had done was they took a form that applied in another context, and when they created this unit, they applied that form, unthinkingly and without adequate review or oversight of this. These forms were signed by many in this unit. From the time they started through the time they ended in 2006, over 29 individuals signed them, and it became the accepted practice. And it was really incorrect and inappropriate, in my view.

Chairman LEAHY. But I am just wondering if there are any grownups around here, because, you know, somebody signed them. They actually read the letter and they signed. They saw the claims of emergency. They saw the claims there was going to be a backup subpoena. They knew there was no emergency. They knew there was no subpoena. They sent the letter anyway. Isn't that kind of a willful violation?

Mr. FINE. Well, in some cases there was an emergency, and there were—they couldn't tell us, though, when there was and when there wasn't. They couldn't tell us when they had followed up with NSLs and when they didn't. The telephone companies tracked it to some extent, but the FBI didn't. They had incredibly inappropriate and sloppy practices. They didn't even keep signed copies of NSLs, which we were astonished at.

So we don't believe that they were intended to deceive the telephone companies because the telephone companies knew what was happening here and were cooperating with the FBI. But it is extremely troubling, I totally agree.

Chairman LEAHY. If you are a manager of a branch of the telephone company and you get one of these letters, you say, "Oh, I am not going to cause any trouble. I am going to do what is being asked of me."

Mr. FINE. Well, it wasn't to branch officials. There was a designated official.

Chairman LEAHY. They have an office for them.

Mr. FINE. They had a certain person and individuals who worked with the FBI on this under contract. But it is an inexcusable practice.

Chairman LEAHY. Did any of these letters result in obtaining information to which they were otherwise not entitled?

Mr. FINE. Well, it is impossible to tell that because we have asked the FBI to tie them to authorized investigations. They have since gone back and are trying to do that as we speak. In the testimony yesterday, the General Counsel said that they are able to tie most of them to authorized investigations, but they are still work-

ing on it. So there is a possibility that there was not an authorized investigation for some of these letters.

Chairman LEAHY. Well, let's go to just the issue—aside from any criminal or other type intent, let's set that aside for the moment and let's just talk about sloppy management. You found, if I am reading this correctly, that attorneys in the National Security Law Branch of the FBI's Office of General Counsel learned of these existent letters as early as 2004 and counseled that they modify them. But why didn't they just tell them to stop doing it or at least alert senior FBI officials to the practice? I mean, if you see something being done wrong, is there nobody in charge that says—having found that it is being done wrong, is there nobody in charge to say you ought to stop doing what is wrong?

Mr. FINE. We think they should have said stop doing it or raised it higher. They made efforts to work with the Communication Analysis Unit to modify the practice, to ensure that they were tied to an authorized investigation, to do other things to ensure that these letters were appropriate, and over time the CAU did not change the practices.

But, unfortunately, the OGC attorneys did not raise it to a higher level, did not raise it to the highest levels of the FBI and say we have got to stop this practice. They were trying to work with the CAU, and they did not have authority to tell the CAU to stop. On the other hand, they should have raised it higher, as you suggest.

Chairman LEAHY. Well, I look at it just from a statistical aspect of the 77 files your office looked at, and you found 22 violations. The FBI said they reported 26 violations, but that is out of the whole pile of these NSL letters.

Am I safe in concluding from that that they did not have a good tracking way and they were not reporting the violations?

Mr. FINE. Yes, I think there were—our reviews indicate that there are violations out there that were not identified by the FBI and they are not reported from the field offices to the FBI.

Now, we did not do a statistical sample. We did a small sample of 77, and you cannot statistically extrapolate from that small sample how many there would be in the entire universe. On the other hand, we found 22 in a review of 77 files, almost as many as the FBI found over the entire 3-year period. So we believe that there are certainly more out there.

Chairman LEAHY. But this information they picked up had to go somewhere, either into data banks or into unrelated case files. Have you done anything to get information that they were not supposed to get back out of that? I mean, I think with all the cross-fertilization of our Government data banks, if you are in there by mistake, it can hurt. I think of Senator Kennedy on this Committee not being allowed to go on an airplane ten times in a row because he is mistaken for some Irish terrorist or—

[Laughter.]

Mr. FINE. Well, yes, they have told us, they reported to us that when they obtained information improperly, illegally through the NSLs, they have destroyed the information—they have either sequestered the information or destroyed the information. And so that is what efforts they have taken. Or in some cases, when an

NSL could have been issued properly, they have gone back and issued a proper NSL.

Chairman LEAHY. So, on the one hand, they were not quite sure how many mistakes they had made, but they claimed that the material they got that they have now taken back out of the databases. Is that it?

Mr. FINE. The ones they know about they have taken out, but they are in the process now of doing a full-scale audit throughout all 56 FBI field offices, a sample of 10 percent, and I am quite confident they are going to find more.

Chairman LEAHY. All right. Thank you very much, Mr. Fine.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Fine, I have two questions for you. One question is: Should we replace the FBI Director? And the second question I have for you is: Should we replace the FBI?

Going to the first question first, you have found "widespread and serious misuse" of the FBI's National Security Letters. "The FBI's oversight of the use of NSLs was inconsistent and insufficient."

On February 12th of this year, you filed a report regarding weapons and laptops, and you found that the FBI "had not taken sufficient corrective action."

"The FBI cannot determine in many cases whether the lost or stolen laptop computers contained sensitive or classified information because the FBI did not maintain records indicating which of its laptop computers actually contained sensitive or classified information."

Then your report on February 20th of this year relating to the FBI's internal controls over terrorism said, "The collection and reporting of terrorism-related statistics within the Department is decentralized and haphazard. The number of terrorism-related cases was overstated because the FBI initially coded the investigative cases as terrorist-related when the cases were open, but did not recode cases when there was no link to terrorism established."

Now, could you do a better job managing the FBI?

Mr. FINE. Could I personally?

Senator SPECTER. That is the question.

Mr. FINE. I am not sure I could. I believe—

Senator SPECTER. Is the job too big for anybody to do right?

Mr. FINE. I don't think so. I think it is a tremendously difficult job.

Senator SPECTER. Well, if you are not the right man, you are suggesting that somebody else might be the right man or woman?

Mr. FINE. I believe Director Mueller is a strong leader and is doing his best to try and reform and change the FBI.

Senator SPECTER. We acknowledge that he is doing his best. Is he doing an adequate job based on what you have said?

Mr. FINE. I believe there are serious problems that he needs to address. I think he has taken responsibility for that.

Senator SPECTER. We know there are serious problems, and we know that he has taken the responsibility. This is the last time I am going to ask you the question. Is he up to the job?

Mr. FINE. I think he is.

Senator SPECTER. Well, you better rewrite your report then, Mr. Fine.

Let me move to the second question. One of the outstanding scholars in America is a man named Richard Posner, who is a judge on the Seventh Circuit, and he wrote an extensive article which appeared in the Wall Street Journal earlier this week, and this is what he says about the FBI: "The FBI training emphasizes firearm skills, arrest techniques and self-defense, and legal rules governing criminal investigations. None of these proficiencies are germane to national security intelligence. What could be more perverse than to train new employees for one kind of work and assign them to another for which they have not been trained?"

Then he goes on to analyze quite a number of cases where the FBI conducts an investigation and makes an arrest, which is what they are good at, but does so, as he analyzes the facts, prematurely, without conducting the investigation far enough to find out if there are others involved. Doing a great job on law enforcement but not on intelligence gathering because they are not trained for it and not experienced in it.

And then he writes this, referring to the FBI, that they have the "wrong attitude." Finding somebody who has the means to carry out a terrorist attack is more important than prosecuting plotters who pose no immediate threat to the Nation's security. The undiscovered somebody is the real threat." And I have only got 40 seconds left, so I cannot go into greater detail, but I commend this to you.

Judge Posner comes to the categorical, emphatic conclusion that the FBI is not suited to carry out intelligence work, and that when he compares it to MI5 in Great Britain, they have a much better system.

Can you be a little more forthcoming on your answer to question No. 2: Should we replace the FBI?

Mr. FINE. I don't think we should replace the FBI. I think we need to reform the FBI. I think it needs dramatic reform. I think it needs to make changes, and it is making changes—clearly not fast enough and good enough. There is no question about that.

Senator SPECTER. Not fast enough or good enough on handling the terrorist threat on intelligence.

Mr. FINE. It needs to do better.

Senator SPECTER. That is a hearty recommendation.

Mr. FINE. It needs to do better.

Senator SPECTER. My time is up, but I have a third question for you, Mr. Fine. Should we replace the Inspector General?

Mr. FINE. I don't think so. We have tried to do our best.

Senator SPECTER. That is you. Should we replace you?

Mr. FINE. I don't think so. We have tried to do our job and—

Senator SPECTER. I asked you three questions and I got three noes. Thank you very much.

Chairman LEAHY. I would hope we would not replace you.

I would hope that—I have found your reports to be very good, without fear of favor, as the expression goes, and you certainly have my confidence.

Senator SPECTER. How about my other two questions, Mr. Chairman? I am not suggesting replacing you. I will revert back to just my first two questions, Mr. Fine.

Chairman LEAHY. Shall we go on to Senator Feinstein.

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

Mr. Fine, in the 15-some years I have watched you, I want to thank you. I think you have done excellent work. You have been straight as an arrow. You have told us as you see them, and this Senator very much respects you, and I want you to know that.

Mr. FINE. Thank you.

Senator FEINSTEIN. Let me ask some specific questions. What is your impression of the FBI's continuing position that agents can continue to issue verbal emergency requests for information?

Mr. FINE. I think there may be some circumstances when there is a true emergency that they need to get the information in a truly expeditious fashion, and if they do ask for it verbally, I believe they need to immediately, as soon as they can, follow it up with documentation for that. So I think there are some circumstances where that would be appropriate.

Senator FEINSTEIN. Which raises the question then: Do you believe that their assurance of the audit trail to follow in this context is sufficient?

Mr. FINE. Well, they clearly didn't have an audit trail and they clearly didn't do it, but I think they need to ensure that if there ever is that need and they use it, there is a clear record and documentation of it and an audit trail of that.

Senator FEINSTEIN. Now, if they are going to use these emergency verbal requests, does it make sense to limit them to a few people?

Mr. FINE. Yes, it does. I think it does make sense—limit them to a few people who can authorize that?

Senator FEINSTEIN. That is correct.

Mr. FINE. Yes. It clearly should be a limited authority on an emergency basis, and it should be authorized by only a few people at the highest levels.

Senator FEINSTEIN. Thank you. Can you provide this Committee with a copy of the FBI's new emergency letter template?

Mr. FINE. I can certainly go back to the FBI and request that.

Senator FEINSTEIN. I appreciate it.

Do you know how many people have had their private telephone, Internet, or financial records turned over in response to NSLs since 2001?

Mr. FINE. We have in our classified appendix a breakdown of the uses of NSL authorities based upon the particular statute. We break that down, and so we do have that in there. In terms of the exact number of people under each one, I am not sure, but we can try and get back to you on that.

Senator FEINSTEIN. If you would, and I have not seen the classified section, so I will take a look at it. Thank you for that.

How do you reconcile your findings of no deliberate or intentional violations of NSL statutes, the Attorney General guidelines, or FBI policy with the fact that the exigency letters, signed by various FBI officials, were sent in non-emergency situations and even inac-

curately represented that the FBI had already requested grand jury subpoenas when, in fact, it had not?

Mr. FINE. Well, we did not do a top-to-bottom review of why everyone signed those letters, but our review indicated that it was an unthinking form that they used inappropriately, it became the accepted practice, and they signed it and sent it.

With regard to the emergency situations, they did say there were times when they could not tie this to an emergency, and they used them, nevertheless, and it was clearly inappropriate.

Now, the FBI is doing a review of talking to the individuals involved, a performance review, and to determine what they did, why they did it, what was in their mind, and we will follow that carefully.

Senator FEINSTEIN. Thank you.

A lawyer to Bassem Youssef, who was in charge of the FBI's Counterterrorism Analysis Unit, recently told the New York Times that his client raised concerns about the FBI's failure to document the basis for its exigent letters soon after being assigned to the Communications Analysis Unit in early 2005 and that his concerns were met with apathy and resistance by superiors who tried to minimize the scope of the problem.

Did your office investigate these allegations?

Mr. FINE. Well, we interviewed Mr. Youssef. As you stated, he became the head of the unit in early 2005. We interviewed him, and he did not tell us at that time that he had raised concerns to his supervisors and that he was ignored.

In addition, he was not the one who brought these allegations about the exigent letters to us. We saw that from lawyers in the Office of General Counsel as well as e-mails from the Office of General Counsel to his unit when he was the head of it to try and reform the practice. And, in fact, when he was the head of that unit, he signed one of these letters, and also under his name approximately 190 of those letters were issued. So the problems with the letters continued under his leadership.

Now, he has said publicly, we have heard, that he raised the concerns to his supervisors and it was met with apathy. He didn't tell us that, and so we did not investigate that. And I know the FBI is looking at exactly what happened here.

Senator FEINSTEIN. Did you find any evidence that his superiors tried to minimize the problem?

Mr. FINE. No. We found that the Office of General Counsel was trying to get the Communications Analysis Unit to change this, and it was not changed. And what went up the chain is not clear, but it does not look like it went high up the chain there.

Senator FEINSTEIN. To your knowledge, has anyone in or out of the FBI's Office of General Counsel been held accountable in any way for these serious and unacceptable failures to establish controls and oversight?

Mr. FINE. As the result of our report, the Attorney General has asked the Department to look at the conduct of attorneys, as well as the FBI is looking at the conduct and the performance of its employees to determine accountability.

Senator FEINSTEIN. Thank you.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you, and I have a list from Senator Specter on the Republican side of who will go first: Senator Cornyn, and then, in sequence, normal sequence, rotating to Senator Grassley, and then the normal sequence, Senator Hatch.

Senator SPECTER. Mr. Chairman, that is the order of arrival under our early bird rule.

Chairman LEAHY. OK.

Senator CORNYN. Thank you, Mr. Chairman.

Thank you, Mr. Fine, for your important work that you are doing. I would like for you to distinguish between the fault you found with the way in which the NSL letters are being accounted for and being issued and the usefulness of this tool, because I do not want us to make any mistakes in what the corrective action needs to be. Could you please clarify that for me or expand on your testimony?

Mr. FINE. Certainly. The FBI told us and provided us examples of the importance of this tool. It is an indispensable tool in the conduct of counterterrorism and counterintelligence.

Senator CORNYN. I am sorry. You called it an "indispensable tool"?

Mr. FINE. Indispensable tool. It can connect terrorists or terrorist groups with other individuals, it can look at the financing of terrorist groups, and it can initiate leads or close investigations. It can be used in an attempt to connect the dots. That is very important.

On the other hand, it has to be used, because it is an intrusive tool, in accord, in strict accord, with the statutes, the guidelines, and the FBI's own policies. There needs to be internal oversight over it. There needs to be internal controls. There needs to be clear guidance to the field and the supervisors who are using it on when it can be used and when it can't be used and what needs to be done. And we found real problems with that.

So, on the one hand, it is an important tool. On the other hand, it is an intrusive tool that needs greater controls.

Senator CORNYN. Thank you. I think that is very important to differentiate. And I know Senator Durbin has spent a lot of time looking into this issue and working on this issue. I think we tried to work together, all of us, in a bipartisan way to deal with some of the problems with National Security Letters, the so-called gag rule that prohibited a recipient from actually even telling their own lawyer, and the issue of allowing them to go to court to challenge the National Security Letter, providing some level of judicial review.

Did you find any problems with regard to those particular features of the amended PATRIOT Act?

Mr. FINE. Well, we didn't really look at that issue that you just raised right there.

Senator CORNYN. OK. Thank you.

Those are the two things I wanted to ask about. Thank you very much.

Chairman LEAHY. Thank you, Senator Cornyn. Thank you very much.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Fine—

Chairman LEAHY. And I should note, at one point I may have to go for a few minutes to the Appropriations Committee. If I do, Senator Whitehouse has offered to stay and chair.

Senator Feingold?

Senator FEINGOLD. Thank you, Mr. Chairman.

Mr. Fine, let me start by thanking you for these very thorough and thoughtful reports. I remember the very strong, courageous IG report about the treatment of detainees right after 9/11 in New Jersey and New York. I know that conducting this type of detailed audit takes a great deal of resources, and I want you to know that we appreciate the work that your office did. This independent product is invaluable to our Congressional oversight responsibilities, and I want to especially compliment you, Mr. Fine, on how you handled the questioning by the Ranking Member concerning the FBI Director.

It is not your job to speak on whether or not Mr. Mueller is up to his job. You have a specific role in the Department, and in my view, you have discharged your duties with tremendous integrity and professionalism. I think it is inappropriate to browbeat you for an answer to a question that is outside of your professional responsibilities.

I do not know why we would want to intimidate somebody like this, but the fact is this is one guy that I do not think can be intimidated. So I thank you for your service to our country.

Mr. Fine, the Attorney General guidelines state generally that agents are supposed to use the least intrusive investigative tools available. Your report recommends that more guidance be provided to agents about how to implement that standard, particularly with respect to the use of NSLs, and I want to get your view on the level of intrusiveness involved in obtaining different types of information available through an NSL.

First of all, with respect to the three main categories of NSLs, how would you rank them in terms of their level of intrusiveness?

Mr. FINE. Well, if you had to rank them, I think that the least intrusive, although I do think it is intrusive, is the telephone records, the transactional records of telephone calls made and the subscriber. I think it then goes to more intrusive, much more intrusive, when you are talking about financial records and when you are talking about credit reports. I think those are much more private and more intrusive than initial telephone call records.

Senator FEINGOLD. That is consistent with the FBI General Counsel's statements to my staff as well. But the same loose legal standard applies with respect to all of these different types of records. Isn't that right?

Mr. FINE. It is the same general standard. Some of them are called "relevant to an authorized investigation." In terms of others, "sought for an authorized investigation" is the same principle. It is the same standard.

Senator FEINGOLD. Do you think it is a good idea that the same standard applies to all these records?

Mr. FINE. Well, I don't know if a different standard needs to be applied. I will have to think about that. But what does need to happen, something we recommended, is that the FBI consider this and look at what guidelines there should be on using the least intrusive

method while at the same time effectively pursuing terrorism leads. And I don't think there has been guidance. It has been left to the field. There are 56 field supervisors who make their own calls, and they have counsel in their office who probably have different ideas of what is intrusive and when it should be used in the conduct of an investigation, whether it is the subject or whether it is someone who is connected to the subject. So I do think there has to be thought put into when these methods are used and at what stage of the investigation.

Senator FEINGOLD. With respect to the NSL for credit reports, would you agree that obtaining a full credit report is more intrusive than obtaining what is commonly known as a "credit header," data such as name, address, employer, and the name of a bank where an individual has an account?

Mr. FINE. Yes.

Senator FEINGOLD. With respect to the NSL for financial records, would you agree that obtaining the details of someone's financial transaction is more intrusive than finding out their bank account number?

Mr. FINE. Yes.

Senator FEINGOLD. And with respect to the NSL for phone or Internet records, would you agree that obtaining the details about who someone is communicating with and when is more sensitive than finding out what their phone number or e-mail address is and how they pay for their phone and Internet usage?

Mr. FINE. Yes.

Senator FEINGOLD. According to your report, the share of NSL requests directed at U.S. persons—that is, citizens and permanent residents—increased from 39 percent in 2003 to 53 percent in 2005. First of all, you have warned that many of the numbers in your report are likely somewhat inaccurate because of poor FBI recordkeeping. Do you have a sense of how accurate the breakdown is that I just mentioned, and to the extent that it is inaccurate, whether it is more likely to overstate or understate the percentage of U.S. persons? Which direction is it likely to go?

Mr. FINE. I don't think we can make an estimation of whether it is more inaccurate for U.S. persons or non-U.S. persons. But it is clearly inaccurate for a whole variety of reasons. We looked at the files and couldn't find about 70 percent of the NSLs that we found in the files in the database. We also know that the FBI has delays in putting information in the database, so the reports that come to Congress, those NSLs are not included.

We also found computer malfunctions and glitches in the system, structural problems, so that they didn't capture NSLs. And I think it is a widespread problem throughout the database, and I couldn't really tell you whether it was more for U.S. persons or less for U.S. persons.

Senator FEINGOLD. Do you have any idea why a larger percentage of targets are U.S. persons now than several years ago, to the point where a majority of NSL requests in 2005 actually involved citizens or permanent residents?

Mr. FINE. I think the FBI would say that because of international terrorism cases, they are looking to see any potential contact with the United States. So if there is a person hypothetically

in the London bombing, if there is a bomber who has information that seems to indicate there was some contact with the United States, they will more assiduously and aggressively look to see if there has been that contact.

Senator FEINGOLD. Thank you, Mr. Fine.

Thank you, Mr. Chairman.

Senator SPECTER. Mr. Chairman, if I may exercise a point of personal privilege.

Mr. Fine, did I browbeat you?

Senator FEINGOLD. Say "No."

[Laughter.]

Chairman LEAHY. I don't think anybody could do that to Mr. Fine, but go ahead.

Mr. FINE. I answered the questions. I didn't feel browbeaten.

Senator SPECTER. Did I intimidate you?

Mr. FINE. No, you did not intimidate me, Senator Specter.

Senator SPECTER. Do you think I need a lesson from Senator Feingold as to how to question a witness?

Mr. FINE. Well, on that one, I will, I think, exercise my discretion and—

[Laughter.]

Chairman LEAHY. I think we may move on to Senator Grassley, who has questions to ask. Senator Grassley?

Senator GRASSLEY. Well, I don't want to be guilty of pandering, so I might as well say I think you do a job that other inspectors general ought to follow, and I think I am some judge of that because I think I have had a hand in getting either the resignation or firing of at least five or six inspectors general since I have been in office. And I am not looking for a replacement for you. I want other people to follow your direction.

I am going to follow along the lines eventually of what Senator Feinstein was asking you, but before I get there, I want to ask a couple other questions.

You have said that some of your most disturbing findings deal with the 739 so-called exigent letters issued from one particular unit. Your report states that these letters "contain factual misstatements, claiming that the subpoenas had been submitted to the U.S. Attorney's Office and that there was an emergency need for the phone records before the subpoena could be processed. We need to find out if the officials signing these letters knew that they were untrue. If so, it would be extremely serious misconduct, if not a criminal violation."

I understand that your review did not focus on that issue because you had a much broader mission to look at the National Security Letters generally. I also understand that in response to your findings of the exigent letters, the Director ordered a special inspection of the headquarters unit that issued them. However, I am not confident that the FBI can be trusted to investigate itself and hold the right people accountable.

If the public is going to be reassured that these abuses are taken seriously, there needs to be a separate independent inquiry to find out whether any misrepresentations in the 739 letters were knowingly or intentional.

Question: Are you aware of any independent investigation by your office or any other office looking into exactly who knew what and when?

Mr. FINE. Senator Grassley, no, we are not looking into who knew what when. We will monitor what the FBI does, and I am sure the FBI will report to this Committee about its findings as well.

We are, as required by the reauthorization act, looking at the use of NSLs in 2006. We have a mandate to do that very broad review again in 2006 for the 2006 NSLs, which we are intending to do.

Senator GRASSLEY. Do you think that there needs to be an independent review?

Mr. FINE. I think the FBI should look at what happened, and we ought to see what the results are and then see whether it was aggressive and thorough or not.

Senator GRASSLEY. Well, I think that there ought to be an independent review. I am skeptical of the FBI's ability to objectively investigate itself, and especially since one of the people at the center of the issue is Bassem Youssef, who has already been referred to by Senator Feinstein. He is a decorated Arab American agent who has a discrimination lawsuit pending against the FBI. Last year, Senator Specter, Senator Leahy, and I wrote to you forwarding evidence that Mr. Youssef appeared to be a victim of whistleblower retaliation. So from my judgment, trusting the FBI to investigate this matter is a little bit like trusting a fox to guard a chicken house.

Mr. Youssef is the current head of the unit that issued the letters, but most of the letters were issued under his predecessor before 2005. According to a letter provided by his attorney, Mr. Youssef's efforts to report and correct the problems were dismissed or ignored by his superiors, forcing him to report the issue to the General Counsel's office, not directly to you, as you stated correctly.

Mr. Chairman, I want a copy of that letter from Mr. Youssef's attorney put in the record.

Chairman LEAHY. Without objection, so ordered.

Senator GRASSLEY. Inspector Fine, yesterday the Washington Post reported that in light of these developments surrounding the release of your report on National Security Letters, the FBI issued new guidance to field agents in seeking phone records. This new guidance includes a new template for emergency letters and instructions telling agents there is no need to follow these letters with NSLs or subpoenas. Further, this guidance states that the letters are a preferred method in emergencies, but that agents may make these emergency record requests orally. FBI Assistant Director John Miller stated that these new procedures will include "an audit trail to ensure we"—the FBI—"are doing it the right way."

My question is: How do you see these new procedures working?

Mr. FINE. We will have to take a look at those procedures. We heard about that as well and read about it. There is a provision in the law, the current law, the ECPA law, Electronic Communications Privacy Act, which allows voluntary disclosure of customer communications in specified circumstances when there is an emergency involving danger of death or serious physical injury to any person.

Now, what we said was you have got to follow that law. You cannot combine it with an NSL because that is not a voluntary disclosure. You have got to separate it. And that was the problem we found with the exigent letters. This does appear to be trying to separate that, but we are going to have to take a look at exactly what it is and how it is in operation. But, clearly, they had to put a stop and they should have put a stop to the exigent letters as they existed and as they were used.

Senator GRASSLEY. Do you think the FBI documents can provide adequate justification for emergency requests when they allow agents to make these requests orally?

Mr. FINE. Well, it has to be documented. Sometimes there is an emergency and you can orally make that request, but it has to be followed up with documentation and immediately thereafter explain why there was an emergency and why there was the need for the oral notification.

Senator GRASSLEY. Could you provide copies of any and all unclassified e-mails related to the exigent letters provided by the CAU?

Mr. FINE. Can we do that?

Senator GRASSLEY. Yes.

Mr. FINE. We will certainly work with this Committee and you for that. They are FBI documents, and we will follow the protocol as we normally do.

Senator GRASSLEY. I think I am going to have to submit the rest of my questions for answers in writing.

Chairman LEAHY. Thank you. And normally, Senator Whitehouse would be next, but he has agreed to let Senator Durbin, the Deputy Leader, go first. Senator Durbin, you are recognized.

Senator DURBIN. Thank you, Mr. Chairman.

Chairman LEAHY. I have been advised that I had the order wrong. Senator Specter says that it will be Senator Kyl next in the normal rotation and then Senator Hatch.

Senator GRASSLEY. Could I have this letter put in the record?

Chairman LEAHY. Without objection.

Senator GRASSLEY. And I would like to also see if we could get this stuff before next Tuesday's hearing that we have schedule.

Chairman LEAHY. Let's see if we can.

Senator Durbin?

Senator DURBIN. Mr. Chairman, thank you, and, Senator Whitehouse, thank you very much for this chance to ask questions.

I think it is worth a minute to reflect on why we are here today. We are here because a bipartisan group of Senators thought that the PATRIOT Act went too far. We came together and suggested changes to tighten up the PATRIOT Act to avoid abuses similar to the ones that are the subject of this Inspector General's report. Unfortunately, our request to amend the PATRIOT Act was denied in this Committee and on the floor, and the best that we could get out of our effort was an Inspector General's report to at least alert us as to what was happening.

And so the reason we are here today is because Mr. Fine followed on the recommendation and requirement of our legislation to at least tell us how this law is being used, and I thank you for that. But I also want to say that if the FBI and Department of Justice

were derelict in the way that they used and applied the PATRIOT Act, I happen to believe that Congress could have done a much better job in making this law more responsive to our basic values when it comes to checks and balances. And I think that comes through very clearly.

I want to try to ask you four fairly specific questions that relate to your findings. Let us move to the exigent letter situation. In this situation, the FBI would go to a telephone company and say to them: We are involved in a national security investigation. It is of an emergency nature. We have requested a subpoena from the court, but because of the emergency we need you to produce this record or this information immediately.

And what you have found, as I understand it, is that in many cases there was no emergency, there was no application for a subpoena, and there was no evidence that it really had anything to do with an ongoing investigation.

If the FBI misrepresented those three material facts to a telephone company to secure the private records of innocent Americans, was a crime committed?

Mr. FINE. One would have to look at the intent of the individuals involved. I don't believe that they had the intent to commit that crime. One has to also recognize that these were three telephone companies with which they had a pre-existing relationship and they had lots of information going back and forth, and they set up this arrangement to obtain these records. The telephone companies were providing this information, lots of this information, on an ongoing basis. The FBI used this form. It was the inappropriate form.

The telephone companies knew what was happening here, and the form kept being used. That was inaccurate and inappropriate. If somebody knew that and intended to do that, nonetheless, that would be a potential crime. We did not see that.

Senator DURBIN. You question whether it was intentional, but yet you found it was repeated over and over again.

Mr. FINE. The same form was used over 700 times. They just kept sending it. It was signed by many people, and it was an unthinking use of an improper form.

Senator DURBIN. And the FBI General Counsel, Valerie Caproni, has said when it came to the NSLs, in her words, there was "a colossal failure on our part to have adequate internal controls and compliance programs in place."

Next question: How high up the chain did this information go? At what point, at any point, did the Attorney General of the United States know of the serious abuses and misuses identified in your report?

Mr. FINE. Of the entire report? He knew about it when we provided a draft report to the Office of the Attorney General.

Senator DURBIN. I am talking about when they were actually using the exigent letters and NSLs.

Mr. FINE. What he said, I think he has said this publicly, is that he was surprised about the misuses that we identified, as did the Director of the FBI.

Senator DURBIN. The Director of the FBI, again, was not informed of these colossal failures?

Mr. FINE. I don't think they knew about these misuses that we found until we put it all together in this comprehensive report.

Senator DURBIN. Would you say the same of the General Counsel of the FBI?

Mr. FINE. I think the General Counsel also probably didn't know of the extent of the problems here.

Senator DURBIN. I say to my colleagues on the Committee, when we start asking questions about whether we need checks and balances when it comes to the PATRIOT Act, isn't this a perfect illustration when neither the Attorney General, the Director of the FBI, nor even the General Counsel of the FBI knew of these serious abuses that may have invaded the privacy of hundreds of innocent Americans.

The next question I have relates to this Office of Professional Responsibility investigation of warrantless wiretaps. It is my understanding—well, first, let me say that when the Office of Professional Responsibility in the Department of Justice initiated this investigation, they were stopped. The White House refused to give security clearances to the Office of Professional Responsibility to investigate any wrongdoing on the part of the Department of Justice in the warrantless wiretap program.

It is my understanding that your office is now investigating the NSA warrantless surveillance program. Is that correct?

Mr. FINE. That is correct.

Senator DURBIN. And have you received security clearances for that?

Mr. FINE. Yes.

Senator DURBIN. Are you aware of any rationale for granting security clearances to your office but not to the Office of Professional Responsibility?

Mr. FINE. I am not aware of any. I wasn't—no, I am not aware of any.

Senator DURBIN. Last question. There is a Privacy and Civil Liberties Oversight Board we created to try to keep an eye on the type of abuses which you have reported in this Inspector General's report to Congress. Is there any evidence that this group was either informed or involved in any decisionmaking related to these incidents?

Mr. FINE. Before the incidents occurred?

Senator DURBIN. Yes.

Mr. FINE. Not that I know of. We are briefing the Privacy Board tomorrow.

Senator DURBIN. This is a board that is supposed to clear these things in advance. It is supposed to decide whether they have gone too far. Now they are learning years later what actually happened. Clearly, under current law they are irrelevant.

Thank you.

Senator WHITEHOUSE. [Presiding.] Senator Kyl?

Senator KYL. Thank you, Mr. Chairman. And, Mr. Fine, I want to thank you for your testimony and for the report which you issued.

You state in your testimony that the violations that your report identified were serious and widespread. You also state, and I am going to quote here, that you "did not find that the FBI agents

sought to intentionally misuse the National Security Letters or sought information that they knew they were not entitled to obtain through the letters. Instead, we," you say, "believe the misuses and the problems we found were the product of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight."

Later in the recommendations section of your report, you state the following, and I again quote: "To help the FBI address these significant findings, the OIG made a series of recommendations, including that the FBI improve its database to ensure the office that it captures timely, complete, and accurate data on NSLs, that the FBI takes steps to ensure that it uses NSLs in full accord with the requirements of National Security Letter authorities, and that the FBI issue additional guidance to field offices that will assist in identifying possible violations arising from use of NSLs. The FBI concurred with all of the recommendations and agreed to implement corrective action."

The report goes on to state, "We believe," again quoting, "that the Department and the FBI are taking the findings of the report seriously. In addition to concurring with all of our recommendations, the FBI and the Department have informed us that they are taking additional steps to address the problems detailed in the report. For example, the FBI's Inspection Division has initiated audits of a sample of NSLs issued by each of its 56 field offices. It is also conducting a special inspection of the exigent letter send by the Counterterrorism Division to three telephone companies to determine how and why that occurred. The FBI's Office of General Counsel is also consolidating its guidance on NSLs, providing additional guidance and training to its field-based chief division counsel on their role in approving NSLs and working to develop a new web-based NSL tracking database. In addition to the FBI's efforts, we have been told that the Department's National Security Division will be actively engaged in oversight of the FBI's use of NSL authorities."

So, Mr. Fine, to summarize, your report found that although the violations you identified were serious, they were the result of inadvertence and inattention rather than intentional malfeasance. And in addition to concurring in and agreeing to implement all of your recommendations for correcting these problems, the FBI has additionally initiated its own audits through its Inspection Division, the FBI General Counsel's office has consolidated its guidance on the use of NSLs, and in addition, the Justice Department's National Security Division will begin overseeing the use of NSLs.

Now, I have two questions, and part of this is in response to the Senator from Illinois, who stated certainly a truism that we need checks and balances. But from my observation, the strength of your report—and, frankly, the strength of your office and your reputation—is one element of the check and balance; second is the Congressional oversight that we are exercising by virtue of having hearings like this; and, third, the report requirements that are part of the statute. All of those are part of the fabric of checks and balances that are either built into this particular program or that exist as a general proposition.

So here are my two questions. Do you believe that FBI's implementation of the recommendations that you made and the additional corrective measures that FBI and DOJ have agreed to undertake are reasonably likely to prevent in the future the bulk of the types of deficiencies that you identified? And, second, do you believe that in order to correct the problems that your report has identified, it would be necessary to increase the statutory standard for issuing an NSL, that the standard for issuance needs to be increased to require more than relevance to an ongoing and legitimate investigation, in order to address the problems that you identified in your report?

Mr. FINE. With regard to the first question, are they reasonably likely to correct the problems: if the FBI takes this seriously, actually implements the controls, does not make this a short-term proposition but has virtually a complete turnaround to ensure that there are the internal controls on it, and not simply relying on others, such as us or the Congress, to point out deficiencies, but as it is ongoing, making sure that it doesn't happen, it can help to ensure that they follow the statutes and the guidelines.

Can I say that it is going to happen? I can't say that.

Senator KYL. So this type of oversight and your work and reports will still be necessary to verify the progress that they make.

Mr. FINE. Well, it certainly will be necessary, and whether it will completely correct the problems, I can't say. And the second question having to do with the statutory standard, that is a question for Congress and the administration, and my job here is to provide the facts and to show what happened and show the problems and to let the process work itself out.

Senator KYL. Good. Again, I said this in another forum, but when we give serious authorities to responsible agencies, we expect the authorities to be carried out properly. I commend you and the folks in your office for helping us to ensure that that occurs. And thank you for your testimony here today.

Senator WHITEHOUSE. I think at this stage I have the floor, or would you like to proceed, Senator Hatch? Are you under time pressure?

Senator HATCH. I am a little bit, if you—

Senator WHITEHOUSE. Why don't you proceed.

Senator HATCH. I have to say, you are very gracious, Senator, and I appreciate it very much.

I also agree that you do an excellent job and that your position is very, very necessary. When you look at the PATRIOT Act, is it because of defects in the PATRIOT Act that these errors have occurred, or were they errors that were primarily violations demonstrated by FBI agents' confusion and unfamiliarity with the constraints on National Security Letter authorities?

Mr. FINE. We looked at the problems, and we found that the execution of the FBI's use of these authorities was very flawed and that there were—

Senator HATCH. In other words, the PATRIOT Act does provide that they have to abide by certain constraints.

Mr. FINE. Well, the PATRIOT Act does require them to abide by certain constraints, and they didn't.

Senator HATCH. And that is the problem here. Primary problem.

Mr. FINE. Well, the problem that we saw was the execution of their authorities here.

Senator HATCH. Well, that is my point. The primary problem is that they ignored—they did not follow what the law really said they should have followed. Is that correct?

Mr. FINE. They did not follow what the law provided.

Senator HATCH. And it was in large measure because of agent confusion over what the law really says and it may be a lack of total supervision with regard to these problems.

Mr. FINE. It was a lack of guidance, a lack of training, a lack of oversight, inadequate internal controls, and there was confusion and mistakes out in the field.

Senator HATCH. Do you expect them to be perfect, the FBI agents, as they implement all of these laws?

Mr. FINE. I don't think anyone is perfect. On the other hand, what we saw—

Senator HATCH. But you do expect them to follow the law.

Mr. FINE. On the other hand, we found widespread problems and clearly not approaching perfection, or even satisfactory execution of it.

Senator HATCH. I agree with that, and I think that my point is that when you work with individuals, you are going to have some mistakes and some confusion and some problems, even though they are not justified in this instance.

Mr. FINE. Well, there certainly will be mistakes and problems, but that is why there needs to be that oversight and those internal controls, and the FBI to be finding this out and ensuring that it doesn't occur, not after the fact for—

Senator HATCH. That is why we need you and us. Right?

Mr. FINE. I think we need all of the entities.

Senator HATCH. With regard to Section 215, did you find any utilization of the 215 authorities to go to libraries?

Mr. FINE. No. We found that they did not seek a 215 order for library records. There were a few where there was a request for it within the FBI, but in the process prior to application to the FISA Court, they were withdrawn.

Senator HATCH. In fact, regarding the Section 215 portion of the report, it appears that even though 215 orders were not utilized often—and that is a fair characterization, isn't it?

Mr. FINE. They were not utilized often. In fact, in the 3-year period that we reviewed, they were utilized, pure 215 orders, approximately 21 times.

Senator HATCH. But they were valued by FBI agents as a tool to try and interdict and work against terrorism.

Mr. FINE. The FBI agents did tell us they thought it was a specialized tool that could get important information in certain cases that others could not.

Senator HATCH. You mentioned that FBI personnel stated during interviews that the kind of intelligence gathered from Section 215 orders is essential to national security investigations and that the importance of the information is sometimes not known until much later in the investigation. That is a fair characterization?

Mr. FINE. That is what some of them told us, yes.

Senator HATCH. Right. Given that you did not find widespread misuse of this 215 authority, do you feel like the FBI was careful in its application and that agents exhibited proper restraint in its use if they did not fully understand the process and requirements of obtaining these orders?

Mr. FINE. Well, in the 215 process, we did find that there were controls over it, that there were levels of review that prevented the misuse of the 215 authority. In some sense, it was very—there were delays in the process.

Senator HATCH. Right.

Mr. FINE. And there was a significant amount of time for them to get a 215 order, which is why some of them thought it was not terribly effective. On the other hand, the multiple levels of review and the internal controls prevented the misuse of these authorities.

Senator HATCH. Well, and, frankly, the 215 authorities have been utilized by law enforcement for anti-crime law enforcement for many years before the PATRIOT Act.

Mr. FINE. The PATRIOT Act expanded the use of the predicate for 215s, but it was in existence, that kind of authority.

Senator HATCH. And we have always been able to go to libraries on a quest to find evidence against crime. Is that correct?

Mr. FINE. In certain cases.

Senator HATCH. Certainly, it seems to me, in terrorism cases or major criminal cases.

Mr. FINE. Criminal cases, they have that authority to go to libraries.

Senator HATCH. Well, I also agree that—well, you said in your report, in your statement here today, "It is important to recognize that in most, but not all, of the cases we examined in this review, the FBI was seeking information that it could have obtained properly through National Security Letters if it had followed applicable statutes, guidelines, and internal policies." That is the point I was making.

Mr. FINE. In most cases. We found some cases where they couldn't have obtained it, and they used it in a way that was seeking information that was not obtainable through an NSL.

Senator HATCH. All right. Mr. Chairman, could I just have another 30 seconds?

Senator WHITEHOUSE. Please.

Senator HATCH. You also said, "We did not find that the FBI agents sought to intentionally misuse the National Security Letters or sought information that they knew they were not entitled to obtain through the letters. Instead, we believe the misuses and the problems we found were products of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight."

Now, you also say that all of that being true, you do not excuse the FBI for these mistakes, and I think that is a fair summary of basically some of your findings.

Mr. FINE. I think so.

Senator HATCH. Well, I just want to tell you that I think we are well served by you and your office, and it is easy to find lots of fault. The point is that we have got some work to do to make sure that these problems are resolved, and because of your work, I think

there will be more of an intense effort to try and resolve these problems. But basically the PATRIOT Act itself, it seems to me, stands as a ready, willing, and able statute to help us to at least do our best against terrorism. Would you agree with that?

Mr. FINE. Well, Senator, it is really not my job to come to you and say whether the PATRIOT Act—

Senator HATCH. But you are an expert in these areas, and—

Mr. FINE. What I try and do is to provide the facts and what happened and the circumstances to allow this Committee and others to make judgments on—

Senator HATCH. As a person who examines this, would you want to face terrorism without the tools that are given in the PATRIOT Act?

Mr. FINE. I think there are important tools in the PATRIOT Act, and those are, as we stated, indispensable tools. On the other hand, there needs to be adequate and effective controls on them as well.

Senator HATCH. I agree with you in every regard there. Thanks so much.

Thanks, Mr. Chairman.

Senator WHITEHOUSE. My pleasure.

I would like to join the other Senators who have complimented your work today, Mr. Fine. It is quite impressive.

I would like to focus on the process side here a little bit, if I may. As I see it, there have really been two failures that are documented by your report. One is the failure in compliance with respect to the various mechanisms regarding the National Security Letters. The other is an oversight responsibility that also appears to have been failed at.

Let me ask you first when and whether this all would have come to light if it had not been for your report and your inquiry.

Mr. FINE. I doubt it would have. I don't know that anyone was doing this kind of review to uncover problems with the use of National Security Letters. I do know that the Director of the FBI said that it was a surprise to him when he learned this through our report.

Senator WHITEHOUSE. There have been previous efforts to report in the past, and I am informed that between 2003 and 2005 the FBI reported 26 possible violations among the 145,000 NSL requests that were made in that period. So, clearly, there was a process of some kind that produced those 26 possible violations.

What was that process, and why did it fail so badly? I mean, the comparison is astounding, 26 out of 145,000, and yet when you really drilled into this, you found that 17, as I count them, 17 out of 77 files had at least one violation of reporting requirements and 46 out of 77, more than half, lacked some of the documentation required for approval. So the comparison between 26 out of 145,000—I cannot even do the percentage, it is so small—and 17 or 46 out of 77 is colossal.

What was the failure in the reporting process that produced that original 26 number?

Mr. FINE. There was a big discrepancy. The number actually should probably be about 44,000 National Security Letters, making 143,000 requests, but there is a huge discrepancy as you point out.

And the problem was the FBI provided guidance to the field: If you have a problem, if you find a problem, if there has been a potential intelligence violation, report it to us; we will review it and we will determine whether it needs to be reported to the President's Intelligence Oversight Board. It relied upon the field to go and report problems.

Senator WHITEHOUSE. Voluntary self-reporting.

Mr. FINE. Voluntary self-reporting. There was no audit function. There was no inspection going out there just saying, OK, we are going to check, too. And so when we go out there and check the files, we find problems in a pretty significant number of files that were not identified by the FBI, the FBI's sort of self-reporting mechanism. And as the Director has stated, which I agree, they should have been doing audits of this. They should have been having some oversight function to do something similar to what we were doing, that is, reviewing the files and making sure that their violations, if they are occurring, are identified and reported.

Senator WHITEHOUSE. What was the administrative travel that led you to commencing this report?

Mr. FINE. We were required to do this by the PATRIOT Reauthorization Act.

Senator WHITEHOUSE. It is in the statute that on a certain date

Mr. FINE. Oh, well, it was in the statute that within 1 year from the date of the signing of the PATRIOT Reauthorization, we had to report on a whole series of issues, and the statute laid out what we had to do, and we did that very broad review and put it in this report. And it was a pretty tight deadline on a lot of subjects. We met the deadline, and I am very proud of our people for doing that.

Senator WHITEHOUSE. Presumably, the Bureau was aware of this through its legislative contacts?

Mr. FINE. They were aware of the requirement, and they knew we were doing the audit. We contact them and seek their cooperation, and they provide it. So, yes, they were fully aware and cooperated fully with our review.

Senator WHITEHOUSE. Is it surprising to you that, aware as they were, this requirement as a matter of law had been established that you should conduct this investigation? There was not any—or maybe there was. You can tell me if there was—administrative effort to kind of get ahead of this and double-check. I mean, if I were leading an agency in my home State and the local legislature authorized a State Inspector General or somebody to come and have a look at a process that I was in charge of, one of my first questions would be to my staff: What is going on here? What have we been doing on this? Let me know, you know, a preview of coming attractions when the auditor comes in to have a look. Did you find any of that going on? Or was the FBI sort of blissfully ignorant right to the—

Mr. FINE. Well, they did not go out in advance of what we were doing and say let's see what is in the files. I am not sure we would have been happy with that. But there was not an effort to try and say what are the problems out there. They had issued policies. They were hopeful that they were being followed. And they weren't. And the problem was the implementation over time.

And, in addition, this is a time period, you know, we were reviewing 2003 to 2005, so it was a historical time period. And I am not sure what they could have done to clean up the problems with regard to that. We will be looking at 2006 as a result of the PATRIOT Reauthorization Act now, and we will provide that report at the end of this year.

But the FBI was not aware of these problems. They did not have a handle on the scope of the problems.

Senator WHITEHOUSE. They did not look for them and they did not find them.

Mr. FINE. I think that is correct.

Senator WHITEHOUSE. At what stage—again, walk me through the administrative travel on all of this. At what point did the Director, for instance, become aware that you were going in and of what you had concluded as a result of your efforts?

Mr. FINE. Well, I think he was aware of it at the beginning of 2006 when the Act was passed and we initiated the audit. We worked with their staff, and he is aware of that. And so that was not a surprise.

With regard to the extent of the findings, I think he probably learned about it when we provided a draft report to the FBI pursuant to our normal processes, saying here are our findings, are they inaccurate, you tell us if there is something inaccurate in there, and we give them a chance to tell us if we are wrong. And it did not happen here.

Senator WHITEHOUSE. And with respect to the Attorney General?

Mr. FINE. I think the same thing. We provided a draft report to the FBI and the Office of the Attorney General, I think probably in January of this year, and laid out in detail what we found.

Senator WHITEHOUSE. Did you find any internal traffic, either from the Director or from the Attorney General, along the lines of saying, you know, hey guys, we got some pretty important responsibilities here, by law we have certain requirements that we have to meet, there is a further requirement that the Inspector General come and have a look at all this stuff, let's pay some attention here?

Mr. FINE. Well, we didn't look for that. We didn't go and ask for the internal processes between the FBI Director and the Attorney General. We were looking at what are the problems out there, and we had a mandate there to look at a broad review and answer very specific questions. And that is what we were focused on, and that is what we provided in this report, a description of the problems that we found.

Senator WHITEHOUSE. So the extent to which the oversight failure tracked up into the Department of Justice is not the focus of your report beyond the initial level that the NSLs themselves were in large measure noncompliant and the self-reporting function had failed.

Mr. FINE. Right. That is correct. We looked at the problems, and when this report was issued, the FBI Director said publicly that the FBI should have, and he should have, ensured that there were adequate controls and that these kinds of reviews had been done and not waited for the OIG to do it. So he said that.

Senator WHITEHOUSE. I think that that raises a whole different set of questions. I understand that your report did not go there. But the idea that this Congress passes legislation as significant as the PATRIOT Act, that lays out very specific responsibilities that relate to the use of an indispensable, according to your testimony, tool in our war on terror and there is not some kind of an automatic process and trigger whereby somebody in the Bureau goes through the statute and says here is the checklist of the things we need to do now and that floats upstream to an appropriate administrative official who says this is what we are going to do, and then the Deputy Director or somebody signs off on the oversight, I mean, that would seem to be an ordinary administrative consequence to a new set of authorities and responsibilities. And as far as you can tell, none of that ever happened.

Mr. FINE. Well, the PATRIOT Act didn't provide this checklist of what needed to be done to oversee this. It was in the PATRIOT Reauthorization Act. But I agree with your point

Senator WHITEHOUSE. I was using that shorthand.

Mr. FINE. I do agree with your point that when you work hard to get these important and sensitive authorities that are intrusive, that get sensitive information that is retained for a significant period of time, you are obligated and you should put in a system and internal controls to ensure that it is used properly and to ensure that there are not misuses of it.

Senator WHITEHOUSE. And I would suggest that even a step ahead of that, as an administrator, you should have a system in place to identify those moments so that you are sure that the process that you just described actually takes place, sort of the meta system, which is are we up to the task of looking at new legislation that Congress gives us and making sure that this step happens. That is sort of an overarching

Mr. FINE. Yes, and they should do that on a systematic basis. I agree with you.

Senator WHITEHOUSE. And there is no indication that they do at this stage, at least that we can glean from your report.

Mr. FINE. We didn't review that, but it didn't happen in this case.

Senator WHITEHOUSE. Yes. A final point, if you don't mind a moment, Senator Feingold. A fine question. There has been some testimony given on the House side that the FISA 215 orders are too cumbersome, and if you tried—that the 215 order would technically allow you to get all of the information that is now obtained through the National Security Letters, but that the process of using that vehicle would be so cumbersome that it would essentially grind a lot of what we need to do to a halt.

In between allowing the FBI, completely unsupervised, to exercise oversight over themselves with, you know, demonstrated failure to date in that respect, and a full-blown FISA 215, are you prepared to recommend whether there is any intermediate step that this Committee and this Congress might consider to see that the FISA Court or somebody, at least, outside of the immediate administrative structure of the Bureau at least has some kind of sign-off on whether the approval process is being done right? Should that be located elsewhere, and is the FISA Court an appropriate place?

Mr. FINE. I am not prepared to recommend a specific legislative piece. I would have to sort of address it on a case-by-case basis. I think that is obviously a consideration to be reviewed, and whether there should be review of these by an entity outside the FBI, whether it is in the Department of Justice or whether it is a local prosecutor, that is obviously an issue that both this Committee and the Congress need to review along with the input of the Department and the FBI about what that would mean.

Senator WHITEHOUSE. OK. Well, I appreciate your testimony very much today, and Senator Feingold has the floor.

Senator FEINGOLD. Thank you, Mr. Chairman, very much. And, Mr. Fine, thanks for your patience here.

In your October 2006 memo to the Attorney General on the Justice Department's top management and performance challenges for fiscal year 2006, you cautioned that the PATRIOT Act granted the FBI broad new authorities to collect information, including the authority "to review and store information about American citizens and others in the United States about whom the FBI has no individualized suspicion of illegal activity." You cautioned nearly 6 months ago that the Department and the FBI need to be particularly mindful about the potential for abuse of these types of powers.

First, I want to establish some basic facts alluded to in your memo. Under the existing NSL statutes, it is possible to obtain information, including full credit reports, about people who are entirely innocent of any wrongdoing. Isn't that correct?

Mr. FINE. It is possible, yes, as a result of the investigation, there is no finding of anything and that they are innocent, yes.

Senator FEINGOLD. And the FBI's policy is that it will retain all information obtained via NSLs indefinitely, often in databases, like the Investigative Data Warehouse, that are available to thousands of investigators. Is that correct?

Mr. FINE. Yes.

Senator FEINGOLD. Now, with regard to your caution about the potential for abuse of these powers, DOJ responded in November 2006 that the FBI agrees and that it is "aggressively vigilant in guarding against any abuse." Would you agree with that statement, that the FBI has been aggressively vigilant in guarding against abuses?

Mr. FINE. I would agree that the FBI was not aggressively vigilant in terms of guarding against the problems we found, yes.

Senator FEINGOLD. So you would disagree that the FBI was

Mr. FINE. Oh, I am sorry. I would disagree that they were—

Senator FEINGOLD. Being aggressively vigilant.

Mr. FINE.—aggressively vigilant, yes.

Senator FEINGOLD. Now that your investigation is complete, what kinds of things do you think the FBI should be doing if it is going to be aggressively vigilant in guarding against abuses of its NSL powers?

Mr. FINE. I think they ought to establish an audit function so they are going out to look for problems and misuses. I think they need to have clear guidance. I think they need to have better training. I think they ought to do a review to look at what happened in this case to ensure it doesn't happen in the future and that accountability is assessed. I think that it has to have a change in

mind-set that we are going to make sure that there are not abuses of these important tools that are indispensable to their investigations.

Senator FEINGOLD. Your office identified 22 violations of the NSL statute that had not previously been reported by the FBI to the President's Intelligence Oversight Board. The report explains that one of the reasons that occurred was that agents did not review the records they received to check them against the original NSL requests, and this strikes me as a little odd.

If, as the FBI has stated, these authorities were so critical to its investigations, why wouldn't agents immediately verify that they had received what they needed and review it to see what insight it provided? Do you think the agents were collecting information with NSLs and then not even reviewing and using that information? And why would they do that?

Mr. FINE. Well, I think they were obtaining information, using them, reviewing it to some extent. I don't think there was a careful check to make sure all these telephone numbers are the correct ones that we have asked for, that there wasn't a typo in the thing that went out or that it wasn't a mistake by the provider to give us an additional telephone number that we hadn't requested. So I don't think it was a careful review. I do think that they were using this information and using it in link analysis and databases. So I think it would be a little strong to say that they weren't reviewing it or using it, but they surely weren't doing it carefully enough.

Senator FEINGOLD. One of the concerns I have repeatedly raised about the legal standard for NSLs is that it is so lax that any one NSL could arguably be used to obtain entire databases of information about people. And your report actually explains that in 2004 nine NSLs were issued in one investigation for a total of 11,100 separate telephone numbers.

You may be limited in what you can say about this in an open setting, but can you tell us any more about the circumstances of that investigation that would lead to thousands of phone numbers being covered by just a few NSLs?

Mr. FINE. I think I am limited in discussing an individual case in an open setting, but I would be glad to discuss this further

Senator FEINGOLD. Would you give that to us in a classified response in writing at some point?

Mr. FINE. Certainly.

Senator FEINGOLD. Thank you. Do you know when precisely the FBI General Counsel and the FBI Director learned of the exigent letters practice?

Mr. FINE. The practice of exigent letters? We believe that they learned of it when we brought it to their attention, and with regard to the General Counsel, sometime late in—by the practice, I should make clear, sort of the practice of the misuses of them, I believe it was late in 2006, and the FBI Director around that time or shortly thereafter.

Senator FEINGOLD. Do you think that these abuses of the NSL authority would have occurred if court orders had been required?

Mr. FINE. I can't speculate on that.

Senator FEINGOLD. Finally, do you believe that these types of abuses would have occurred if the standard for issuing an NSL had

required more individualized suspicion about the individual whose records were being obtained?

Mr. FINE. I don't think I can speculate on that either. I think that abuses are going to occur in many settings, but certainly they occurred in a widespread setting here.

Senator FEINGOLD. Thank you very much, Mr. Fine.

Thank you, Mr. Chairman.

Senator WHITEHOUSE. I don't think we have any necessity for closing statements, so the record will remain open for a week, and I thank the Inspector General for his testimony and for his report and for the hard work of his staff.

I would like to take a moment, I know that you are here representing an office that has worked very hard to make this happen, and as somebody who has led offices like that before, I know firsthand how important the staff work is that makes something like this all come to pass. So I want to commend, through you, the hard work of your staff as well.

The Committee will stand in recess.

Mr. FINE. Thank you.

[Whereupon, at 11:58 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Questions of Senator Patrick Leahy,
Chairman, Committee on the Judiciary
Hearing on "Misuse of Patriot Act Powers"
March 21, 2007

Questions for Glenn Fine, Inspector General, Department of Justice

Exigent Letters

1. Your March 2007 report extensively discussed the FBI's use of more than 700 so-called "exigent letters." The relevant statute allows for companies to voluntarily provide records in an emergency involving immediate danger of death or serious physical injury. But you have observed that, in these exigent letters, where the government requests records and then says that it will follow that request with a mandatory process, like a National Security Letter (NSL) or a subpoena, the production is no longer truly voluntary.

a. Do you think that the "exigent letter" process is legally proper even if done in a genuine emergency and followed up with an NSL?

ANSWER: We do not believe it is appropriate for the FBI to issue "exigent letters" to telephone companies – even in emergency circumstances – that have the potential of confusing the FBI's authority to *compel* the production of telephone toll billing records or subscriber information pursuant to national security letters (NSLs) (set forth in the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709) with its authority to *request* voluntary emergency disclosure of such records pursuant to 18 U.S.C. § 2702(c)(4). One authority is compulsory while the other is voluntary. Moreover, as we stated in our report, we did not believe when the FBI sent the exigent letters in 2003 – 2005 that it was relying on the voluntary emergency disclosure authority because the letters (1) were sometimes used in non-emergency circumstances, (2) did not reference the emergency voluntary disclosure statute or the factual predication necessary to invoke that authority, and (3) were not signed by FBI officials who had authority to sign such letters. For these and other reasons stated in our report, we believe the FBI circumvented the requirements of the ECPA NSL statute and violated the Attorney General's NSI Guidelines and internal FBI policy.

We believe that if the FBI is relying upon its authority to request voluntary emergency disclosures, it should not suggest or state that a national security letter or a grand jury subpoena will follow. The guidance recently issued by the FBI on use of voluntary emergency disclosure authority underscores the difference between the distinct compulsory and voluntary disclosure authorities in the ECPA statute.

b. According to press reports, the FBI still has contracts with three telephone companies allowing for instant production of records to be followed up with NSLs – essentially the exigent letter process you documented. Do you think that the FBI should change this policy?

ANSWER: The documentation provided to us by the FBI concerning the contracts with the telephone companies indicates that the telephone companies and the FBI contemplated that national security letters would be served by the FBI before responsive records were produced. This process was not followed when the FBI obtained records from the telephone companies without first serving national security letters. Apart from observing that the strict requirements of the NSL statutes should be followed in any contractual or other arrangements with communication providers, financial institutions, credit bureaus, or other entities from which the FBI is authorized to obtain information through NSLs, we have not analyzed the contracts or examined other considerations that would be necessary to determine whether the FBI should change its policy in facilitating the production of telephone company records through contractual arrangements.

c. Do you believe that the exigent letters used by the FBI satisfied the statutory requirement that the emergency involved an "immediate danger of death or serious physical injury" to a person before making the voluntary disclosures?

ANSWER: It is difficult to answer this question because the FBI could not tie all the exigent letters to specific national security investigations. We therefore could not analyze the underlying investigations to which the exigent letters related to determine whether they met the statutory requirement for voluntary production, namely an "immediate danger of death or serious physical injury" to a person. However, information developed in our investigation indicated that, at least in some instances, there was no emergency satisfying this statutory requirement.

d. Do you believe that the FBI's current, revised exigent letters satisfy this standard?

ANSWER: The FBI's new guidance was issued in March 2007 for the issuance of emergency voluntary disclosure requests pursuant to 18 U.S.C. § 2702(c)(4). We have not yet reviewed any examples of the use of this authority pursuant to the new guidance. However, we will provide an update on this guidance and any observations we can make about the use of this authority in the context of our analysis of corrective actions the FBI is taking in response to our first report.

Couns l Approval

2. The PATRIOT Act reduced the level of approval necessary before an NSL can be issued. Now a Special Agent-in-Charge of any of the FBI's field offices can sign the NSLs, whereas previously only senior officials at FBI headquarters could sign NSLs. The only attorneys who now review NSLs are Division Counsels, who report to the Special Agents-in-Charge in their field offices. According to your report, because the Division Counsels are brought into the process late, and because they are in the same chain of command as the officials requesting the NSLs, Division Counsels have often been reluctant to question the NSLs presented to them and to exercise their independent professional judgment.

a. Do you believe that the apparent constraints on the attorneys who review NSLs have contributed to the number of improper NSLs approved and sent out?

ANSWER: As stated in our report, we are concerned that the supervisory structure of Division Counsels may affect the independence and aggressiveness of their review of national security letter authorities. Our concerns were based on interviews and examination of documents reflecting reluctance on the part of some Chief Division Counsel in raising concerns about insufficiently predicated national security letters.

Moreover, as noted in our report, we identified 22 possible Intelligence Oversight Board (IOB) violations in 4 FBI field offices that involved approval of national security letters that were improperly authorized; improper requests under the cited NSL statute; or resulted in unauthorized collection, due either to FBI or third party error. With respect to the first two categories of possible IOB violations, Division Counsel were in the chain of approval for these NSLs. Likewise, Division Counsel were in the chain of approval for the NSLs that were issued in the FBI four field offices we visited during the review despite failure to adhere to internal controls on NSL authorities (including NSL approval memoranda that were not reviewed and initialed by one or more of the required field supervisors or Division Counsel, NSL approval memoranda that did not contain all of the required information, and NSLs that did not contain the recitals or other information required by the authorizing statutes). In our review of 77 investigative files and 293 NSLs, 46 of the 77 files, or 60 percent, contained one or more infractions of this nature. Although we did not conclude that these lapses were attributable solely to the supervisory structure of Division Counsel within the FBI, we believe the lapses reflect failures on the part of all personnel in the supervisory chain of these NSL approvals, including Division Counsel.

b. Would it be beneficial for attorneys at the FBI or at the Justice Department with more independence from the field office officials requesting NSLs to review those NSLs to make sure that they meet legal and internal standards?

ANSWER: We believe that this is an issue that should be considered to ensure appropriate use of NSLs as well as other investigative techniques used in national security investigations. At the same time, the approval process needs to be flexible and expeditious to ensure that appropriate investigative techniques can be used in a timely fashion when required.

Prior Inaccuracies

3. The Judiciary Committee has received letters and briefings from Justice Department and FBI officials in the past, assuring the Committee that NSLs were being used properly, and that all appropriate safeguards and legal authorities were being followed. For example, in a November 2005 letter to Senator Specter, attached, the Justice Department asserted that the FBI was not abusing the process for seeking NSLs, and that all NSL activity was accurately being reported to Congress as required by law. Your report appears to contradict both assertions. Do you believe that the attached letter was accurate when sent, and do you conclude that any aspects of it were intentionally or unintentionally misleading as to NSLs?

ANSWER: As indicated by the data presented in our report on NSL usage, we do not believe the letter was accurate with respect to the total number of NSL requests. Our report documents significant problems regarding how the data on NSL usage were collected for the Department's semiannual classified reports to Congress. Specifically, our report identifies several flaws in the internal reporting of NSLs and structural problems with the FBI-OGC database, the only centralized repository of data reflecting the FBI's use of NSL authorities. These flaws and structural problems resulted in a significant understatement of the total numbers of NSL requests that were reported to Congress in Calendar Years 2003, 2004, and 2005, as well as inaccuracies in the total number of "investigations of different U.S. persons" or "investigations of different non-U.S. persons" reported to Congress in that period. However, we did not see evidence that anyone who submitted these numbers intentionally submitted inaccurate numbers.

Failure to Follow Rules

4. Your report found that, in 60 percent of the NSLs you reviewed, the FBI failed to comply with one or more of its own internal control policies. In many cases, you found that the NSLs were not reviewed by an

appropriate supervisor, and in many others, there was no written record of the basis for the request. And in three of the four FBI offices you visited, the office did not systematically keep signed copies of NSLs that were sent out. How will the FBI be able to effectively protect against future abuse of the NSL process with new rules and policies, when it has, thus far, failed to follow its own rules and policies?

ANSWER: As stated in our report, we identified serious lapses in the internal controls designed to ensure compliance with NSL authorities, guidelines and internal policies, and appropriate supervisory review of the use of these authorities. Other lapses, including failure to require the retention of signed copies of national security letters, made it difficult if not impossible to audit the use of these authorities.

The FBI needs to ensure that its own rules and policies are being followed. Prior to our report, we believe that the FBI did not provide sufficient attention to oversight, internal controls, guidance, and training to ensure that its policies were being followed. This was a significant failing, which the FBI now acknowledges.

As I stated in my testimony before the Senate Judiciary Committee, I believe the FBI is taking our report seriously. The FBI has agreed to undertake audits, special inspections, training, and a variety of remedial measures designed to capture accurate information about NSL usage, provide better guidance and training to FBI personnel, avoid the acquisition of improper information, ensure timely and accurate reporting of possible IOB violations, and purge databases of improperly obtained information. We will closely monitor the FBI's progress on these essential steps to help ensure that the FBI complies with NSL statutes, Attorney General Guidelines, and internal policies regarding the use of these important investigative tools.

Library Records

5. In your report, you found that "the FBI did not obtain Section 215 orders for library records from 2002 through 2005." However, in a Windsor, Connecticut, case which has received media attention, the FBI served a National Security Letter, not a Section 215 order, on four librarians. In the course of your review, did you find any instances in which the FBI used National Security Letters to request public or academic library records, or book store records? If so, did you reach any conclusions about the propriety of those NSLs?

ANSWER: We did not come across any other uses of NSLs for library records in the records we reviewed. We also asked the FBI this question, and it responded that it did not believe NSLs were used to obtain library

records. However, FBI records are not maintained in a manner that would enable us to readily determine whether the FBI sought library records using an NSL.

Preliminary Briefing on 2006 Report

6. Your office is conducting a follow up investigation of the FBI's use of NSLs in 2006. Would you or your staff be willing to brief the Judiciary Committee about preliminary findings of this follow-up investigation as soon as possible and well in advance of issuing the final report?

ANSWER: Given the scope of our follow-up report and the tight timeframes under which we are required to complete the review, it would be difficult for us to provide findings -- or even preliminary findings -- prior to the December 31 due date. That said, we will continue to work with the Committee, as we have in the past, to keep it informed about these important issues and the progress of our review.

Use of Improperly Obtained Information in Criminal Cases

7. Your report suggests that much of the information improperly obtained with NSLs may have been placed in nationwide databases or used in other investigations, with no record of the source of the information.

a. Did you find that any of this information has, or is likely to have, been used in criminal cases?

ANSWER: As noted in our report, information uploaded into FBI databases from responses to NSLs is not required to be electronically tagged with the source of the information. Accordingly, it is difficult to determine if data improperly obtained pursuant to national security letters has been entered into these databases. As a result, FBI and DOJ officials told us that they could not identify how often information derived from NSLs was provided to law enforcement authorities for use in criminal proceedings. As a result, we did not identify any information improperly obtained in response to NSLs that was thereafter used in criminal proceedings.

b. Do you think that the FBI's failure to follow the law in obtaining NSLs may be exculpatory, or Giglio, information, that needs to be disclosed if information obtained through such NSLs is used in a criminal case in court?

ANSWER: I do not think that type of information fits within the Giglio requirements, but our review did not encompass an analysis of any legal implications in criminal cases arising from information improperly obtained in response to national security letters.

Senator Charles Grassley
Questions for the Record

Senate Judiciary Committee Hearing: "The Inspector General's Findings of Improper Use of the National Security Letters by the FBI"

March 21, 2007

Questions from Senator Grassley

For Inspector General Fine:

1. On March 20, 2007, *The Washington Post* reported that in light of the developments surrounding the release of your report on national security letters, the FBI issued new guidance to field agents for seeking phone records on an emergency basis. This new guidance included a new template "emergency letter" and instructions telling agents there is no need to follow these letters with NSL's or subpoenas. Further, this guidance states that the letters are the preferred method in emergencies, but that agents may make these emergency records requests orally. FBI Assistant Director John Miller stated that these new procedures will include "an audit trail to ensure we [FBI] are doing it the right way."

a. How do you see these new procedures working?

ANSWER: The FBI issued new procedures in March 2007 clarifying its authority to make emergency voluntary disclosure requests pursuant to 18 U.S.C. § 2702(c)(4). We will provide an update on this guidance and any observations we can make about the use of this authority in the context of our analysis of corrective actions the FBI is taking in response to our first report.

b. Do you think the FBI can provide adequate justification for emergency requests when they allow agents to make these requests orally?

ANSWER: The FBI is authorized to seek the voluntary production of non-content records from communication providers pursuant to 18 U.S.C. § 2702(c)(4). This statute does not require that the FBI provide written justification when making the request, nor does its internal FBI guidance. The FBI's most recent guidance, issued in March 2007, states that while the request to providers may be oral, the basis for the request and approval must be documented. In some truly emergency circumstances, we believe that oral requests would be appropriate. However, we believe that any such oral requests must be followed with timely written documentation memorializing the oral requests, explaining the reasons that oral requests were required, and ensuring that all

statutory, Attorney General Guidelines, and internal policy requirements are strictly followed.

c. What basic controls do you believe the FBI should institute to ensure these new procedures aren't just a way to avoid a paper trail that leads to another report like this one you issued?

ANSWER: See answer to question 1(b) above. In addition, we believe the FBI should require strict adherence to the statute, relevant Attorney General Guidelines, and requirements set forth in its March 2007 guidance, and it should reinforce these requirements through the training of its agents, supervisors, and Division Counsel and on its Intranet web site.

d. What review process or other controls has the FBI put in place to ensure that these new procedures are being followed?

ANSWER: We will examine these issues in our ongoing review of the FBI's use of national security letter authorities.

e. Will there be any disciplinary action for agents and supervisors that do not comply with these new procedures?

ANSWER: We believe that if agents or supervisors intentionally fail to comply with FBI procedures, or do so negligently after being given adequate training and guidance, they should be held accountable. Through its field supervisors, Headquarters program managers, Inspection Division, and Office of Professional Responsibility, the FBI should take appropriate steps to determine if any FBI personnel do not comply with the new procedures governing this authority as well as national security letter authorities.

2. About two weeks ago, the FBI issued a Bureau-wide directive prohibiting the use of the exigent letters and asked all FBI field offices to identify any use of an exigent letter. Have any similar letters been identified by other FBI offices, or is it limited to just the Communications Analysis Unit (CAU) at headquarters?

ANSWER: We are aware of at least one exigent letter sent by a field division during calendar years 2003-2005, the time period examined in our first review. We have not yet reviewed the exigent letters sent during 2006 or 2007.

3. On page 93 of your report, you stated that, "CAU personnel circumvented the ECPA (Electronic Communications Privacy Act) NSL

statute." On page 3 of your testimony, however, you state that the FBI's misuse of national security letters "violated" NSL statutes. Simply put, were the exigent letters illegal? If so, what penalties or remedies apply to the legal violations you found?

ANSWER: We believe the FBI improperly circumvented the Electronic Communications Privacy Act NSL statute when it issued the exigent letters. In using exigent letters that, on the one hand, asked the communication provider to voluntarily provide records and, on the other hand, stated that compulsory process would follow, we believe the FBI improperly combined a national security letter request authorized by 18 U.S.C. § 2709 with its distinct authority to request the voluntary production of non-content records pursuant to 18 U.S.C. § 2702(c)(4).

The OIG and the FBI are now conducting a joint investigation of the use of the exigent letters from the inception of the practice to date. Initially, as I responded to a question to you at the hearing on March 21, the OIG intended to monitor the FBI's investigation of exigent letters and whether anyone should be held accountable for the problems related to the improper use of exigent letters. Since the hearing, the OIG has decided to conduct a joint investigation with the FBI to examine this matter. During this review, we will assess the actions of relevant FBI personnel and their supervisors involved in the issuance of exigent letters. The penalties or remedies from this investigation that could apply could include administrative sanctions or, if criminal misconduct occurred, criminal sanctions.

4. In high-profile indictments last year, several Hewlett-Packard executives were prosecuted under California law for obtaining telephone records using false pretenses. The Telephone Records and Privacy Protection Act of 2006, which was signed into law earlier this year, also makes it a federal crime to "knowingly and intentionally" obtain confidential phone records using false statements. Could there be potential criminal violations under these or other statutes if FBI officials knowingly issue exigent letters with false representations to obtain phone records? If so, what other state or federal statutes may apply?

ANSWER: The Telephone Records and Privacy Protection Act of 2006, Public Law 107-476, which became effective on January 12, 2007, makes it a felony in interstate or foreign commerce to knowingly and intentionally obtain, or attempt to obtain, confidential phone records information of a telecommunications carrier by "making false or fraudulent statements or representations to an employee of a covered entity" or "providing a document to a covered entity knowing that such

document is false or fraudulent." The statute does not apply to "lawfully authorized investigative, protective, or intelligence activity of a law enforcement agency of the United States, a State, or political subdivision of a State, or of an intelligence agency of the United States."

We do not yet know whether any exigent letters were issued after the effective date of this statute. However, we will consult, as appropriate, with the Department's Criminal Division about the possible applicability of this statute and any other federal statutes to evidence developed in our joint investigation of the FBI's use of exigent letters described in response to Question 3 above.

5. According to FBI briefings, the only system for tracking National Security Letters was a simple Microsoft Access database operated by the FBI General Counsel. The FBI's response to your report indicates that a more sophisticated computer system module is currently being designed to handle the preparation, issuance and tracking of National Security Letters and that the prototype of the module is scheduled for testing in the FBI's Washington Field Office in July, 2007.

a. Please describe what your office knows about the implementation of this module.

ANSWER: The FBI has told us that development of an automated system for tracking the workflow of national security letters is on schedule for deployment in the Washington Field Office by July 2007. The FBI has also told us that its remaining offices will be transitioned to the automated system during 2007. We will examine the status of this project in our forthcoming report when we assess this and other remedial measures the FBI has agreed to implement in response to our recommendations.

b. Will it be part of the FBI's Sentinel system? If so, what impact will the new, additional requirements have on the budget and schedule for implementing the Sentinel computer system?

ANSWER: We have been informed by FBI officials that, at least initially, this new national security letter tracking system will not be part of the Sentinel project.

c. Why did the process of analyzing the FBI's business processes during preparation for computer systems upgrades, first for the Virtual Case File and then for Sentinel, not identify the need to record and track the issuance of National Security Letters?

ANSWER: Based on our review, we do not know the answer to this question.

d. Were the personnel involved in designing VCF and Sentinel unaware of the database maintained by the General Counsel's Office or was a conscious decision made not to include that function in the development of Sentinel?

ANSWER: Based on our review, we do not know the answer to this question.

e. Do you believe that the implementation of this system will eliminate most or all of the problems and abuses uncovered during your investigation?

ANSWER: We believe this automated tracking system can help address some of the problems we identified, but it alone will not eliminate all of the problems we identified.

f. What is the timeframe for making this system available to every FBI official responsible for issuing and tracking National Security Letters?

ANSWER: As noted above, the FBI has told us that development of the system is on schedule for deployment in the Washington Field Office by July 2007, and that remaining FBI offices will receive the automated system during 2007.

6. What training, if any, did the supervisors at the FBI receive regarding the issuance of National Security Letters and exigent letters? In particular, what training did the Directors of the FBI's Communications Analysis Unit receive on the legal requirements for the issuance of NSL's prior to assuming the responsibilities of that office?

ANSWER: The training provided to FBI personnel on the use of national security letters included training at the New Agent Academy; training upon assignment to counterterrorism, counterintelligence, and cyber squads; mandatory training provided by Chief Division Counsel; and periodic training provided by the international terrorism, counterintelligence, and cyber programs. To our knowledge, supervisory special agents and assistant special agents in charge did not receive additional training on national security letters. With regard to training of personnel assigned to the Communication Analysis Unit, we are examining that issue in the course of our joint investigation of the use of the exigent letters discussed in response to Question 3.

7. What written guidelines, if any, did the FBI's Office of General Counsel draft to set forth the legal requirements for the issuance of National Security Letters and how were those written guidelines disseminated to the field?

ANSWER: As described in our report on pages 22 to 27, FBI-OGC issued periodic guidance on national security letter authorities, including guidance following enactment of the PATRIOT Act, that described the legal requirements for each type of NSL. This initial guidance was supplemented by other guidance to address recurring questions and changes in the models provided by NSLB to assist agents in generating NSLs. FBI-OGC guidance was typically sent by means of "electronic communications" (ECs), and these ECs were sometimes supplemented by postings on the FBI-OGC's National Security Law Branch's (NSLB) Intranet web page. In addition, NSLB attorneys occasionally sent "all CDC" e-mails to Chief Division Counsel when particular issues required prompt clarification. Lawyers assigned to the NSLB also responded to questions posed by agents and CDCs as they arose. In addition, NSLB's written guidance was included in periodic training of Division Counsel and in the training provided by Division Counsel to field personnel.

8. What written guidelines, if any, did the FBI's Office of General Counsel draft to set forth the legal requirements for emergency requests and how were those written guidelines disseminated to the field?

ANSWER: FBI-OGC issued written guidance to the field in 2003 – 2005 describing the FBI's authority to seek voluntary production of certain non-content records in emergency circumstances. As noted on page 97 of our report, this included guidance sent in August 2005 identifying the level of approval. Lawyers assigned to NSLB also responded to questions posed by agents and Division Counsel as they arose.

9. Are there currently any training programs being used within the Federal Bureau of Investigation to provide guidance to rank and file agents on the use of National Security Letters and exigent letters?

ANSWER: The FBI Director has stated that the FBI has collected all the rules and policies on NSLs into one document which will be disseminated to the field. The FBI has also summarized NSL statutes and policies on the FBI-OGC Intranet web page. In addition, the FBI has mandated NSL training in 12 FBI field divisions in conjunction with previously scheduled FISA minimization reviews and will be coordinating training in other field divisions with the Department's National Security Division during the balance of 2007.

10. During briefings of Congressional staffers, the FBI has acknowledged having retroactively issued seven blanket National Security Letters to communications carriers to cover previously issued exigent letters. Those letters are not covered in your report since they were issued outside the timeframe covered by the report, i.e., 2003-2005.

a. Please describe in detail what you office currently knows about the issuance of these blanket letters. In complying with this request, please provide the title of the individual(s) who signed the blanket National Security Letters and the number of exigent letters covered by each blanket National Security Letter.

ANSWER: We do not yet have sufficient information to describe or assess the FBI's use of so-called "blanket" NSLs. The OIG served a document request on the FBI seeking information relevant to our ongoing review of NSLs, including documents reflecting the issuance of "blanket" NSLs. We will analyze these documents and conduct interviews to assess the propriety of these blanket NSLs and include our findings, analysis, and conclusions in our forthcoming report.

b. Do you believe these blanket letters were an appropriate way to provide legal process for the records obtained inappropriately through the exigent letters?

ANSWER: See answer to Question 10 (a).

S nat Judiciary Committ
Hearing on "Misuse of Patriot Act Power: The Inspector General's Findings of Improper Use of the National Security Letters by the FBI"
Wednesday, March 21, 2007

Questions Submitted by U.S. Senator Russell D. Feingold to Inspector General Glenn Fine

1. At the hearing, I asked you about an investigation in which, according to your report, nine NSLs were issued for a total of 11,100 separate phone numbers. Please provide in a classified response whatever information you can about the circumstances that led to thousands of phone numbers being covered by just a few NSLs.

ANSWER: A separate classified response will be provided in response to this question.

2. Your report questioned whether case agents should be able to "access NSL information about parties two or three steps removed from their subjects without determining if these contacts reveal suspicious connections."

a. Is it correct that under current law these types of tenuous connections are all that is required to issue a National Security Letter (NSL) since the statutory standard for issuing an NSL is that the information is "relevant to" or "sought for" an authorized investigation?

ANSWER: Under current law, national security letters may be issued for records covered by the NSL statutes so long as the information sought is relevant to, sought for, or necessary for the conduct of a national security investigation, depending on the particular NSL authority being used. In our review, we learned of discussions among Division Counsel and the FBI Office of General Counsel's (OGC) National Security Law Branch (NSLB) about whether NSLs forwarded to NSLB for approval were seeking information about individuals two or three steps removed from the subjects of the investigation and, more generally, whether seeking such information was advisable even if it was legally defensible.

b. Is it also correct that under current law the person whose records are obtained need not be the subject of the investigation?

ANSWER: Yes. The persons whose records are sought in a national security letter need not be the subject of the underlying national security investigation. The statutory certification that must accompany requests for records covered by the NSL statutes is the same whether the target of

the NSL is a subject of the underlying national security investigation or not.

c. Has the FBI or Justice Department provided any guidance to the field about how to interpret these statutory standards, other than to state generally that agents are to use the least intrusive means available?

ANSWER: As discussed in our report on pages 22 to 27, FBI-OGC issued periodic guidance on national security letter authorities, including guidance following enactment of the PATRIOT Act, that described the legal requirements for each type of NSL. This initial guidance was supplemented by other guidance that addressed recurring questions and changes in the models provided by NSLB to assist agents in generating NSLs. FBI-OGC guidance was typically sent by means of "electronic communications" (ECs), and these ECs were sometimes supplemented by postings on the NSLB Intranet web page. In addition, NSLB attorneys occasionally sent "all CDC" e-mails to Chief Division Counsel when particular issues required prompt clarification. Lawyers assigned to NSLB also responded to questions posed by agents and Division Counsel as they arose. Written guidance was also discussed in periodic training of Division Counsel and in the training provided by Division Counsel to field personnel. However, during the period covered by our review, the FBI did not issue guidance that would have assisted agents in evaluating questions that routinely arise as to how they should apply the "least intrusive collection techniques feasible" proviso of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection to their use and sequencing of NSL authorities.

3. Your report explained that the FBI had no system for tracking how NSL-derived information was being used by the Bureau or other agencies. Is that unusual? For example, in the criminal context, don't investigators need to know <u>how</u> evidence was obtained if they want to rely on it to build a criminal case?

ANSWER: In criminal cases, the FBI is able to track information obtained from grand jury subpoenas. By contrast, the FBI did not tag or identify what information was obtained from NSLs. In fact, as noted in the report, the FBI did not even require the retention of signed copies of NSLs. As we recommended in the report, we believe the FBI should consider measures to label or tag information derived from NSLs to assist in identifying when such information is provided to law enforcement authorities for use in criminal proceedings.

4. In Director Mueller's letter to you in response to the report, he said, "[T]he FBI does not believe that the use of exigent letters is improper in

itself .... "Do you agree with Director Mueller that exigent letters may be appropriate in some circumstances? Please explain.

ANSWER: We agree that emergency requests for voluntary production of information may be appropriate in some circumstances. Under a provision of the Electronic Communications Privacy Act, 18 U.S.C. § 2702(c)(4), the FBI is authorized to seek voluntary production of non-content records from communications providers. This statute authorizes voluntary production if the provider in good faith believes that "an emergency involving danger or death or serious injury to any person requires disclosure without delay of information relating to the emergency." This authority, however, does not contemplate the issuance of a compulsory process such as national security letters or grand jury subpoenas. As noted in the report, we believe the FBI improperly circumvented the Electronic Communications Privacy Act NSL statute when it issued the exigent letters. In using exigent letters that, on the one hand, asked the communication provider to voluntarily provide records and, on the other hand, stated that a compulsory process would follow, we believe the FBI improperly combined a national security letter request authorized by 18 U.S.C. § 2709 with its distinct authority to request the voluntary production of non-content records pursuant to 18 U.S.C. § 2702(c)(4).

5. According to your report, an associate general counsel with the National Security Law Branch (NSLB) at the FBI first raised concerns about the use of exigent letters in late 2004. Then in June 2006 – 18 months later – the NSLB, rather than banning these letters, instead issued revised models for exigent letters that stated that the Bureau would follow up with an NSL instead of a grand jury subpoena. Your report found that did not solve the problem, as neither the old nor the new version of the exigent letter was authorized by statute.

a. When did the FBI finally and completely bar the use of exigent letters?

ANSWER: The FBI sent guidance to all divisions on March 1, 2007, directing that all divisions immediately cease the practice of using exigent letters that seek to obtain information with the promise of forthcoming legal process.

b. Why do you believe it took so long to resolve this issue?

ANSWER: The FBI Office of the General Counsel (OGC) and senior officials in the Counterterrorism Division failed to effectively communicate in a timely fashion about the FBI's practice of issuing exigent letters, the fact that the exigent letters circumvented the

Electronic Communications Privacy Act (ECPA) NSL statute, and the fact that they could not be justified under the emergency voluntary disclosure authority in ECPA. The OGC attorney also did not raise the issue to a higher level in the FBI when the Communications Analysis Unit (CAU) did not take measures to address the concerns of the OGC. We believe that should have happened, and the issue should have been resolved much sooner.

6. As you point out in the report, the NSL authority for financial records was expanded in 2003 to cover not just traditional financial institutions like banks, but also a range of other entities, from casinos to car dealers to insurance companies to real estate companies. To what extent has the FBI used this NSL authority to obtain information from these other types of entities that most of us would not think of as "financial institutions"?

ANSWER: In our review of the FBI's use of these authorities in 2003 – 2005, we did not examine the types of NSL recipients to whom the FBI directed national security letters pursuant to the Right to Financial Privacy Act NSL statute. However, in our review of 77 investigative files in 4 field offices, the RFPA NSLs we examined were typically directed to banks, savings and loan associations, credit unions, financial services companies, brokerage firms, and mortgage companies.

7. As part of your review of the use of Section 215 business records orders, did you evaluate the breakdown between records sought that pertain to individuals who were already targets of investigations, and records sought that pertain to individuals who were <u>not</u> already targets of investigations? If so, what did you find?

ANSWER: A separate classified response will be provided in response to this question.

8. The NSL report identified some undefined terms in the NSL statute covering communications records as one source of confusion for FBI agents. Specifically, the statute authorizes agents to obtain "toll billing records information" and "electronic communications transactional records," but the statute defines neither term.

a. How has the FBI interpreted these terms up to this point? Have agents in some offices been interpreting them differently than agents in other offices?

ANSWER: In the absence of clear definitions of these terms, we learned that FBI agents are sometimes confused about what records are permissible to obtain, and we noted periodic discussion about the

meaning of these terms among FBI attorneys and agents in an effort to promote consistency of interpretation. We also noted during our review that in the attachments accompanying some ECPA NSLs, the FBI sometimes deferred to the providers to determine what information the providers deemed to be "non-content" records.

b. What type of information is the FBI actually getting with this authority?

ANSWER: As noted in the report, the FBI has interpreted the term "toll billing records information" to include historical information on telephone calls made and received from a specified number, including land lines, cellular phones, prepaid phone call cards, toll free calls, alternate billed numbers, and local and long distance billing records. The FBI has interpreted the term "electronic communication transactional records" (e-mails) to include records on e-mail addresses associated with the account, screen names, billing records, and methods of payment.

9. At the hearing, you indicated to Senator Whitehouse that you do not believe the FBI, Congress, or the general public would know about the abuses of NSLs if not for your report. On December 14, 2005, the *Washington Post* quoted Attorney General Gonzales as saying, "[T]he PATRIOT Act has already undergone extensive review and analysis by Congress, by the DOJ Inspector General, and by other bodies .... This extensive review has uncovered not one verified example of abuse of any of the Act's provisions."

a. At that point in time, had you undertaken any review or analysis of the Patriot Act other than investigating complaints by individual citizens?

ANSWER: In December 2005, the OIG was in the early stages of planning its review of the FBI's use of national security letter authorities in Calendar Years 2003 – 2005. We also were gathering data on Intelligence Oversight Board violations, which we discussed in our March 2006 report required by Section 1001 of the Patriot Act. (See Office of the Inspector General, Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act (March 2006), available at http://www.usdoj.gov/oig/special/s0603/final.pdf.)

b. Would the serious misuse of the NSL authorities that your report uncovered have come to light if Congress had relied solely on individual citizens to come forward with complaints?

ANSWER: We believe it is unlikely that our findings on the FBI's use of national security letter authorities would have come to light had the Congress relied solely on individual citizen complaints or on the FBI's internal controls on the exercise of national security letter authorities.

10. During your testimony before Congress, several House Republicans and one Republican Senator implied that the NSL authority that existed prior to the Patriot Act is similar to the authority that exists today. However, in the Patriot Act, Congress replaced the old standard, requiring specific and articulable facts demonstrating that the records pertain to a suspected terrorist or spy, with a standard requiring only that the records be "relevant to" or "sought for" an authorized investigation, with no requirement that there be any individualized suspicion about the individuals whose records the FBI is obtaining. Would you agree that this was a dramatic expansion of the FBI's authority?

ANSWER: This was a significant expansion of the FBI's authority with regard to NSLs. The Patriot Act significantly expanded the FBI's preexisting authority to obtain information through national security letters by substituting a lower evidentiary threshold to obtain records, by expanding approval authority to permit Special Agents in Charge of the FBI's 56 field offices to sign NSLs, and by adding a new NSL authority under the Fair Credit Reporting Act.

11. In your testimony, you said, "(A]lthough we could not rule it out, we did not find that FBI employees sought to intentionally misuse NSLs or sought information that they knew they were not entitled to obtain." What evidence prevented you from ruling out the possibility of intentional misuse of NSLs?

ANSWER: In our review, we did not conduct an investigation to determine what each individual did with regard to NSLs, what they knew, and what their motivation was. However, with regard to many of the violations, we did not see evidence that suggested any deliberate intent to misuse NSLs, particularly since, in most cases, the FBI could have properly obtained the information sought had it followed appropriate statutes, guidelines and policies. Nevertheless, since the Office of the Inspector General (OIG) did not seek to establish individual accountability for the use of NSLs, we could not rule out the possibility of intentional misuse of NSLs or that individual FBI agents or supervisors knowingly sought information through NSLs that they knew they were not entitled to obtain.

The most troubling aspect of the review involved the FBI's practice of using exigent letters rather than NSLs to obtain telephone toll billing

records and subscriber information. In our review, we did not conduct an exhaustive investigation to determine what individuals knew and did with regard to each of the exigent letters they signed or authorized. However, in our current review we have decided to conduct a joint investigation with the FBI examining the use of the exigent letters from the inception of the practice to date. In this review, which the OIG will lead, we will assess the actions of relevant FBI personnel involved in the issuance and approval of exigent letters. We will report our findings, analysis, and conclusions in our December 2007 report.

SUBMISSIONS FOR THE RECORD

WASHINGTON
LEGISLATIVE OFFICE

Statement for the Record

of

Caroline Fredrickson, Director

Washington Legislative Office
American Civil Liberties Union

The Abuse of National Security Letters

Submitted to the United States Senate
Committee on the Judiciary

March 21, 2007

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On behalf of the American Civil Liberties Union, its more than half a million members and activists, and 53 affiliates nationwide, I thank Chairman Leahy and ranking member Specter for holding today's hearing on FBI abuse of National Security Letters.

Over five years ago, in the wake of the terrorist attacks of September 11, 2001 Congress passed the USA Patriot Act,[1] giving the FBI extraordinarily broad powers to secretly pry into the lives of ordinary Americans in the quest to capture foreign terrorists. One of the changes the Patriot Act made was to expand the circumstances in which National Security Letters (NSLs) could be issued so that the information sought with such letters would no longer have to pertain to an agent of a foreign power, and would no longer be limited to the subjects of FBI investigations.[2] An NSL is a letter that can be issued by Special Agents in Charge (SAC) of the FBI's 56 field offices— without any judicial review— to seek records such as telephone and e-mail information,[3] financial information, and consumer credit information.

The four NSL authorizing statutes include the Electronic Communications Privacy Act,[4] the Right to Financial Privacy Act,[5] the Fair Credit Reporting Act,[6] and the National Security Act of 1947.[7] Subsequent legislation expanded the types of institutions from which records could be sought using NSLs. The Intelligence Authorization Act for Fiscal Year 1996,[8] amended the FCRA to give the FBI authority to obtain credit header information with NSLs, and a provision of the Patriot Act, expanded this power to allow the FBI and other government agencies that investigate terrorism to obtain full credit reports.[9] The Patriot Act also reduced the

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[1] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. Law No 107-56, 115 Stat. 272 (2001)[Hereinafter Patriot Act].

[2] Id., section 505.

[3] Telephone and e-mail information that can be obtained with NSLs includes historical information on calls made to and from a particular number, billing records, electronic communication transactional records and billing records (including method of payment), and subscriber information.

[4] 18 U.S.C. section 2709 (1988).

[5] 12 U.S.C. section 3401 (2000).

[6] 15 U.S.C. section 1681 et seq. (1996).

[7] 50 U.S.C. section 436(a)(1)(2000).

[8] Pub. Law No. 104-93, section 601(a), 109 Stat. 961, codified at 15 U.S.C. section 1681u (Supp.V. 1999).

[9] Patriot Act section 358(g)(2001).

standard necessary to obtain information with NSLs, requiring only that an SAC certify that the records sought are "relevant" to an authorized counterterrorism or counter-intelligence investigation.

The ACLU opposed these unwarranted expansions of NSL power, and opposed making provisions of that statute permanent with the Patriot Reauthorization Act of 2005,[10] fearing these unnecessary and unchecked powers could be too easily abused. When Congress reauthorized the Patriot Act, it directed the Department of Justice Inspector General (IG) to review the effectiveness and use of these expanded authorities and one of the first of these reports, a review of the FBI's use of NSLs, was released on March 9, 2007.[11]

The IG's audit confirms our worst fears: that the FBI uses its NSL authorities to systematically collect private information about people who are not reasonably suspected of being involved in terrorism, and it retains this information indefinitely. The FBI ignored the scant requirements of the law and developed shortcuts to illegally gather information the FBI wanted from telecommunications companies and financial institutions. It did this without opening the investigations for which, by law, this information must be sought or be relevant to, and often without ever bothering to secure the NSLs or grand jury subpoenas it told these telecoms and financial institutions it would secure to support its claim of access to sensitive customer information.[12] This should be of great concern to all Americans, because the IG found the FBI is increasingly using this power against U.S. persons.[13] And despite the issuance of more than 140,000 NSL requests, the IG report documents only one terrorism conviction – for providing "material support" for terrorism -- and only 153 "criminal proceedings" resulting from the extensive use of this power.[14] "Criminal proceedings" is defined as all federal grand jury proceedings, as well as search warrants, indictments and trials.[15]

For over five years the Federal Bureau of Investigation has collected vast troves of data in secret and without accountability. I hope this hearing is only one of many to reestablish checks and balances on the executive branch and curb its many abuses of power. The ACLU asks this committee to hold

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[10] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. Law No. 109-177, 120 Stat. 192 (2006).

[11] Office of the Inspector General, A Review of the Federal Bureau of Investigation's Use of National Security Letters, March 2007, http://www.usdoj.gov/oig/reports/FBI/index.htm (Hereinafter IG Report).

[12] IG Report at 94.

[13] IG Report at 38.

[14] IG Report at 63, 64.

[15] IG Report, footnote 103, p. 62.

the FBI and this administration accountable for these abuses and to make statutory changes that will ensure that they cannot happen again.

The Inspector General's Findings

Despite statements to the contrary, the Inspector General found much more than just sloppy management and poor record keeping. The Inspector General's report documents systematic failures to meet statutory requirements, and at times, intentional refusals to comply with the law.

Intentional Violation of the NSL Statute

Most disturbingly, the Inspector General's report shows that the FBI's Communications Analysis Unit (CAU) declared itself unconstrained by the NSL statutes— arguing that the law was "insufficient" for CAU's purposes— and it contracted directly with three telephone companies to access information illegally.[16] The information included telephone toll and call detail records and the contract specified that the telephone companies would provide "near real-time servicing" of these requests. The contracts were approved by the FBI's Office of General Counsel (OGC), and fulfilled by issuing so-called "exigent" letters that were used even when no exigent circumstances existed.[17] The IG was able to confirm the use of 739 exigent letters to obtain information on 3,000 telephone accounts, in the clear absence of statutory authority to do so.[18] The true number is unknown because the FBI does not keep adequate records. That FBI Office of General Counsel procurement attorneys were involved with these contracts confirms that the telecommunication companies were paid for their cooperation and silence, and confirms that contrary to the IG's assertion that the FBI's use of "exigent" letters was undertaken without the benefit of advance legal consultation,[19] FBI lawyers were instrumental in establishing this illegal process.

CAU staff, who were not authorized to sign NSLs, used "exigent" letters containing obviously false statements to obtain documents from the telephone companies when no authorizing investigation was open, when no NSLs or subpoenas had been requested, and when no emergency situation existed.[20] They then asked FBI field offices to open investigations so NSLs could be issued without telling the field office personnel that CAU staff had already received the records,[21] a clear indication that they knew what they

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[16] IG Report at 88.

[17] IG Report at 92.

[18] IG Report at 90.

[19] IG Report at 97.

[20] IG Report at 92.

[21] Id.

were doing was improper. FBI National Security Law Branch (NSLB) attorneys were made aware of this issue in late 2004, possibly through complaints from field agents who resisted CAU's directives, and an NSLB Assistant General Counsel concluded that the practice of using "exigent" letters did not comply with the NSL statute. Yet, rather than prohibiting the practice outright, the NSLB attorney counseled CAU for two years regarding how and when CAU officials should use them. Regardless of this advice, CAU continued using these "exigent" letters, and the practice wasn't "banned" until the IG issued its report.[22] Even today the FBI is unable to determine whether data requested with "exigent" letters was ever covered with properly issued NSLs or subpoenas.[23]

And the issuance of "exigent" letters was only one of the illegal methods the FBI used to circumvent the NSL statutes. Using a similar scheme, the Terrorist Financing Operations Unit issued "Certificate Letters" to obtain the financial records of at least 244 named individuals in violation of the Right to Financial Privacy Act.[24] Again, agents without authority to issue NSLs used these letters to circumvent the law and gain access to private financial records, and then lied about it when confronted by NSLB attorneys. When the NSLB attorneys realized they had been misled they ordered the practice halted, but it did not stop.[25] This sequence reveals what can only be described as clearly intentional misconduct.

In other instances NSLB attorneys actually signed NSLs without reference to any authorized investigation, and more than 300 NSLs were issued out of an FBI control file that was opened specifically because there was not an authorized investigation from which to issue an NSL for the data the FBI wanted.[26]

Increasing Collection of Data on U.S. persons

When Congress expanded the FBI's authority to use NSLs, it required FBI officials to certify that the information sought with these letters is relevant to an authorized investigation. By instituting this requirement, Congress clearly intended for NSLs to be a targeted investigative power, rather than a broad power that could be used to cast a wide net. But, the IG report makes clear this is not how the FBI is using its NSL authorities. In one example, nine NSLs were used to obtain records for 11,000 different telephone numbers. And, agents and analysts often didn't even review the

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[22] FBI letter to Inspector General Glen Fine dated March 6, 2007 included in the appendix of the IG Report.

[23] IG Report p. 91.

[24] 12 U.S.C. section 3401 (2000). See IG Report at 115.

[25] IG Report at 117.

[26] IG Report at 100.

data they received from NSLs. They simply uploaded it into computers.[27] The IG found information received from NSLs is uploaded into three separate FBI databases, where it is retained indefinitely and retrievable by tens of thousands of FBI and non-FBI personnel,[28] even if the information exonerates the subject from any involvement in terrorism.[29] Despite this extraordinary collection effort, the IG was able to document only one terrorism conviction resulting from the use of NSLs.[30] Clearly NSLs are not being used as targeted investigative tools.

The IG also expressed concern that the FBI allows agents to use NSLs to access information about individuals who are "two or three steps removed from their subjects without determining if these contacts reveal suspicious connections."[31] The fact that NSLs are being issued from control files and "exigent" letters are being used by analytic units at FBI Headquarters suggests that this tool is not being used in the manner Congress intended. Despite the FBI's claims that NSLs are directed at suspected terrorists, the Inspector General found that the proportion of NSLs issued to obtain information on Americans is increasing. In fact, the majority of NSLs the FBI issued in 2005 were used to obtain information about U.S. persons (American citizens and lawful permanent residents of the U.S.).[32]

Datamining

Neither the NSL statutes nor Department of Justice policy require the FBI to purge from its databases sensitive personal information about persons who are found to be innocent and not tied to foreign powers.[33] The Inspector General confirmed that the FBI has taken advantage of this loophole and uploads all information – admittedly innocent or not – into national databases that are indefinitely maintained. The data received from NSLs is uploaded into a "Telephone Application Database" where a link analysis is conducted, and into an Investigative Data Warehouse where it is mixed with 560 million records from 50 different government databases.[34] Tens of thousands of law enforcement and intelligence personnel have access to the information, which is not given a disposition, leaving innocent people associated with a terrorism investigation long after their information becomes irrelevant. Intelligence

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[27] IG Report at 85.

[28] IG Report at 28, 30, and 110.

[29] IG Report at 44.

[30] IG Report at 64.

[31] IG Report at 109.

[32] IG Report at 38.

[33] IG Report at 110.

[34] IG Report at 28, 30.

products developed from this data do not cite the origin,[35] so errors in the information can never be checked against the source documents. Instead, errors will be compounded when intelligence products derived from this erroneous information are distributed throughout the intelligence community and to state and local law enforcement agencies.

Erroneous Reports to Congress and the Intelligence Oversight Board

The Inspector General found that statutorily required reports to Congress excluded at least six percent of the overall number of NSLs.[36] The number of unreported NSLs may be higher, but record keeping is so bad at the FBI, the Inspector General was unable to even confirm a final number. A review of just 77 cases from four FBI field offices found 22 percent more NSLs in case files than the FBI General Counsel knew about. More significantly, the IG found 60% of those files deficient in required paperwork, and his review doubled the number of unlawful violations that needed to be reported to the President's Intelligence Oversight Board.[37]

Proposed Amendments

Regrettably, the Inspector General's report only included suggestions for internal changes within the FBI's discretion, and did not include recommendations for amending the underlying statute that is the source of these abuses. It is clear that the violations the Inspector General uncovered were the natural consequence of a statute that allows government agents to access sensitive information without suspicion of wrongdoing, in the absence of court oversight, and with complete secrecy compelled by a gag order with criminal consequences. In fact, even if management and technology problems identified in the IG's report are solved, hundreds of thousands of NSLs will continue to collect information on innocent Americans because that is exactly what the statute allows.

The ACLU recommends three statutory changes that are absolutely necessary to ensure that the law protects privacy while permitting the collection of information necessary to investigate terrorism.

Limit NSLs to Suspected Terrorists and Other Agents of Foreign Powers

First, Congress must repeal the expansion of the NSL power that allows the FBI to demand information about totally innocent people who are not the targets of any investigation. The standard should return to the requirement that NSLs seek only records that pertain to terrorism suspects and other

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[35] IG Report at 54.

[36] IG Report at 34.

[37] IG Report at 78.

agents of foreign powers.[38] And the FBI should not be allowed to use NSLs to investigate people two or three steps removed from any criminal or terrorist activity.

Under current law, the FBI can use an NSL to obtain information that the FBI asserts is "relevant" to an investigation. The FBI has clearly taken advantage of this "relevance" standard and issued NSLs to obtain information on innocent American people with no connection to terrorism. In fact, it obtained this information without even opening an investigation to which the information must be relevant. NSLs are now issued to collect records just for the sake of building databases that can be mined later. In addition to being wholly ineffective as an investigative technique, this data collection and warehousing is an affront to the privacy of U.S. persons.

Restrict the Gag Provisions and allow for Meaningful Challenges

The gag provisions of the NSL statutes unconstitutionally inhibit individuals receiving potentially abusive NSLs from challenging them in court. Congress should amend the NSL statute so that gag orders are imposed only upon the authority of a court, and only where necessary to protect national security. Judicially imposed gag orders should be limited in scope and duration.

Further, gags must come with a meaningful right to challenge them before a neutral arbiter. Last year's amendments created a sham court proceeding, whereby a judge is powerless to modify or overturn a gag if the federal government simply certifies that national security is at risk, and may not even conduct any review for a full year after the NSL is issued. Under the NSL statute, the federal government's certification must be treated as "conclusive," rendering the ability to go before a judge meaningless. To comport with the First Amendment, a recipient must be able to go before a judge to seek meaningful redress.

Court Review

If there is one undeniable conclusion that Congress can draw from the Inspector General's report, it is that the FBI cannot be left to police itself. Allowing the FBI to keep self-certifying that it has met the statutory requirements invites further abuse and overuse of NSLs. Contemporaneous and independent oversight of the issuance of NSLs is needed to ensure that they are no longer issued at the drop of a hat to collect information about innocent U.S. persons. Court review will provide those checks and balances as was intended by the Constitution.

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[38] Agent of a foreign power is defined in the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. § 1801 (1978).

Congressional oversight

In his report, the IG stated, "the improper or illegal uses of the national security letter authorities we found in our review did not involve criminal misconduct."[39] But the IG retreated from this definitive position in testimony yesterday before the United States House of Representatives Committee on the Judiciary hearing on FBI Patriot Act Misuse. In response to a question from Representative Darrell Issa about the possibility of criminal prosecutions resulting from the FBI's illegal use of its NSL authorities, the IG said:

> The FBI is looking at the evidence right now to see what people know and what they did. Whether it was because of any intentional conduct that they knew they were doing wrong, we didn't see that. But we didn't do a review where we asked each individual, "what did you do and why?" we did a review of an audit to lay out the problems for the Congress.[40]

If the IG didn't do a review to determine the intent of the FBI agents involved in this misconduct, who will? The FBI has clearly demonstrated that it is incapable of policing itself, and FBI Director Robert Mueller, citing the IG's findings that there were no criminal violations, has already stated that the FBI's Inspection Division review of this matter would only determine "whether or not there should be any administrative actions taken."[41]

Congress should not be fooled by this shell game. The evidence the IG's audit demonstrates obviously intentional misconduct and an institutional disregard for the law that cannot go unchallenged in an agency charged with enforcing the law. Congress must investigate all of the FBI's abuses of its Patriot Act authorities, and it should hold those who violated the law accountable.

Conclusion

The Inspector General reviewed just a tiny proportion of NSLs issued by the FBI from 2003 through 2005, yet he found an extraordinary level of mismanagement, incompetence, and willful misconduct that clearly demonstrates that the unchecked NSL authorities given to the FBI in the Patriot Act must be repealed. The FBI and Department of Justice have shown that they cannot police themselves and need independent oversight. The American Civil Liberties Union applauds the Committee for holding this

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[39] IG Report at p. xxviii, footnote 26.

[40] Inspector General Glen Fine, testimony before the U.S. House of Representatives Committee on the Judiciary, March 20, 2007.

[41] FBI Director Robert Mueller, Congressional Quarterly Transcriptions, March 9, 2007.

hearing and opening a window on these abuses, but there is more work to be done. Congress must fully investigate the FBI's abuse of power to insure that those responsible for these violations are held accountable, and the innocent people who have had their privacy invaded and their civil rights abused need to be identified and notified, and records that have been improperly or inappropriately seized should be purged from FBI databases. But most importantly, Congress needs to fix the Patriot Act, which has set the stage for all of these problems.

Statement
United States Senate Committee on the Judiciary
Misuse of Patriot Act Powers: The Inspector General's Findings of Impr
March 21, 2007

Th Honorable Russ Feingold
United States Senator , Wisconsin

Prepared Statement of Senator Feingold
At Judiciary Hearing on NSL Inspector General Report
March 21, 2007

Today the Committee – and the country – will have the opportunity to revisit a particularly flawed piece of legislation that was passed shortly after the 9/11 attacks.

I am referring, of course, to the USA Patriot Act. The National Security Letter, or NSL, authorities were dramatically expanded by Sections 358 and 505 of the Patriot Act. Unfortunately, in its haste to pass this flawed legislation, Congress essentially granted the FBI a blank check to obtain some very sensitive records about Americans, including people not under any suspicion of wrong-doing, without judicial approval.

So it is not surprising that the Justice Department's Inspector General has identified serious problems with the implementation of these broad authorities. Congress gave the FBI very few rules to follow. As a result, Congress shares some responsibility for the apparently lax attitude and in some cases serious misuse of these potentially very intrusive authorities by the FBI.

This Inspector General report proves that "trust us" doesn't cut it when it comes to the government's power to obtain Americans' sensitive business records without a court order and without any suspicion that they are tied to terrorism or espionage. It was a grave mistake for Congress to grant the government broad authorities and just keep its fingers crossed that they wouldn't be misused. We have the obligation, the responsibility, to put appropriate limits on government authorities – limits that allow agents to actively pursue criminals and terrorists, but that also protect the privacy of innocent Americans.

Congress needs to exercise extensive and searching oversight of those powers, and it must take corrective action. The Inspector General report has shown both that current safeguards are inadequate and that the government cannot be trusted to exercise those powers lawfully. Congress must address these problems and fix the mistakes it made in passing and reauthorizing the flawed Patriot Act.

Office of the Inspector General
United States Department of Justice

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice

before the

Senate Committee on the Judiciary

concerning

The FBI's Use of National Security Letters and
Section 215 Requests for Business Records

March 21, 2007

Statement of Glenn A. Fine
Inspector General, U.S. Department of Justice,
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Mr. Chairman, Senator Specter, and members of the Committee on the Judiciary:

Thank you for inviting me to testify about two recent reports issued by the Department of Justice Office of the Inspector General (OIG) regarding the Federal Bureau of Investigation's (FBI) use of national security letters and the FBI's use of Section 215 orders to obtain business records. In the Patriot Reauthorization Act, enacted in 2006, Congress directed the OIG to examine the FBI's use of these two important authorities. The reviews were directed to examine, among other things, the number of times these authorities were used, the importance of the information obtained, how the information was utilized, any improper or illegal uses of these authorities, and other noteworthy facts or circumstances related to their use.

On March 9, 2007, we issued separate reports on the FBI's use of national security letters and Section 215 orders. We publicly released two unclassified reports, with only limited information redacted (blacked out) which the Department or the FBI considered to be classified. We also provided to Congress, including this Committee, copies of the full classified reports that contain some additional classified information on the FBI's use of the two authorities. However, the OIG's main findings and conclusions are included in the unclassified versions that were publicly released.

In this written statement, I will summarize the key findings from our reports, focusing most of my comments on the national security letters report. I will first provide brief background on national security letters and how we conducted our review. I will then provide a few observations to put our findings in context. Next, I will highlight the main findings of our national security letter report. After that, I will briefly summarize our report on the FBI's use of Section 215 orders to obtain business records.

I. THE OIG'S NATIONAL SECURITY LETTER REPORT

A. Background on National Security Letters

Under five statutory provisions, the FBI can use national security letters (NSLs) to obtain – without a court order or any review by a court – records such as customer information from telephone companies, Internet service providers, financial institutions, and consumer credit companies. Most of these statutory provisions regarding NSLs existed prior to enactment of the USA PATRIOT Act (Patriot Act) in October 2001. Prior to the Patriot Act, the FBI could obtain information using a national security letter only if it had "specific and articulable facts giving reason to believe that the customer or entity whose records are sought [was] a foreign power or agent of a foreign power." In addition, NSLs could only be issued by a limited number of senior FBI Headquarters officials.

The Patriot Act significantly broadened the FBI's authority to use NSLs by both lowering the threshold standard for issuing them and by expanding the number of FBI officials who could sign the letters. First, the Patriot Act eliminated the requirement that the information sought must pertain to a foreign power or an agent of a foreign power. Instead, it substituted the lower threshold standard that the information requested must be relevant to or sought for an investigation to protect against international terrorism or espionage. Consequently, the Patriot Act authorized the FBI to issue national security letters to request information about persons other than the subjects of FBI national security investigations, so long as the requested information is relevant to an authorized national security investigation.

In addition, the Patriot Act permitted Special Agents in Charge of the FBI's 56 field offices to sign national security letters, which significantly expanded approval authority beyond a limited number of FBI Headquarters officials. Finally, the Patriot Act added a new authority allowing NSLs to be used to obtain consumer full credit reports in international terrorism investigations.

B. The OIG Review

As directed by the Patriot Reauthorization Act, the OIG's report examined the FBI's use of national security letters during the time period from 2003 through 2005. As required by the Reauthorization Act, the OIG will conduct another review examining the use of NSLs in 2006, which we are required to issue by the end of this year.

During our review, a team of OIG staff conducted interviews of over 100 FBI and Department of Justice employees, including personnel at FBI Headquarters, the FBI Office of the General Counsel (OGC), FBI Counterterrorism and Counterintelligence Divisions, FBI personnel in four field divisions, and officials in the Department's Criminal Division.

In addition, the OIG reviewed a sample of FBI case files that contained national security letters at four FBI field divisions: Chicago, New York, Philadelphia, and San Francisco. These field divisions were selected from among the eight FBI field divisions that issued the most NSL requests during the review period. During our field work at the four field divisions, we examined a sample of 77 investigative case files that contained 293 national security letters. An investigative case file can contain a large number of documents, and some of the case files we reviewed consisted of the equivalent of 20 or 30 boxes of documents. We used a judgmental sample in selecting which files to review and included in our sample both counterterrorism and counterintelligence cases, cases in which the NSLs were issued during preliminary investigations and full investigations, and opened and closed FBI cases.

The OIG also analyzed the FBI OGC's national security letter tracking database, which the FBI uses for collecting information to compile the Department's required reports to Congress on NSL usage. Finally, we distributed an e-mail questionnaire to the counterintelligence and counterterrorism squads in the FBI's 56 field divisions in an effort to determine the types of analytical products the FBI developed based on NSLs, the manner in which NSL-derived information was disseminated, and the occasions when such information was provided to law enforcement authorities for use in criminal proceedings.

C. Findings of the OIG Review

Our review found widespread and serious misuse of the FBI's national security letter authorities. In many instances, the FBI's misuse of national security letters violated NSL statutes, Attorney General Guidelines, or the FBI's own internal policies. We also found that the FBI did not provide adequate guidance, adequate controls, or adequate training on the use of these sensitive authorities. In many respects, the FBI's oversight of the use of NSL authorities expanded by the Patriot Act was inconsistent and insufficient.

1. Background to OIG Findings

However, before detailing the main findings of our report, I believe it is important to provide context for these findings and also to note what our review did not find.

First, in evaluating the FBI's misuse of national security letters, it is important to recognize the significant challenges the FBI was facing during the period covered by our review. After the September 11 terrorist attacks, the FBI implemented major organizational changes to prevent additional terrorist attacks in the United States. These changes included overhauling and expanding its counterterrorism operations, expanding its intelligence capabilities, attempting to upgrade its information technology systems, and seeking to improve coordination with state and local law enforcement agencies. These changes occurred while the FBI and its Counterterrorism Division had to respond to continuing terrorist threats and conduct many counterterrorism investigations, both internationally and domestically.

Second, it is important to recognize that in most – but not all – of the cases we examined in this review, the FBI was seeking information that it could have obtained properly through national security letters if it had followed applicable statutes, guidelines, and internal policies.

Third, national security letters are important tools that can provide critical evidence in counterterrorism and counterintelligence investigations. Many Headquarters and field personnel – from agents to senior officials – believe these tools are indispensable to the FBI's mission to detect and deter terrorism and espionage.

Fourth, we did not find that that FBI agents sought to intentionally misuse the national security letters or sought information that they knew they were not entitled to obtain through the letters. Instead, we believe the misuses and the problems we found were the product of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight.

Yet, I do not believe that any of these observations excuse the FBI's widespread and serious misuse of its national security letter authorities. When the Patriot Act enabled the FBI to obtain sensitive information through NSLs on a much larger scale, the FBI should have established sufficient controls and oversight to ensure the proper use of these authorities. The FBI did not do so. The FBI's failures, in my view, were serious and unacceptable.

I would now like to highlight our review's main findings, which are detailed in the OIG's 126-page report.

2. OIG Findings

Our review found that, after enactment of the Patriot Act, the FBI's use of national security letters increased dramatically. In 2000, the last full year prior to passage of the Patriot Act, the FBI issued approximately 8,500 NSL requests. It is important to note that one national security letter may request information about multiple telephone numbers or e-mail addresses. Because the FBI's semiannual classified reports to Congress provide the number of requests rather than the number of letters, we also focused on the total number of requests.

After the Patriot Act, the number of NSL requests issued by the FBI increased to approximately 39,000 in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005. In total, during the 3-year period covered by our review, the FBI issued more than 143,000 NSL requests.

However, we believe that these numbers, which are based on information from the FBI's database, understate the total number of NSL requests issued by the FBI. During our review, we found that the FBI database used to track these requests is inaccurate and does not include all NSL requests.

First, when we compared information from the database to the documents contained in investigative case files in the 4 FBI field offices that we visited, we found approximately 17 percent more NSL letters and 22 percent more NSL requests in the case files than we could find in the FBI database. In addition, we determined that many NSL requests were not included in the Department's reports to Congress because of the FBI's delays in entering NSL information into its database. We also found problems and incorrect data entries in the database that caused NSLs to be excluded from the Department's reports to Congress.

Therefore, based on shortcomings in the FBI's NSL database and its reporting processes, we concluded that the Department's semiannual classified reports to Congress on NSL usage were inaccurate and significantly understated the total number of NSL requests during the review period.

Our report also provides breakdowns on the types of NSLs used by the FBI. We determined that, overall, approximately 73 percent of the total number of NSL requests were used in counterterrorism investigations and 26 percent in counterintelligence cases.

In addition, our review found that the percentage of NSL requests that related to investigations of U.S. persons increased from about 39 percent of all NSL requests in 2003 to about 53 percent in 2005.

As directed by the Patriot Reauthorization Act, our review attempted to assess the effectiveness of national security letters. NSLs have various uses, including to develop evidence to support applications for orders issued under the Foreign Intelligence Surveillance Act (FISA), develop links between subjects of FBI investigations and other individuals, provide leads and evidence to allow FBI agents to initiate or close investigations, and corroborate information obtained by other investigative methods. FBI personnel told the OIG that NSLs are indispensable investigative tools in many counterterrorism and counterintelligence investigations, and they provided us with examples and evidence of their importance to these investigations.

We determined that information obtained from NSLs is also used in FBI analytical intelligence products that are shared within the FBI and with DOJ components, Joint Terrorism Task Forces, other federal agencies, and other members of the intelligence community.

In addition, information obtained from NSLs is stored in FBI databases such as its Automated Case Support system and its Investigative Data Warehouse. However, because information is not tagged or identified in FBI files or databases as derived from NSLs, we could not determine the number of times that NSLs were used in such analytical products, shared with other agencies, or used in criminal cases.

As also directed by the Patriot Reauthorization Act, the OIG review examined whether there were any "improper or illegal uses" of NSL authorities. We found that from 2003 through 2005, the FBI identified 26 possible intelligence violations involving its use of NSLs, 19 of which the FBI reported to the President's Intelligence Oversight Board (IOB). Of the 26 possible violations, 22 were the result of FBI errors, while 4 were caused by mistakes made by recipients of the NSLs.

These possible violations included the issuance of NSLs without proper authorization, improper requests under the statutes cited in the NSLs, and unauthorized collection of telephone or Internet e-mail transactional records. For example, in three of these matters the FBI obtained the information without issuing national security letters. One of these three matters involved receipt of information when there was no open national security investigation. In another matter, the FBI issued national security letters seeking consumer full credit reports in a counterintelligence investigation, which the NSL statutes do not permit. In other matters, the NSL recipient provided more information

than was requested in the NSL, or provided information on the wrong person, either due to FBI typographical errors or errors by the recipients of NSLs.

In addition to the possible violations reported by the FBI, we reviewed FBI case files in four field offices to determine if there were unreported violations of NSL authorities, Attorney General Guidelines, or internal FBI policies governing the approval and use of NSLs. Our review of 293 national security letters in 77 files found 22 possible violations that had not been identified or reported by the FBI.

The violations we found fell into three categories: improper authorization for the NSL, improper requests under the pertinent national security letter statutes, and unauthorized collections. Examples of the violations we identified include issuing NSLs for consumer full credit reports in a counterintelligence case, which is not statutorily permitted; issuing an NSL for a consumer full credit report when the FBI Special Agent in Charge had approved an NSL for more limited credit information under a different NSL authority; issuing an NSL when the investigation had lapsed; and obtaining telephone toll billing records for periods in excess of the time period requested in the NSL due to third-party errors.

Thus, it is significant that in the limited file review we conducted of 77 investigative files in 4 FBI field offices, we identified nearly as many NSL-related violations (22) as the total number of possible violations that the FBI had identified (26) in reports from all FBI Headquarters and field divisions over the entire 3-year period. Moreover, 17 of the 77 files we reviewed, or 22 percent, had 1 or more violations.

We have no reason to believe that the number of violations we identified in the four field offices we visited was skewed or disproportionate to the number of possible violations in other files. This suggests that a large number of NSL-related violations throughout the FBI have not been identified or reported by FBI personnel.

Our examination of the violations we identified did not reveal deliberate or intentional violations of the NSL statutes, the Attorney General Guidelines, or FBI policy. We believe that some of these violations demonstrated FBI agents' confusion and unfamiliarity with the constraints on national security letter authorities. We also believe that many of the violations occurred because FBI personnel do not consistently cross check the NSL approval documentation with the proposed NSLs, or verify upon receipt that the information supplied by the recipient matches the request. Other violations demonstrated inadequate supervision over use of these authorities.

We examined the FBI investigative files in the four field offices to determine whether FBI case agents and supervisors had adhered to FBI policies designed to ensure appropriate supervisory review of the use of NSL authorities. We found that 60 percent of the investigative files we examined contained one or more violations of FBI internal policies relating to national security letters. These included failures to document supervisory review of NSL approval memoranda and failures to include in NSL approval memoranda required information, such as the authorizing statute, the status of the investigative subject, or the number or types of records requested.

In another finding, our review determined that the FBI Headquarters Counterterrorism Division generated over 300 NSLs exclusively from "control files" rather than from "investigative files," in violation of FBI policy. When NSLs are issued from control files, the NSL documentation does not indicate whether the NSLs are issued in authorized investigations or whether the information sought in the NSLs is relevant to those investigations. This documentation is necessary to establish compliance with NSL statutes, Attorney General Guidelines, and FBI policies.

In addition, we found that the FBI had no policy requiring the retention of signed copies of national security letters. As a result, we were unable to conduct a comprehensive audit of the FBI's compliance with its internal control policies and the statutory certifications required for NSLs.

In one of the most troubling findings, we determined that from 2003 through 2005 the FBI improperly obtained telephone toll billing records and subscriber information from 3 telephone companies pursuant to over 700 so-called "exigent letters." These letters generally were signed by personnel in the Communications Analysis Unit (CAU), a unit of the Counterterrorism Division in FBI Headquarters, and were based on a form letter used by the FBI's New York Field Division in the criminal investigations related to the September 11 attacks. The exigent letters signed by the CAU typically stated:

> Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided. Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally to [information redacted] as expeditiously as possible.

These letters were signed by CAU Unit Chiefs, CAU special agents, and subordinate personnel, none of whom were delegated authority to sign NSLs.

Our review found that that the FBI sometimes used these exigent letters in non-emergency circumstances. In addition, the FBI failed to ensure that

there were duly authorized investigations to which the requests could be tied. The exigent letters also inaccurately represented that the FBI had already requested subpoenas for the information when, in fact, it had not. The FBI also failed to ensure that NSLs were issued promptly to the telephone companies after the exigent letters were sent. Rather, in many instances, after obtaining records from the telephone companies the FBI issued national security letters many months after the fact to "cover" the information obtained.

As our report describes, we were not convinced by the legal justifications offered by the FBI during our review for the FBI's acquisition of telephone toll billing records and subscriber information in response to the exigent letters without first issuing NSLs. The first justification offered was the need to reconcile the strict requirements of the NSL statute with the FBI's mission to prevent terrorist attacks. While the FBI's counterterrorism mission may require streamlined procedures to ensure the timely receipt of information in genuine emergencies, the FBI needs to address the problem by expediting the issuance of national security letters or by seeking legislative modification to the voluntary emergency disclosure provision in the Electronic Communications Privacy Act (ECPA), not through these exigent letters. Moreover, the FBI's justification for the exigent letters was undercut because they were used in non-emergency circumstances, not followed in many instances within a reasonable time by the issuance of NSLs, and not catalogued in a fashion that would enable FBI managers or anyone else to review the practice or the predication required by the NSL statute.

In sum, we concluded that the FBI's use of these letters inappropriately circumvented the requirements of the NSL statute, and violated Attorney General Guidelines and FBI policies.

As directed by the Patriot Reauthorization Act, our report also describes several other "noteworthy facts or circumstances" we identified in the review. For example, we found that the FBI did not provide clear guidance describing how FBI case agents and supervisors should apply the Attorney General Guidelines' requirement to use the "least intrusive collection techniques feasible" during national security investigations to the use and sequencing of national security letters. In addition, we saw indications that some FBI lawyers in field offices were reluctant to provide an independent review of NSL requests because these lawyers report to senior field office managers who already had approved the underlying investigations.

D. Recommendations

To help the FBI address these significant findings, the OIG made a series of recommendations, including that the FBI improve its database to ensure

that it captures timely, complete, and accurate data on NSLs; that the FBI take steps to ensure that it uses NSLs in full accord with the requirements of national security letter authorities; and that the FBI issue additional guidance to field offices that will assist in identifying possible violations arising from use of NSLs. The FBI concurred with all of the recommendations and agreed to implement corrective action.

We believe that the Department and the FBI are taking the findings of the report seriously. In addition to concurring with all our recommendations, the FBI and the Department have informed us that they are taking additional steps to address the problems detailed in the report. For example, the FBI's Inspection Division has initiated audits of a sample of NSLs issued by each of its 56 field offices. It is also conducting a special inspection of the exigent letters sent by the Counterterrorism Division to three telephone companies to determine how and why that occurred.

The FBI's Office of the General Counsel is also consolidating its guidance on NSLs, providing additional guidance and training to its field-based Chief Division Counsel on their role in approving NSLs, and working to develop a new web-based NSL tracking database.

In addition to the FBI's efforts, we have been told that the Department's National Security Division will be actively engaged in oversight of the FBI's use of NSL authorities.

As required by the Patriot Reauthorization Act, the OIG will continue to review the FBI's use of national security letters. We are required by the Act to issue another report by the end of this year on the FBI's use of NSLs in 2006. In addition, we intend to monitor the actions that the FBI and the Department have taken and are taking to address the problems we found in our first review.

II. THE OIG'S SECTION 215 REPORT

In the last section of my statement, I want to summarize briefly the OIG's second report, which examined the FBI's use of Section 215 orders to obtain business records. Section 215 of the Patriot Act allows the FBI to seek an order from the FISA Court to obtain "any tangible thing," including books, records, and other items, from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities.

Section 215 of the Patriot Act did not create new investigative authority, but instead significantly expanded existing authority found in FISA by broadening the types of records that could be obtained and by lowering the

evidentiary threshold to obtain a Section 215 order for business records. Public concerns about the scope of this expanded Section 215 authority centered on the ability of the FBI to obtain library records, and many public commentators began to refer to Section 215 as the "library provision."

Our review found that the FBI and the Department's Office of Intelligence Policy and Review (OIPR) submitted to the FISA Court two different kinds of applications for Section 215 orders: "pure" Section 215 applications and "combination" Section 215 applications. A "pure" Section 215 application is a term used to refer to a Section 215 application for any tangible item which is not associated with an application for any other FISA authority. A "combination" Section 215 application is a term used to refer to a Section 215 request that was added to a FISA application for pen register/trap and trace orders, which identify incoming and outgoing telephone numbers called on a particular line. In a combination order, the Section 215 request was added to the pen register/trap and trace application in order to obtain subscriber information related to the telephone numbers.

We found that from 2002 through 2005 the Department, on behalf of the FBI, submitted to the FISA Court a total of 21 pure Section 215 applications and 141 combination Section 215 applications.

We found that the first pure Section 215 order was approved by the FISA Court in spring 2004, more than 2 years after enactment of the Patriot Act. The FISA Court approved six more pure Section 215 applications that year, for a total of seven in 2004. The FISA Court approved 14 pure Section 215 applications in 2005.

Examples of the types of business records that were obtained through pure Section 215 orders include driver's license records, public accommodations records, apartment records, and credit card records.

We also determined that the FBI did not obtain Section 215 orders for any library records from 2002 through 2005 (the time period covered by our review). The few applications for Section 215 orders for library records that were initiated in the FBI during this period were withdrawn while undergoing the review process within the FBI and the Department. None were submitted to the FISA Court.

With respect to how information from Section 215 orders was used, we found no instance where the information obtained from a Section 215 order resulted in a major case development such as disruption of a terrorist plot. We also found that very little of the information obtained in response to Section 215 orders has been disseminated to intelligence agencies outside the DOJ.

However, FBI personnel told us they believe that the kind of intelligence gathered from Section 215 orders is essential to national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation, when the information is linked to some other piece of intelligence. FBI officials and Department attorneys also stated that they believe Section 215 authority is useful because it is the only compulsory process for certain kinds of records that cannot be obtained through alternative means.

We did not identify any instances involving "improper or illegal use" of a pure Section 215 order. We did find problems with two combination Section 215 orders. In one instance, the FBI inadvertently collected information from a telephone number that no longer belonged to the target of the investigation. In another instance, the FBI received information from a telephone that was no longer connected to the subject because of a mistake by the telephone company.

We also found that the FBI has not used Section 215 orders as effectively as it could have because of legal, bureaucratic, or other impediments to obtaining these orders. For example, after passage of the Patriot Act in October 2001, neither the Department nor the FBI issued implementing procedures or guidance with respect to the expansion of Section 215 authority for a long period of time. In addition, we found significant delays within the FBI and the Department in processing requests for Section 215 orders. We also determined through our interviews that FBI field offices do not fully understand Section 215 orders or the process for obtaining them.

III. CONCLUSION

In sum, our review of national security letters revealed that, in various ways, the FBI violated the national security letter statutes, Attorney General Guidelines, or FBI internal policies governing their use. While we did not find that the violations were deliberate, we believe the misuses were widespread and serious.

Finally, I also want to note that the FBI and the Department cooperated fully with our review. In addition, the FBI and the Department agreed to declassify important aspects of the report to permit a full and fair airing of the issues we describe in the report. They have also acknowledged the problems we found and have not attempted to cover up the deficiencies. The FBI and the Department also appear to be taking the findings of the report seriously, and appear committed to correcting the problems we identified.

We believe that these serious and ongoing efforts are necessary to ensure that the FBI's use of national security letter authorities to obtain sensitive information is conducted in full accord with the NSL statutes, Attorney General Guidelines, and FBI policies.

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

Opening Statement of Senator Charles Grassley
Senate Judiciary Committee - "The Inspector General's Findings of Improper Use of the National Security Letters by the FBI"

March 21, 2007

Chairman Leahy, thank you for calling this hearing today. I also want to thank Inspector General Fine and his staff for their hard work on these important reports. Some people are pointing to these findings to argue that there is something fundamentally wrong with the Patriot Act provisions expanding the FBI's authorities after 9/11. That point of view goes a step too far. I believe that National Security Letters ("NSLs") are a good tool for the FBI to utilize in tracking and disrupting potential terrorist activity on U.S. soil. To suggest that the FBI's new NSL authorities should be repealed or severely cut back would be an overreaction and a mistake. However, as worthy as these tools are, it is absolutely essential that the FBI use them according to the letter of the law, and be accountable for any abuses of their authority. The FBI doesn't need Congress to tie its hands by removing its ability to efficiently and effectively gather the financial and telephone records of suspected terrorists. What the FBI needs is transparency, accountability, and reform, so that the public can have confidence that any abuses will be exposed, corrected, and prevented in the future.

These reports and the work of this Committee today show just how crucial it is to have strong and independent oversight of the FBI. Unless we shine the light of day on abuses like these, they will continue in secret. Even after abuses are exposed, however, our work isn't done. We have to dig into the details and insist on consequences for anyone who engaged in wrongdoing or looked the other way. We have to find out what underlying issues may have contributed to the problems and deal with the institutional disease rather than just treating the symptoms.

I agree with Inspector General Fine that one of the most disturbing problems exposed by his investigation was the use of so-called "exigent letters" to circumvent the NSL statutes. Unlike the other problems identified by the reports, this issue did not involve the misuse of any provisions of the Patriot Act. Instead, the FBI utilized a process that was *not authorized by any statute*. There is a statutory provision allowing phone companies to *voluntarily* provide records in an emergency situation. However, the exigent letters did not cite that provision and implied that production of the records was compulsory.

The Inspector General's report describes how an FBI headquarters division known as the Communications Analysis Unit ("CAU") obtained information on about 3,000 telephone numbers by issuing 739 of these "exigent letters." According to the report, the letters "contained factual misstatements," claiming that the FBI had submitted a subpoena to a U.S. Attorney's office when, in fact, no subpoena had been submitted. Moreover, the letters were often issued

when there was no emergency and although the FBI promised to deliver a subpoena later, those subpoenas never came.

These circumstances raise additional and even more serious questions about the state of mind of the FBI officials who signed the 739 letters. It is difficult to imagine how those individuals did not know that the letters were false when they were signed. It is even more difficult to imagine why there would not have been swift and severe consequences for anyone who knowingly signed a letter with false statements. Anyone at the FBI who knew about that kind of wrongdoing had an obligation to put a stop to it and report it immediately. We know that some within the FBI General Counsel's Office knew about the exigent letters as early as 2004, but it is unclear when the misrepresentations in them were reported to higher-ups. Congress needs to know who knew about these irregularities and when they knew it. I've asked Director Mueller for information and documents that will begin to address those questions, and I expect him to provide answers to this Committee promptly.

Something not specifically addressed in the report is what role FBI whistleblower Bassem Youssef may have had in reporting and trying to correct problems caused by the issuance of the exigent letters. Youssef is the current Unit Chief at CAU. He is also a decorated Arab-American agent, who is suing the FBI alleging discrimination in its promotion practices. I became very concerned when I discovered that FBI officials took the surprising position in his lawsuit that subject-matter expertise and counterterrorism experience are not necessary prerequisites for senior positions in the FBI's National Security Branch. Given the Inspector General's findings, I am worried that the lack of experience among senior FBI managers may be the institutional disease, and the abuse of these exigent letters is just another symptom.

I wrote to the Inspector General last year to advise him of evidence of whistleblower retaliation against Youssef that came to light during the discovery process in his lawsuit. It would be very disappointing if it turns out that Youssef had brought this matter to the attention of higher-ups at the FBI only to be dismissed or ignored because of an FBI culture that is still more interested in silencing whistleblowers than in fixing its problems.

This Committee ought to learn more about Youssef's particular role in this matter. So, last week, I wrote to Youssef's attorney seeking more information. In his reply, Youssef's attorney explained:

> Mr. Youssef discussed the issue with his Assistant Section Chief, who advised Mr. Youssef that there was no problem with the way CAU had used exigent letters. . . . Because the Assistant Section Chief had been personally involved in the prior practices of the CAU, he was hostile to the NSL-related issues raised by Mr. Youssef. Additionally, Mr. Youssef also raised this matter at a unit

> chiefs meeting attended by the Section Chief. The Section Chief was dismissive of the concern.
>
> * * *
>
> In summary, the Assistant Section Chief for the Communications Exploitation Section was hostile to Mr. Youssef's identification of the matters identified above. The operational units and field offices were non-compliant with the requests for documentation. The [National Security Law Branch ("NSLB") of the General Counsel's Office's] attempt to have the operational units/field offices assist in obtaining compliance with the documentation requests were ineffective. The contacts with "higher ups" identified by the NSLB were ineffective. At all times the NSLB and FBI OGC knew that the Field offices and operational units were non-compliant in obtaining the legal documentation.

If these representations are true, it seems that FBI leadership had a clear opportunity to address the problems with exigent letters long before the Inspector General investigation. And yet, they did not do so until it became clear that the Inspector General was taking a close look and was going to report to Congress on this issue. That's not a scenario that instills public confidence in the FBI as a healthy, well-run institution.

Mr. Chairman, I have asked the FBI to provide us with copies of the unclassified emails reviewed by the Inspector General related to the exigent letter issue, so that we can determine whether the claims from Bassem Youssef's attorney are supported by the documentary evidence. If the FBI initially turned a blind eye to these problems, then that is something this Committee ought to know about.

Thank you again for calling this hearing, and I look forward to hearing Inspector General Fine's testimony.

United States Senate

WASHINGTON, DC 20510

March 16, 2007

Mr. Stephen Kohn, Esq.
Kohn, Kohn & Colapinto
3233 P Street, N.W.
Washington, D.C. 20007

Dear Mr. Kohn:

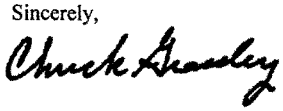
I am writing today in response to the Justice Department Inspector General's March 9, 2007, report entitled "A Review of the Federal Bureau of Investigation's Use of National Security Letters" and in anticipation of the Inspector General's testimony next week before the Judiciary Committee. In my view, the most troubling section of the report begins on p. 86 and is entitled "Using 'Exigent Letters' Rather than ECPA National Security Letters." That section describes how an FBI headquarters division known as the Communications Analysis Unit ("CAU") obtained information on about 3,000 telephone numbers by issuing 739 so-called "exigent letters."

I understand that your client, Bassem Youssef is the current Unit Chief at CAU. In preparation for next week's hearing, I am interested in learning more about his particular role, if any, in bringing to light the problems with the CAU's use of exigent letters to circumvent the statutes governing National Security Letters ("NSLs"). In particular, I would like to know (1) whether Youssef signed any of the exigent letters, (2) how and when he learned that there were problems with the way they were being issued, (3) what steps he took, if any, to notify others of the problems, (4) what steps, if any, he took to try to rectify the problems, and (5) how timely, responsive, and cooperative others at the FBI were in addressing any of the issues he may have identified.

In exercising our oversight responsibilities, it is critical for the Judiciary Committee to obtain a fuller understanding of who at the FBI knew what about these exigent letters, and when they knew it. Therefore, in order to prepare for next week's hearing, please provide answers to the questions about Bassem Youssef's involvement as well as copies of any and all unclassified e-mails related to the exigent letters issued by CAU.

If you have any questions about this request, please contact Jason Foster at (202) 224-4515. A copy of all correspondence in reply should be sent electronically in PDF format to thomas_novelli@finance-rep.senate.gov or via facsimile to (202) 228-2131.

Sincerely,



Charles E. Grassley
United States Senator

cc: Senator Patrick Leahy, Chairman
Committee on the Judiciary

Senator Arlen Specter, Ranking Member
Committee on the Judiciary

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March 17, 2007

Hon. Charles E. Grassley
United States Senator
Senate Committee on the Judiciary
U.S. Senate
Washington, D.C. 20510

Re: NSL Information Request

Dear Senator Grassley:

Thank you for your letter dated March 16, 2007. In this letter you requested Mr. Bassem Youssef, the current Unit Chief for the Communications Analysis Unit ("CAU"), to provide your office with certain information and documents related to the Federal Bureau of Investigation's ("FBI") compliance with rules governing National Security Letters ("NSLs"). As counsel for Mr. Youssef, please accept this letter as his response to your requests.

In regard to your request for copies of "any and all unclassified e-mails related to the exigent letters issued by CAU," we hereby request that you obtain access to these documents directly from the U.S. Department of Justice ("DOJ"), the DOJ Office of Inspector General ("OIG") or the FBI. I understand from my client, that there are a number of e-mails which are highly relevant to your investigation. These emails are not classified. They have been fully vetted by the DOJ and FBI, and either the DOJ, OIG and/or FBI should be able to provide you with these documents within one day. These documents are critical in gaining a full understanding of what happened within the FBI concerning the use of exigent letters, and many (if not all) of these e-mails were provided to the OIG as part of their investigation. If it is asserted that any of the e-mails were deleted, the deleted e-mails can be easily retrieved from the FBI's Microsoft Outlook server in archive format.

Answers to the five questions you asked are set forth below:

1. *Whether Mr. Youssef signed any of the exigent letters*: All of the exigent letters are in the control and possession of either the FBI or the OIG. These documents are the best record of who signed what documents. At this time Mr. Youssef does not recall signing any such letter. However, when Mr. Youssef became Unit Chief of the Communications Analysis Unit (CAU), such letters were frequently issued, and the default printed signature was that of the Unit Chief. The common practice at that time was for a supervisor to author the letter and be the individual who actually signed the letter.

2. *How and when Mr. Youssef learned that there were problems with the way they were being issued*: In March-April 2005, the CAU's processing of the NSLs was noted by Mr. Youssef as a matter under his management that needed to be further reviewed. After a very informal "audit" conducted by Mr. Youssef shortly after being named Unit Chief he became aware that NSLs had not been issued concerning records that already had been obtained by the FBI from third parties. In this regard, a non-FBI employee of a company whose records were being searched, notified Mr. Youssef that he had not been provided NSLs for the records he had provided to the FBI. Thereafter, Mr. Youssef requested the third party companies to provide a list of all searches for which NSLs had not been provided. This audit/request for information enabled Mr. Youssef to compile a comprehensive list of the NSL deficiencies.

In regard to the "exigent letters," as used by the FBI prior to Mr. Youssef's tenure as Unit Chief in CAU, in practice these letters constituted what could be characterized as a "promissory note." That is, a letter from the FBI promising that legal documentation, specifically an NSL or a subpoena, would be forthcoming. Although these letters are regularly referred to as "exigent letters," they were not utilized in connection with an exigent circumstance [18 U.S.C. section 2702 (b)(8)].

Initially, Mr. Youssef's primary concern was the failure of the field offices and operational counterterrorism units to provide the required NSLs and/or to follow-up on their representations to CAU (and the third parties) that they would provide the NSLs for information they had already received.

Once it became apparent that the field offices and the operational counterterrorism units were not complying with their earlier representations, Mr. Youssef personally examined the contents of the "exigent letters." After reviewing the contents of the "exigent letters," which occurred sometime in or about late 2005, he discovered an additional problem. Specifically, Mr. Youssef learned that the exigent letters stated that a "subpoena" was forthcoming from a U.S. Attorneys office. Mr. Youssef knew, from his prior experience, that no such subpoena would ever be forthcoming. In other words, whoever drafted that language made representations that could never be fulfilled. Mr. Youssef instructed a supervisor to inform NSLB of this situation and further seek guidance on changing the contents of the letters for future circumstances.

3. *What steps Mr. Youssef took, if any, to notify others of the problems:* Mr. Youssef took the following steps:

Step 1: Mr. Youssef contacted all of the relevant third parties to gain an accurate assessment of the outstanding NSLs.

Step 2: Mr. Youssef discussed the issue with his Assistant Section Chief, who advised Mr. Youssef that there was no problem with the way CAU had used exigent letters. This Assistant Section Chief was the prior Unit Chief for CAU, and was fully aware of the practices used in obtaining the information from the third parties, without ever obtaining an NSL.[1]

Step 3: Mr. Youssef instructed all of the CAU supervisory special agents to immediately contact the individual requestors from field offices and operational counterterrorism units. The representatives from field offices and operational units were asked to provide the NSLs or subpoenas which were used to justify the acquisition of the information obtained from third parties. Specifically, it was the responsibility of the field offices/operational units to provide the properly executed and materially accurate NSLs to the CAU.

Step 4: Upon the realization that the field and operational units were not being responsive with their obligation to provide legally required documentation for the searches that had been conducted, Mr. Youssef contacted an attorney within the FBI's Office of General Counsel ("OGC") National Security Law Branch ("NSLB"). Mr. Youssef requested that NSLB set up a meeting with representatives from ITOS I and II, with the express purpose of soliciting their support in making good on the prior representations that proper NSLs would be forthcoming.

Step 5: The meeting took place in September, 2005, and was attended by NSLB attorneys and the Assistant Section Chiefs from ITOS I and II. At this meeting the Assistant Section Chiefs vowed to support CAU's efforts to obtain the proper legal documentation from the field/operational units. At the meeting, it was fully understood by the representatives from NSLB and ITOS I and II that NSL letters should have been previously provided to the CAU from the field/operational units, whose executive managers had the authority to sign/approve the NSLs. NOTE: CAU did not have the authority to approve the NSLs but merely acted as a conduit between the field offices/operational units and the third parties.

Step 6: After the meeting, Mr. Youssef again instructed the CAU supervisors to obtain the necessary documentation from the field offices/operational units. However, despite the representations made in the September meeting, the documentation was not provided.

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[1] Because the Assistant Section Chief had been personally involved in the prior practices of the CAU, he was hostile to the NSL-related issues raised by Mr. Youssef. Additionally, Mr. Youssef also raised this matter at a unit chiefs meeting attended by the Section Chief. The Section Chief was dismissive of the concern.

Step 7: Interaction between Mr. Youssef and NSLB continued after the September, 2005 meeting. In October, 2005, an NSLB attorney informed Mr. Youssef that "higher ups" had been made aware of the problem.

4. *What Steps did Mr. Youssef take to rectify the problems:* Information related to this question was set forth in response to questions number 2 and 3. In addition, Mr. Youssef continued, after September 2005, to work with NSLB in an attempt to obtain the necessary cooperation from the field/operational units. Mr. Youssef also discussed prospective ideas on how to fix the problem in the future. Mr. Youssef also instructed his unit personnel, on several occasions, that in non-exigent circumstances, NSLs were required prior to obtaining records from the third parties referenced above. In other words, the CAU personnel were instructed to make sure that the field offices and/or operational units provided CAU with the NSLs prior to CAU obtaining the requested information from the third parties. In a small number of cases in which exigent circumstances actually existed, Mr. Youssef ensured that the request for information was proper. Thereafter, in order to avoid any confusion, Mr. Youssef worked with NSLB to formulate a procedure to ensure the proper utilization of the exigent circumstance authority. *See,* 18 U.S.C. section 2702(b)(8).

5. *How timely, responsive and cooperative were others at the FBI in addressing any of the issues Mr. Youssef identified:* The time-line set forth above provides information responsive to this question. In summary, the Assistant Section Chief for the Communications Exploitation Section was hostile to Mr. Youssef's identification of the matters identified above. The operational units and field offices were non-compliant with the requests for documentation. The NSLB's attempt to have the operational units/field offices assistance in obtaining compliance with the documentation requests were ineffective. The contacts with "higher ups" identified by the NSLB were ineffective. At all times the NSLB and FBI OGC knew that the filed offices and operational units were non-compliant in obtaining the legal documentation.

In mid-2006, Mr. Youssef was contacted by the DOJ OIG and was shown copies of various e-mails related to this matter. These e-mails, many of which speak for themselves, set forth an accurate record of how CAU managed the NSL matter during Mr. Youssef's tenure. Based on the information in the possession of the OIG, it was clear that the OIG had been made aware of the NSL issues and was in fact investigating these matters. Mr. Youssef fully cooperated in that investigation. He was questioned twice under oath - both times without an attorney being present. He also had a number of informal telephonic contacts with the responsible OIG investigator.

Finally, in February, 2007 the FBI counterterrorism executives sought Mr. Youssef's counsel and recommendations on how to respond to the issues Mr. Youssef previously identified internally within the FBI, and which were further documented in a draft OIG report. Mr. Youssef fully cooperated with the executive management in developing various corrective actions and proposals.

Based on information reported by in the press, and statements I have received from individuals in direct contact with FBI spokesmen, it is apparent that there is substantial confusion over the NSL/exigent letter issue. This confusion appears to be the result of two factors: (i) the scope and duration of the problem; (ii) the lack of direct first hand knowledge by the spokespersons. Consequently, upon advice of counsel, Mr. Youssef would be willing to comply with his constructional obligations and make himself reasonably and appropriately available to the Senate Judiciary Committee (or directly to Senator Grassley) to assist Congress in understanding precisely what happened in these matters.

Thank you in advance for your kind attention to this matter. If I can be of any further assistance, please do not hesitate to contact me.

Respectfully submitted,

Stephen M. Kohn

CC. The Hon. Alberto Gonzales
United States Attorney General

The Hon. Robert Mueller
Director, Federal Bureau of Investigation

Notification of Authority and Disclaimer

This letter is submitted under the authority granted by 5 U.S.C. 7211 and the First Amendment of the United States Constitution. Additionally, this letter constitutes activities protected under the opposition clause of Title VII of the Civil Rights Act of 1964, *as amended*, and 5 U.S.C. 2303, as codified in 28 C.F.R. Part 27. This letter does not represent the official position of the FBI.

United States Senate

WASHINGTON, DC 20510

March 19, 2007

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Mueller:

I am writing today in response to the Justice Department Inspector General's March 9, 2007, report entitled "A Review of the Federal Bureau of Investigation's Use of National Security Letters" and in anticipation of the Inspector General's testimony next week before the Judiciary Committee. In my view, the most troubling section of the report begins on p. 86 and is entitled "Using 'Exigent Letters' rather than ECPA National Security Letters." That section describes how an FBI headquarters division known as the Communications Analysis Unit ("CAU") obtained information on about 3,000 telephone numbers by issuing 739 so-called "exigent letters."

In exercising our oversight responsibilities, it is critical for the Judiciary Committee to obtain a fuller understanding of who at the FBI knew what about these exigent letters, and when they knew it. Therefore, in order to prepare for next week's hearing, please provide copies of any and all unclassified e-mails related to the exigent letters issued by CAU.

If you have any questions about this request, please contact Jason Foster at (202) 224-4515. A copy of all correspondence in reply should be sent electronically in PDF format to thomas_novelli@finance-rep.senate.gov or via facsimile to (202) 228-2131.

Sincerely,

Charles E. Grassley
U.S. Senator

cc: Senator Patrick Leahy, Chairman
Committee on the Judiciary

Senator Arlen Specter, Ranking Member
Committee on the Judiciary

Statement of Senator Patrick Leahy,
Chairman, Committee on the Judiciary
Hearing on "Misuse of Patriot Act Powers"
March 21, 2007

I welcome Inspector General Fine to the Committee's hearing today. I am grateful for the important work that his office has done in shining light on significant abuses of the broad powers Congress gave the FBI to obtain information through National Security Letters.

Six years ago, in the wake of the September 11 attacks, I worked hard with Democrats and Republicans to ensure that the government had the powers it needed to protect us from terrorism. I also knew that it was vital to include safeguards and checks and balances to be sure that the government did not abuse its powers, violate civil liberties, or needlessly invade the privacy of Americans.

In the years since, the government's powers have increased steadily. One safeguard that I fought hard to keep in the 2005 PATRIOT Act reauthorization was the mandate for this review by the Department of Justice Inspector General of the FBI's use of National Security Letters. Some of us wanted more safeguards, but this is the best we could do and the most we could get. Keeping the PATRIOT Act's sunset provisions and adding new "sunshine" provisions to improve oversight and accountability were among my highest priorities during that reauthorization process. Working with then-Chairman Specter, we insisted on this Inspector General review. The Inspector General issued the report earlier this month.

I am deeply troubled by the results of this report, but I am glad that we insisted on it. We would not know of the egregious errors and violations that Inspector General Fine documented – extending back years-- if not for these sunshine requirements we were able to put into the 2005 rewrite of the PATRIOT Act. These abuses might be continuing were it not for our insistence on reporting and oversight.

The Judiciary Committee must now continue its oversight we initiated until we get to the bottom of what went wrong and what needs to be done to prevent these abuses from recurring. Along with this hearing, the Committee has scheduled an oversight hearing with the FBI Director for March 27, and we are planning a hearing with the Attorney General in April. We will hold whatever other hearings we need to fulfill our oversight role and shut down abuses and invasions of privacy.

I have long been troubled by the scope of National Security Letters (NSLs) and the lack of accountability for their use. As the Inspector General's report makes clear, these concerns were well-founded. NSLs allow the FBI to request sensitive personal information – phone toll records, email transaction records, bank records, credit records, and other related records – without a judge, a grand jury, or even a prosecutor evaluating the requests. In the PATRIOT Act and other recent legislation, Congress expanded the scope of information the FBI could request with NSLs and reduced the procedural and

substantive requirements for the FBI to use them. In light of this report, we need to consider whether Congress went too far.

The Inspector General found instances of improper use of National Security Letters in more than one in five of the files reviewed, suggesting that there could be thousands of violations among the tens of thousands of NSLs the FBI sends each year. In some cases, the requests were not appropriately authorized or did not go through proper procedures. In other cases, more disturbingly, the FBI requested and got information it was not entitled to under the relevant laws. The report found widespread "confusion," frequent failures to check whether agents were requesting the information they were approved to request, and failures to review the information when it was received. In some cases, the FBI failed to connect the request with any ongoing investigation in the NSL, so it is impossible now to know whether the FBI was entitled to the information received or not.

Amazingly, the Inspector General's report found that, of the more than 143,000 National Security Letter requests the FBI issued from 2003 through 2005, FBI field divisions self-reported only 26 possible violations of law and policy. The Inspector General found almost as many violations in his independent review of only 77 case files from that period. None of the errors the Inspector General found had been self-reported by the FBI. The FBI massively failed to find or to report its own mistakes and abuses connected with NSLs, and documentation was incomplete in 60 percent of the files the Inspector General reviewed.

I was particularly distressed by the Inspector General's findings about the FBI's use of so-called "exigent letters." The FBI sent these letters, which are not authorized in any statute, in at least 739 instances to telephone companies in place of NSLs or grand jury subpoenas. Essentially, the FBI told these companies: This is an emergency, so give us these records voluntarily, without the regular legal process. Each letter went on to say, "Subpoenas requesting this information have been submitted to the U.S. Attorney's Office who will process and serve them formally." Only, in reality, no subpoena had been submitted to any U.S. Attorney's Office in any of the cases the Inspector General examined, and often there was not even any emergency. Sometimes the letters were followed up with an NSL, sometimes they weren't, and sometimes the FBI did not know one way or the other. The letters were often sent by FBI personnel who were not authorized to sign NSLs.

These abuses are unacceptable. We cannot have the FBI requesting information under false pretenses and proceeding with total disregard for the relevant laws. That this lawless technique continued for years in hundreds of instances is alarming. That it continued into 2006 despite the FBI's Office of General Counsel becoming aware of it as early as 2004 is astonishing. According to the Inspector General's Report, FBI attorneys raised concerns about the practice, suggested ways of modifying it, but never once instructed agents to stop.

Senator Grassley, who has long bemoaned abuses and inefficiencies at the FBI and championed whistleblowers there, wrote letters about this issue both to Inspector General

Fine and to FBI Director Mueller. He specifically focused on Bassem Youssef, the current Chief of the unit that produced many if not all of the "exigent letters." Senator Grassley has highlighted Mr. Youssef's whistle blower role in the past, and Mr. Youssef has said to the press recently that he raised concerns about exigent letters in early 2005, and senior officials were unreceptive. I know that Senator Grassley's inquiries will help our understanding of this issue.

I want to make clear that this is not a matter of technical violations. The FBI obtained private and personal information about Americans and others including phone numbers, bank records, and credit information. The FBI apparently got this information without following the proper safeguards, and at times agents requested and received personal information to which they were not entitled. This information was then placed in databases and distributed within the FBI and beyond. The Inspector General's report makes clear that the FBI's record-keeping in connection with NSLs was so poor that we cannot even determine what has happened to any improperly obtained information. It may be impossible to put that genie back into the bottle. This is not acceptable. We cannot have unwarranted and unauthorized invasions of Americans' privacy.

I hope that Inspector General Fine, and next week Director Mueller, will help us to understand the scope of the problem. Then we must determine what to do to make sure that the FBI does not improperly and illegally obtain information about Americans. Trusting the FBI to fix the problem and proceed properly from now on is not an option. We tried that already. That is why we are holding this hearing.

Real oversight will be a start. The oversight that we managed to get into the PATRIOT Act reauthorization led to this report and this hearing. We look forward to the Inspector General's follow up report, due at the end of this year. We have already heard that the FBI, in 2006 -- after the period considered in the Inspector General's report -- attempted to cover for its improper "exigent letters" with "blanket" NSLs, each covering multiple prior requests and multiple investigations. This is another violation of the law and only compounded the problem. I am eager to learn more about that new violation once the Inspector General has had a chance to examine it. We will press the FBI for more information, and we will consider what future audits and reviews need to be legislated.

We will need to explore whether the law should require higher level review and approval, perhaps from FBI headquarters or from Department of Justice attorneys, before NSLs can be sent out. We should come up with an appropriate and regulated procedure for obtaining information in an emergency, and make clear that false and inaccurate "exigent letters" are not acceptable. We should look at how to ensure that records are kept in a way that NSLs can be connected to investigations and the records they generate can be traced. Those whose records are collected improperly should be able to rest assured that the problem will be corrected and the records destroyed. Finally, we should think about whether we need to reexamine the PATRIOT Act's expansion of the types of information that can be obtained through NSLs and the circumstances where they can be used. I look forward to the insights of Senator Feingold, who has been a leader on this issue.

I worked hard with Senators Specter, Feingold, Durbin and others to amend and reauthorize the PATRIOT Act in 2005. This Committee reported a bipartisan bill that the Senate passed. Regrettably the conference with the House was hijacked by the Administration.

I did not vote for the final version of the Act that came out of that conference. I did not trust this Administration to implement it fairly or honor its safeguards. I noted at the time, this is an Administration "that does not believe in checks and balances and prefers to do everything in secret." I had seen enough of the presidential signing statements and practices of this Administration to be concerned. In voting against the PATRIOT Act reauthorization, I explained: "Confronted with this Administration's claims of inherent and unchecked powers, I do not believe that the restraints we have been able to include in this reauthorization of the PATRIOT Act are sufficient."

This report of abuses on the National Security Letter authority, along with the abuses we have seen in the mass firings of U.S. attorneys, and the Justice Department's failure to provide the data-mining report that is now past due, reinforce those concerns.

We must combat terrorism without sacrificing individual liberties and privacy.

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