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From: [redacted] (OGC) (FBI)
Sent: Monday, March 26, 2007 10:48 AM
To: [redacted] (OGC) (FBI)
Subject: FW: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)

Importance: High
SENSITIVE BUT UNCLASSIFIED
NON-RECORD

[redacted]
[redacted]
[redacted]

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[redacted]

-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Monday, March 26, 2007 9:57 AM
To: KELLEY, PATRICK W. (OGC) (FBI)
Cc: [redacted] (OGC) (FBI); [redacted] (OGC) (FBI); [redacted] (OGC) (FBI)
Subject: FW: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
Importance: High

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NON-RECORD

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Pat, re your comments below, is there any background materials or insights that you have from the data retention group that might be useful background? (See my e-mail back to [redacted] below)?

-----Original Message-----

From: KELLEY, PATRICK W. (OGC) (FBI)
Sent: Friday, March 23, 2007 5:38 PM
To: [redacted] (OGC) (FBI); [redacted] (OGC) (FBI)
Subject: RE: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)

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Actually, the data retention working group is working on that issue/policy so [redacted] articulation of the reasons will help me at the working group.

-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Monday, March 26, 2007 9:25 AM
To: [redacted] (OGC) (FBI)
Cc: [redacted] (OGC) (FBI); [redacted] (OGC) (FBI); KELLEY, PATRICK W. (OGC) (FBI)

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Subject: FW: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
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[redacted] just want to make sure I have any pertinent material that may provide helpful context for preparing responses to #9. I've got VC's prepared testimony from FBI intranet. But is there anything more that would also be relevant?

1. Like transcript of the extemporaneous parts of the hearing?
2. Like prior FBI congressional responses or other articulated positions re data retention?

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3. Like draft of the portion of #9 that you're evidently working on [redacted]

4. Other?

P.S. What is time frame?

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-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Friday, March 23, 2007 4:51 PM
To: [redacted] (OGC) (FBI)
Cc: KELLEY, PATRICK W. (OGC) (FBI)
Subject: FW: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
Importance: High

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[redacted] want to take a crack at #9 in view of my departure--don't know the time frame but you can ask [redacted]. This may be an opportunity to take on a project we have discussed--if we have to retain names we collect per policy, explore ways to archive and restrict access.

-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Friday, March 23, 2007 10:09 AM
To: KELLEY, PATRICK W. (OGC) (FBI); [redacted] (OGC) (FBI); [redacted] (OGC) (FBI)
Cc: [redacted] (OGC) (FBI)
Subject: RE: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
Importance: High

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Sincere thanks to all. Looking forward to your replies.

[redacted]

NSL VIO-30089

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-----Original Message-----

From: KELLEY, PATRICK W. (OGC) (FBI)
Sent: Friday, March 23, 2007 8:27 AM
To: [REDACTED] (OGC) (FBI); [REDACTED] (OGC) (FBI)
Cc: [REDACTED] (OGC) (FBI)
Subject: FW: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
Importance: High

SENSITIVE BUT UNCLASSIFIED
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[REDACTED] please take #3--provide input to [REDACTED] and copy me.

[REDACTED]: please take #9. Ditto. Thanks. (The answer to this will assist me in the Data Retention Working Group.)

-----Original Message-----

From: [REDACTED] (OGC) (FBI)
Sent: Thursday, March 22, 2007 3:07 PM
To: KELLEY, PATRICK W. (OGC) (FBI)
Cc: THOMAS, JULIE F. (OGC) (FBI)
Subject: QFRs fm GC Caproni's HJC Hrg (20 Mar 07)
Importance: High

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Pat --

Sir, as you probably know, OGC has already received some QFRs from GC Caproni's 20 March testimony before the House Judiciary Committee.

Julie asked me to contact you regarding two of those QFRs:

3. [Please provide] copies of all documents, including internal memoranda, pertaining to the FBI's Communications Analysis Unit's contracts with the three telephone companies identified in the Inspector General's Report, and identify all FBI attorneys who participated in the review and approval of those contracts.

9. [P]lease detail the FBI's reasons for the retention of data pertaining to individuals who the FBI has concluded are irrelevant to terrorism investigations.

Re No. 3: OCA will contact Finance Division regarding the actual contracts. However, based on what we suspect would've been the Procurement Law Unit's involvement, Julie asked me to contact you regarding the referenced attorney participation.

NSL VIO-30090

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Re No. 9: [redacted]
[redacted]
[redacted] In that regard,
comments from you and [redacted] would be most helpful.

As always, sincere thanks for your help.

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Good morning Mr. Chairman, Ranking Member Smith, and Members of the Committee. It is my pleasure to appear before you today to discuss the recent report by Department of Justice's Office of the Inspector General (OIG) regarding the FBI's use of national security letters (NSLs). The OIG's report is a fair report that acknowledges the importance of NSLs to the ability of the FBI to conduct the national security investigations that are essential to keeping the country safe. Importantly, the OIG found no deliberate or intentional misuse of the national security letter authorities, Attorney General Guidelines or FBI policy. Nevertheless, the OIG review identified several areas of inadequate auditing and oversight of these vital investigative tools, as well as processes that were inappropriate. Although not intentionally, we fell short in our obligations to report to Congress on the frequency with which we use this tool and in the internal controls we put into place to make sure that it was used only in accord with the letter of the law. Director Mueller concluded from the OIG's findings that we must redouble our efforts to ensure that there is no repetition of the mistakes of the past in the use of these authorities and I share his commitment. I would also like to acknowledge the role of Congress and the effectiveness of congressional oversight in surfacing the deficiencies raised in this audit, which was called for in the USA PATRIOT Improvement and Reauthorization Act. The report made ten recommendations in response to the findings, designed to provide both the necessary controls over the issuance of NSLs and the creation and maintenance of accurate records. The FBI fully supports each recommendation and concurs with the Inspector General that, when implemented, these reforms will ensure full compliance with both the letter and the spirit of the authorities entrusted to the Bureau.

National Security Letters

National Security Letters generally permit us to obtain the same sort of documents from third party businesses that prosecutors and agents obtain in criminal investigations with grand jury subpoenas. Unlike grand jury subpoenas, however, NSL authority comes through several distinct statutes and they have specific rules that accompany them. NSLs have been instrumental in breaking up cells like the “Portland Seven,” the “Lackawanna Six,” and the “Northern Virginia Jihad.” Through the use of NSLs, the FBI has traced sources of terrorist funding, established telephone linkages that resulted in further investigation and arrests, and arrested suspicious associates with deadly weapons and explosives. NSLs allow the FBI to link terrorists together financially, and pinpoint cells and operatives by following the money.

The NSL authority used most frequently by the FBI is that provided by the Electronic Communications Privacy Act (ECPA). Through an ECPA NSL, the FBI can obtain subscriber information for telephones and electronic communications and can obtain toll billing information and electronic communication transaction records. Significantly, the FBI cannot obtain the content of communications through an ECPA NSL. Although the exact numbers of ECPA NSLs remains classified, it is the most common NSL authority used.

Pursuant to the Right to Financial Privacy Act (RFPA), the FBI also has the authority to issue NSLs for financial records from a financial institution. RFPA NSLs are used commonly in connection with investigations of potential terror financing.

Pursuant to the Fair Credit Reporting Act, the FBI has the authority to issue three different, but related, types of NSLs to credit reporting agencies: an NSL pursuant to 15 U.S.C. 1681u(a) for the names of financial institutions with which the subject has or has had an account; an NSL pursuant to 15 U.S.C. 1681u(b) for consumer identifying information (name, address, former addresses, employment and former employment); an NSL pursuant to 15 U.S.C. 1681v for a full

credit report. Of all the FBI's NSL authorities, only the last of the FCRA authorities is restricted to use only in international terrorism cases.

Finally, the FBI has the authority to issue NSLs pursuant to the National Security Act in the course of investigations of improper disclosure of classified information by government employees.

For the first 3 types of NSLs (ECPA, RFPA, FCRA) the NSL must include a certification by an authorized FBI employee that the material is being sought for an authorized national security investigation. That certification is slightly different in the case of a FCRA NSL for a full credit report, where the certification required is that the information is relevant to an international terrorism investigation.

The authority to issue an NSL lies at a senior level within the FBI. An NSL can be issued only by an official who ranks not lower than Special Agent in Charge or Deputy Assistant Director. All such officials are career government employees who are members of the Senior Executive Service. Procedurally, an agent or analyst seeking an NSL must prepare a document (an electronic communication or EC) in which the employee lays out the factual predicate for the request. The factual recitation must be sufficiently detailed so that the approving official can determine that the material sought is relevant to an investigation. Additionally, it needs to provide sufficient information concerning the underlying investigation so that reviewing officials can confirm that the investigation is adequately predicated and not based solely on the exercise of First Amendment rights. Finally, the EC includes a "lead" to the Office of the General Counsel (OGC) for purposes of Congressional reporting.

OIG Report

As directed by Congress, we endeavored to declassify as much information as possible concerning our use of NSLs in order to allow the maximum amount of public awareness of the

extent of our use of the NSL tool consistent with national security concerns. To that end, for the first time the public has a sense of the frequency with which the FBI makes requests for data with national security letters. In the period covered by the report, the number of NSL requests has ranged from approximately 40,000 to 60,000 per year and we have requested information on less than 20,000 persons per year. For a variety of reasons that will be discussed below, those numbers are not exact. Nevertheless, they, for the first time, allow the public to get some sense of the order of magnitude of these requests; there are a substantial number of requests, but we are not collecting information on hundreds of thousands of Americans.

There are three findings by the OIG that are particularly disturbing, and it is those three findings that I wish to address this morning: (1) inaccurate reporting to Congress of various data points we are obligated to report relative to NSLs; (2) the use of so-called exigent letters that circumvented the procedures required by ECPA; and (3) known violations (both previously self-reported by FBI and not previously reported) of law and policy with regard to usage of NSLs.

Congressional Reporting

A finding of the report that particularly distresses me is the section that addresses the inaccuracies of the numbers we report to Congress. That responsibility lies with my division, and we did not do an acceptable job. The process for tabulating NSLs simply did not keep up with the volume. Although we came to that realization prior to the OIG report and are working on a technological solution, that realization came later than it should have.

At some point several years before my tenure at the FBI began, our process for tracking NSLs for Congressional reporting purposes shifted from a totally manual process, where NSL data was written on index cards, to a standalone Access database. This database is referred to in the OIG report as the OGC database. While the OGC database was a giant technological step forward from

3 x 5 index cards, it is not an acceptable system given the significant increase in use of NSLs since 9/11. First and foremost, the OGC database is not electronically connected to ACS, the system from which we derive the data. Instead, there is a manual interface between ACS and the OGC database. An OGC employee is responsible for taking every NSL lead that is sent to OGC and manually entering the pertinent information into the OGC database. Nearly a dozen fields must be manually entered, including the file number of the case in which the NSL was issued (typically 15 digits and alphanumeric identifiers).

Approximately a year ago we recognized that our technology was inadequate and began developing an automated system to improve our ability to collect this data. The system, in addition to improving data collection, will automatically prevent many of the errors in NSLs that we will discuss today. We are building an NSL system to function as a workflow tool that will automate much of the work that is associated with preparing NSLs and the associated paperwork. The NSL system is designed to require the user to enter certain data before the workflow can proceed and requires specific reviews and approvals before the request for the NSL can proceed. Through this process, the FBI can automatically ensure that certain legal and administrative requirements are met and that required reporting data is accurately collected. For example, by requiring the user to identify the investigative file from which the NSL is to be issued, the system will be able to verify the status of that file to ensure that it is still open and current (e.g. request date is within six months of the opening or an extension has been filed for the investigation) and ensure that NSLs are not being requested out of control or administrative files. The system will require the user to separately identify the target of the investigative file and the person whose records are being obtained through the requested NSL, if different. This will allow the FBI to accurately count the number of different persons about whom we gather data through NSLs. The system will also require that specific data

elements be entered before the process can continue, such as requiring that the target's status as a United States Person or non-United States Person be entered. The system will not permit requests containing logically inconsistent answers to proceed.

The NSL system is being designed so that the FBI employee requesting an NSL will enter data only once. For example, an agent or analyst who wishes to get telephone toll billing records will only have to prompt the system that he is seeking an ECPA NSL for toll records and type the telephone number once. The system will then automatically populate the appropriate fields in the NSL and the authorizing EC. The system will then generate both the NSL and the authorizing EC for signature, thereby ensuring that the two documents match exactly and minimizing the opportunity for transcription errors that give rise to unauthorized collections that must be reported to the Intelligence Oversight Board (IOB). Agents and analysts will still be required to provide the narrative necessary to explain why the NSL is being sought, the factual basis for making a determination that the information is relevant to an appropriately predicated national security investigation, and the factual basis for a determination whether the NSL should include a non-disclosure provision. In addition, this system will have a comprehensive reporting capability.

We began working with developers on the NSL system in February 2006 and we are optimistic that we will be able to pilot it this summer and roll it out to all field offices by the end of the year. At that point, I will be confident the data we provide to Congress in future reports is as accurate as humanly possible.

In the meantime, we are taking several steps to correct the numbers we have previously reported. First, we are making data corrections in our database. Through a computer program, we have identified all entries that must be erroneous because there is an apparent error in the entry (e.g., there are more NSLs reported than requests; the date shows a year that is impossible (203)). We are

manually reviewing those entries and making corrections. We have also started a random sampling of ten percent of the total entries in the OGC database which contains approximately 64,000 entries.

Those entries will be manually checked against ACS. We will determine whether there is a significant difference between the entries in our database and the actual information in ACS. To the extent there is a difference, that will be the factor that will be used to correct our prior reporting. While not yielding an exact count, we believe that to be a statistically appropriate way of correcting prior reporting. We have discussed this methodology with the OIG and will offer it the opportunity to review our work. We are striving to have corrected reports to Congress as soon as possible.

As with the other shortcomings identified by the OIG, there was no finding of an intent to deceive Congress concerning our use of NSLs. In fact, as noted, we identified deficiencies in our system for generating data prior to the initiation of the OIG's review and flagged the issue for Congress almost one year ago. While we do not know the extent of the inaccuracies in past reporting, we are confident that the numbers will not change by an order of magnitude.

Exigent Letters

The next significant finding of the OIG involved the use within one unit at Headquarters of so-called "exigent letters." These letters, which numbered in excess of 700, were provided to telephone companies with requests for toll billing information regarding telephone numbers. All of the letters stated that there were exigent circumstances. Many of the letters stated that federal grand jury subpoenas had been requested for the records even though in fact no such request for grand jury subpoenas had been made, while others promised future national security letters. From an audit and internal control perspective, the FBI did not document the nature of the emergency circumstances that led it to ask for toll records in advance of proper legal process, did not keep copies of all of the exigent letters it provided to the telephone companies, and did not keep records showing that it had

subsequently provided either the legal process promised or any other legal process. Further, based on interviews the OIG conducted, some employees indicated that there was not always any emergency relating to the documents that were sought.

OGC has been working with the affected unit to attempt to reconcile the documentation and to ensure that any telephone record we have in an FBI database was obtained because it was relevant to an authorized investigation and that appropriate legal process has now been provided. As of late last week, there were still a small handful of telephone numbers that had not been satisfactorily tied to an authorized investigation. If we are unable to determine the investigation to which those telephone numbers relate, they will be removed from our database and destroyed.

The OIG rightfully objected to the FBI obtaining telephone records by providing a telephone carrier with a letter that states that a federal grand jury subpoena had been requested when that was untrue. It is unclear at this point why that happened. The Director has ordered a special inspection in order to better understand the full scope of internal control lapses.

We also concur with the OIG that it is inappropriate to obtain records on the basis of a purported emergency if, in fact, there is no emergency. We continue to believe, however, that providers had the right to rely on our representation that there was an emergency and that the "exigent letters" - had they been issued only when there was an exigent circumstance and had they correctly identified the legal process that would follow - would have been an appropriate tool to use.

In response to the obvious internal control lapses this situation highlights, changes have already been made to ensure that this situation does not recur. Any agent who needs to obtain ECPA-protected records on an emergency basis must now do so pursuant to 18 U.S.C. 2702. Section 2702(c)(4) permits a carrier to provide information regarding its customers to the government if the provider in good faith, believes that an emergency involving danger of death or

serious physical injury to any person requires disclosure without delay of information relating to the emergency. A request for disclosure pursuant to that statute generally must be in writing and must clearly state that the disclosure without legal process is at the provider's option. The letter request must also set out the basic facts of the emergency so that the provider can make some assessment whether it concurs that there is an emergency.

Intelligence Oversight Board Process

The OIG also examined misuse of NSLs that had been reported (and some that had not been reported) as part of the IOB process. As this committee knows, pursuant to Executive Order 12863 the President has an Intelligence Oversight Board that receives from the agencies in the intelligence community reports of intelligence activities that the agency believes may have been unlawful or contrary to Executive Order or Presidential Directive. This language is interpreted by the FBI and DOJ to mandate the reporting of any violation of a provision of the Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection if such provision is designed to ensure the protection of individual rights.

The FBI requires its employees to report any violations of law or policy about which they are aware. We encourage employees to err on the side of reporting so that we can be sure that all violations are appropriately reported. In terms of process, all potential violations (called PIOBs - or potential intelligence oversight board violations) are reported to OGC. Lawyers within OGC are responsible for "adjudicating" the violation - that is, determining whether the PIOB is an actual Intelligence Oversight Board violation. If it is, a report is made to the IOB, a copy is provided to DOJ and a copy is provided to the FBI's Inspection Division. If the violation involved intentional misconduct, the Inspection Division will determine whether the matter should be referred to the Office of Professional Responsibility for discipline.

The OIG found that from 2003 through 2005, the FBI had self-reported 26 potential violations involving NSL authorities. Of the 26, OGC adjudicated 19 to be violations and reported them. The OIG agreed with each of those determinations. Of the 7 PIOBs that OGC determined were not violations, the OIG agreed with all but one. As to the one determination about which we disagreed, upon re-review, the FBI concurred with the OIG that it was a violation that should have been reported and it has since been reported to the IOB. These 20 violations included: third party errors (4), NSLs issued when the authority for the investigation had lapsed (3), obtaining ECPA-protected records without any legal process (3) and obtaining a full credit report in a counterintelligence case (1).

The OIG also found, however, a number of potential IOBs in the files it examined that had not been reported to OGC for adjudication. Although press accounts of the reports have implied that the OIG found massive abuses of the NSL authorities by the FBI, a careful read of the report reflects a different set of facts. The OIG examined 293 NSLs - a reasonably small sample. The sample was a judgmental sample and the size was chosen because the audit was extremely labor intensive. We do not suggest that the sample was not a fair sample (although it was not random), but only that it is questionable from a statistical standpoint to attempt to extrapolate from a very small sample to an entire population. Moreover, there was wide variation in the number of purported unreported violations from different field offices. The OIG found 8 potential violations that were unreported in files in both the Philadelphia and Chicago field offices, but only 2 unreported potential violations from files in New York and 4 from San Francisco. We are doing additional follow-up work, but the wide variance between field offices may be a function of the very small sample, or it may indicate that the percentages of potential errors detected are not constant across all field offices.

Setting aside questions about whether the sample is representative, I urge you to look closely at the numbers before arriving at the conclusion that there is a systemic problem concerning the use of NSLs. Of the 293 NSLs the OIG examined, 22 (7%) were judged to have potential unreported IOB violations associated with them. Moreover, of that 7%, 10 - or almost 50% - were third party errors -- that is, the NSL recipient provided the FBI information we did not seek. Only 12 of the NSLs examined - 4% - had mistakes that the OIG rightfully attributes to the FBI.

Examining the 12 potential errors that were rightfully attributed to the FBI reveals a continuum of seriousness relative to the potential impact on individual rights. Four (or just over 1% of the sample) were serious violations. Specifically, two of the violations involved obtaining full credit reports in counterintelligence investigations (which is not statutorily authorized), one involved issuing an NSL when authorization for the investigation to which it related had lapsed, and one involved issuing an NSL for information that was arguably content, and therefore not available pursuant to an NSL. (In the latter case, the ISP on which the NSL was served declined to produce the requested material so there was, in fact, no collection of information to which we were not entitled.) The balance of the 12 potential violations identified by the OIG do not, in our view, rise to the same level of seriousness as those 4. The remaining 8 involve errors that are best characterized as arising from a lack of attention to detail, and did not result in the FBI seeking or obtaining any information to which it was not entitled. Those 8 potential violations involved errors such as using the wrong certification language in an NSL (although the appropriate certification is not materially different) and having the NSL and the EC seeking the NSL not entirely consistent. We do not excuse such lack of attention to detail, but we do not believe that such mistakes result in or cause a risk to civil liberties.

In short, approximately 1% of the NSLs examined by the OIG had significant errors that were attributable to FBI actions and that had not been, but should have been, reported as PIOBs.

While a 1% error rate is not huge, it is unacceptable, and we have taken steps to reduce that error rate. First, we are very concerned that of all the potential IOBs involving mistakes in NSLs attributable to the FBI (whether previously reported or not), 3 involved the same mistake: namely, issuing an NSL for a full credit report in a counterintelligence investigation. In order to ensure that this particular error is fully rectified, the FBI ordered all field offices to examine all counterintelligence files in which Fair Credit Report NSLs have been issued since January 1, 2002 in order to ascertain whether the file contains a full credit report. If it does, the credit report must be removed from the file, sequestered with the field office's attorney, and a PIOB must be reported to OGC. The results from that search are due to headquarters by April 16, 2007.

Several other steps we have taken will, we believe reduce the likelihood that the FBI will commit the other mistakes in the future. First, as indicated previously, the FBI is developing an automated system to prepare NSLs and their authorizing ECs. That system will reduce to zero mistakes such as having the wrong certification language or inconsistency between the NSL and the EC. It will also ensure that the investigative file out of which the NSL is being issued is open. Finally, it will ensure that an NSL for a full credit report cannot be issued out of a counterintelligence file.

Other changes to FBI policy have been made that we believe will facilitate better handling of IOBs and also reduce errors that lead to IOBs. First, last fall we provided comprehensive advice to the field regarding its responsibility towards information obtained as a result of third party errors. That guidance requires all such information to be sequestered and reported to OGC as a PIOB. If the "over collected" information is irrelevant to the investigation (e.g., the telephone company

transposed a number and provided us records on the wrong telephone account), then it will be destroyed or returned. No such information should be entered into FBI databases. If the information is relevant to the investigation but simply not within the four corners of the NSL, then the information must be sequestered until a new NSL has been issued for the extra data. After the new NSL has been issued, the information can be entered into FBI databases.

Secondly, we have collected all the rules and policies on NSLs into one document which will be disseminated to the field. Those rules now mandate that, until the deployment of the automated NSL system, all NSLs and ECs be prepared from the exemplars that are provided on OGC's website. That should eliminate many of the mistakes identified by the OIG.

All of these rules will, of course, only reduce or eliminate errors if they are followed. The OIG's report has highlighted for us that there must be some sort of auditing function - above and beyond the IOB process - to systematically ensure that these rules, as well as others that govern our activities in national security investigations are followed. The FBI has historically been very good at establishing policy and setting rules, but we have not been as proactive as we should have been in establishing internal controls and auditing functions.

The full parameters of the compliance program have not been set, although these aspects have been: the Inspection Division with participation of DOJ's National Security Division and Privacy and Civil Liberties Office is in the process of a special inspection of NSL usage in all 56 field offices and headquarters. That inspection should uncover any other significant problems with our use of this tool but should also tell us whether there are variances between offices in terms of the numbers and types of errors. The results of the inspection will then inform the program that the Attorney General announced of having teams of DOJ lawyers, FBI lawyers and the Inspection Division periodically audit field offices' use of NSLs. That process will begin in April and should

result in at least 15 offices being audited this year. We are also considering other proactive compliance programs in order to develop a program that ensures, to the maximum extent possible, that the rules and policies designed to protect privacy and civil liberties are faithfully adhered to by all of our employees, that we promptly identify and correct any violations of law or policy, and that any information collected erroneously is removed from FBI databases and destroyed. In addition, a working group co-chaired by the Office of the Director of National Intelligence and the CPCLO has been convened to examine how NSL-derived information is used and retained by the FBI. The FBI and DOJ's National Security Division will have a representative on this working group. We welcome the Committee's input as we move forward on these initiatives.

The FBI is acutely aware that the only way that we can achieve our mission of keeping the country safe is if we are trusted by all segments of the American public. With events like the London terror attacks of 2 years ago and the Canadian plot to use fertilizer bombs to destroy buildings in Canada in 2006, we have all become worried about the risk of a catastrophic attack from home grown terrorists. Our single best defense against such an attack is the eyes and ears of all Americans -- but particularly of those segments of the population in which the risk of radicalization is at its highest. We need people in those communities to call us when they hear or see something that looks amiss. We know that we reduce the probability of that call immeasurably if we lose the confidence of those segments of the population. That is one of the reasons that we are looking for ways to assure all Americans that we are respectful of individual rights, including privacy rights, and that we use the tools that have been provided to us consistent with the rules set out by Congress.

I appreciate the opportunity to appear before the Committee and look forward to answering your questions. Thank you.

CONGRESSIONAL TRANSCRIPTS

March 20, 2007

House Judiciary Committee Holds Hearing on FBI Patriot Act Misuse

CONYERS:

Good morning. Committee will come to order.

We're here for a hearing on the inspector general's independent report on the FBI's use of national security letters.

Nearly six years ago, in the immediate aftermath of September 11th, the Department of Justice told us that they needed significantly enhanced authority, while promising the members of this committee in no uncertain terms that these new tools would be carefully and appropriately used.

Two years ago, when the Patriot Act was reauthorized, they promised us there was not a single instance in which the law had been abused.

Now, to underscore the importance of the reasons that we're holding this hearing, many of us remember the times in the past when the power of our government has been abused: in one war, led to the suspension of habeas corpus; another war, the notorious Palmer raids; in World War II, the internment of Japanese Americans; in the Vietnam War, the secret spying and enemy list.

In my view, we are now in a period where we risk a continuation of these deplorable acts and effect genuine harm to the Constitution and the rule of law.

One week ago, the inspector general told us that the exact opposite was true of the promise that had been made that there was not a single instance when the Patriot Act was being reauthorized that the law had been abused.

One tool in particular, the national security letters -- essentially, secret subpoenas issued without any court review -- was used repeatedly to invade the privacy of law-abiding Americans outside the law and proper legal process.

This was a serious breach of trust. The department had converted this tool into a handy shortcut to illegally gather vast amounts of private information while at the same time significantly underreporting its activities to Congress.

CONYERS:

We learned that the number of national security letter requests had increased from 8,500 in the year 2000 to in excess of 143,000 from the three-year period between 2003 and 2005.

The Department of Justice consistently provided inaccurate information to Congress concerning the national security letters, failing to identify at least 4,600 security letter requests to us.

The security letters were routinely issued without proper authorization, and outside statutory and regulatory requirements.

The inspector general found that more than 60 percent of the investigatory files they looked at included one or more violations of FBI policy.

But worse, the inspector general found even more widespread abuses concerning the so-called exigent letters, that is emergency requests for telephone and other data. An exigent letter, as opposed to a national security letter, is meant to obtain information in an extreme emergency, like a kidnapping when the bureau has already sought subpoenas for the requested information. But the FBI issued these letters in nonemergencies as a means to bypass the requirements of the national security letter procedure.

And so, as if it wasn't troubling enough, in many instances the bureau attempted to issue after-the-fact national security letters to cover their tracks on their use of exigent letters.

The inspector general specifically found that the exigent letters were ordinarily issued when there was no emergency present, and very often when there was not even a pending investigation.

More often than not, the letters were issued based on promises that subpoenas were in the process of being issued when that was not the case, and even though some subpoenas were never issued at all.

CONYERS:

The Federal Bureau of Investigation made numerous factual misstatements in the letters, which were frequently issued in violation of the statute as well as the attorney general and FBI guidelines.

The recordkeeping was so poor that it was impossible for the I.G. to document how and why all these problems occurred.

And what disturbs me most is that the abuse and misuse of these security letters is not an isolated instance. It appears to be apparent of a pattern which the Department of Justice has violated not only our trust, but the very laws which they are charged with enforcing.

And so I hope -- from the approval of the notorious torture memos to warrantless and illegal surveillance to wrongful smearing of able U.S. attorneys, this Department of Justice has squandered its reputation for independence and integrity.

The attorney general needs to understand that with power comes responsibility and with authority must come accountability.

I would like now to turn to the distinguished gentleman from Texas, the ranking member of this committee, Mr. Lamar Smith.

SMITH:

Thank you, Mr. Chairman.

Mr. Chairman, I appreciate your holding this hearing on the inspector general's report on the FBI's use of national security letters. The inspector general should be commended for conducting a thorough audit as directed by Congress in the Patriot Act reauthorization.

The report raises concerns as to the FBI's internal recordkeeping and guidelines for the use of NSLs in terrorism and espionage investigations.

It is clear from the report that these deficiencies are the result of the poor implementation and administration of national security letter authority. In other words,

the problem is enforcement of the law, not the law itself. Timely corrective measures by the FBI and effective oversight by the Justice Department and Congress will ensure proper use of this important law.

The inspector general's report found that the FBI's database for tracking NSLs significantly underestimated the number of NSL requests, resulting in inaccurate reports to Congress on the FBI's use of NSLs.

From 2003 to 2005, the FBI issued a total of 143,074 NSLs. This compares to 739 exigent letters to three telephone companies issued contrary to national security investigation guidelines. The exigent letters represent 1/200th of the national security letters issued.

Although the use of these unauthorized letters is disconcerting, the FBI discontinued this practice last year.

The inspector general makes two other very important findings.

First, there is no evidence that anyone at the FBI intended to violate the law or internal policy. This is a significant finding because it confirms that FBI agents acted in good faith and sought to comply with the law, even as they worked under severe time constraints and with an urgent desire to thwart terrorist activities.

Second, as detailed by the inspector general, NSLs are a critical tool in fighting terrorism and keeping our country safe. The information acquired through NSLs is valuable to international terrorism and espionage investigations and has allowed the FBI and intelligence agencies to identify terrorists and spies, the sources of their financing, and their plans to attack or harm our national security.

SMITH:

In addition, the FBI shares important information gathered through NSLs with other intelligence agencies, joint terrorism task forces, and state and local law enforcement agencies.

To do their job, the FBI must be able to collect important information about suspected terrorists and spies while complying with the law and freely share such information with key partners.

In response to extensive oversight efforts conducted last Congress, the Patriot Reauthorization Act added critical new safeguards. For instance, an NSL recipient can challenge the request in court, nondisclosure orders require supervisory approval, and the recipient may disclose the NSL to an attorney.

I applaud the administration's response to the inspector general's report and expect the administration to follow through on its promise to act quickly to remedy the deficiencies identified by the inspector general.

Mr. Chairman, on September 11th, 2001, the United States was attacked. More than 3,000 people lost their lives. Members of Congress overwhelmingly approved important new counterterrorism tools for our nation's law enforcement personnel and updated existing authorities to meet the terrorist threat.

We must continue to demonstrate responsible leadership on the NSLs and other important national security issues.

Of course, we need to be vigilant to make sure these problems are fixed, that the inspector general's recommendations are implemented, and that our civil liberties and privacy are protected.

Mr. Chairman, I'll yield back the balance of my time.

CONYERS:

And I thank the gentleman for his statement.

I'd like now to recognize the chairman of the Constitution Subcommittee, Jerry Nadler, for two and one-half minutes.

NADLER:

Thank the chairman.

I'd like to thank Chairman Conyers for holding this important hearing on the FBI abuses of national security letters. We are here today in response to the Department of Justice inspector general report that found widespread abuses of the FBI's authority to issue national security letters.

And NSL can be issued to third party, such as a health insurance company or an Internet service provider, ordering them to reveal all their information about you and your transactions, and the third party is prohibited from telling you or anyone else about the order. That's the so-called gag order provision.

So you cannot object to an NSL directed at your information in court, as you could to a subpoena, because you don't know about it. And the third party may have no interest in going to court to protect your rights or your privacy.

While last year's reauthorization of the Patriot Act did make some changes to the NSL provisions, these changes were essentially meaningless. For example, the court is now authorized to modify or set aside the gag order only if it finds there is no reason to believe that disclosure would endanger national security, diplomatic relations, or anyone's life or safety. But the court must accept the government's assertion of harm as conclusive, so this protection is meaningless.

Some of us had predicted that the unrestricted authority of the FBI to issue NSLs would be abused. And unfortunately our worst fears have now been realized.

The I.G.'s audit found the NSLs have been used by the FBI to collect and retain private information about American citizens who are not reasonably suspected of being involved in terrorism.

During the last Congress, we predicted that unchecked power would lead to rampant abuse. That's why I proposed the Stop Self-Authorized Secret Searches Act two years ago. This bill would have restored some pre-Patriot Act provisions: that an NSL could not be issued unless the FBI made a factual, individualized showing that the records sought pertain to a suspected terrorist or spy. It would have given the recipient of a national security letter an opportunity to obtain legal counsel, the right to challenge the letter, and a nondisclosure requirement -- a real right to challenge it.

NADLER:

It would have given notice to the target of the NSL if the government later seeks to use the records obtained from the NSL against him or her in a subsequent proceeding. And it would have given the target an opportunity to receive legal counsel and challenge the use of those records.

The bill would also have authorized the FBI to obtain documents that it legitimately needs while protecting the privacy of law-abiding American citizens.

The abuses by the DOJ and the FBI are proving that these legislative fixes are a necessary check on the investigatory power. We do not trust government always to be run by angels, especially not this administration.

It is not enough to mandate that the FBI fix internal management problems and recordkeeping, because the statute itself authorizes the unchecked collection of information on innocent Americans. Congress must act now to fix the statute authorizing the abuses revealed in the I.G. report and to hold those responsible for these abuses and violations accountable.

Thank you. I yield back.

CONYERS:

Thank you.

The chair recognizes the distinguished gentleman from Arizona, the ranking minority member of the Constitution Subcommittee, Trent Franks, for two and one-half minutes.

FRANKS:

Well, thank you, Mr. Chairman.

Mr. Chairman, today our task is a vital one: to check and balance our sister branch of government through oversight and to ensure citizens' rights are being properly safeguarded.

Today's subject is somewhat delicate because we must all walk a fine line. In our grave and critical responsibility to prevent jihadist attacks upon American citizens, we must also be careful to strike the proper balance between vigilance and fighting the enemy on the one side of the scales and the preservation of citizens' rights on the other.

The report of the inspector general that we review today is hopeful. We see that while there are human imperfections in the FBI's operation, there was an overall finding that the FBI is indeed carrying out its duties responsibly, there being no evidence of any intentional or deliberate act to violate the law; and that NSLs are performing their vital function as a valuable tool in national security investigations.

FRANKS:

To put today's hearing in perspective, we should keep in mind that the issuance of NSLs under the Patriot Act is a relatively new process, given that the Patriot Act is only a few years old and that this new use of NSLs will necessarily require a careful examination of their best and most appropriate use in this early period.

Certainly, we will have to work out the kinks, given that we are most likely in the business of fighting terror for a long time to come.

While the FBI's practices have had their shortcomings, it appears that these are problems that can be easily resolved. And this is good news. Many of the issues that we must review today are administrative in nature and, to some extent, unavoidable.

Government is a human institution, and it is therefore, by definition, imperfect. Those of us who have run corporations know that a perfect audit is a very rare occurrence, particularly on the first go-around.

Most business do internal audits -- perhaps many, many internal audits -- to discover where human judgment has fallen short and where to improve before being audited by an outside source.

This is an arduous but necessary task, and one that I hope we do well here today, and prospectively.

The FBI has vowed that it will make all the adjustments that Mr. Gonzales and Ms. Caproni have recommended. We look forward to the realization of this goal.

And with that, I thank the witnesses for joining us today, and we look forward to hearing your testimony.

And thank you, Mr. Chairman.

CONYERS:

Thank you.

The chair recognizes the distinguished gentleman from Virginia, Bobby Scott, chairman of the Crime Subcommittee, for two and a half minutes.

SCOTT:

Thank you, Mr. Chairman.

Mr. Chairman, we all believe that it's important to be aggressive in fighting terrorism, and also aggressive in maintaining privacy and freedoms. And I don't believe we should operate on the premise that we always give up freedom in order to obtain security.

SCOTT:

But for us to provide appropriate oversight, we have to have accurate information. Unfortunately, there are indications that we have received clearly inaccurate reports after the significant use of secret, invasive processes that do not appear to be necessary to advance terrorism-related investigations.

Whether it's a secret NSA wiretapping in violation of the FISA law or inappropriate use of the national security letters, we are discovering that what is actually occurring is quite different from what we were being told. And we cannot evaluate the ongoing need for NSA (sic) letters without accurate information.

There's also a clear indication of intentional misuse of the word "exigent" letters to telephone companies as emergency information when, in fact, no emergency existed. Somebody obviously knew this was a problem. There were, in fact, reports to Congress and oversight boards. And we need to find out who these people are.

With these disturbing indications, Mr. Chairman, I hope the testimony of the witnesses today will reveal who is responsible for these abuses and who should be held accountable for false reports to the Congress.

Thank you, Mr. Chairman. I yield back.

CONYERS:

Thank you so much.

Another Virginian, the ranking minority member of the Crime Subcommittee, Mr. Randy Forbes?

FORBES:

Mr. Chairman, I'd like to thank you and the ranking member, Congressman Smith, for holding this important hearing today and also for our witnesses for being here.

You know, the subject matter of this hearing makes for great theater, but when the show is over, we have the task of finding the facts and making sure the proper balance is struck and implemented to protect our citizens.

That we will do. And hopefully we will do it without the negativism and the emotionalism that seems so prevailing in public policy today. Pounding our fists makes great sound bites, but it does not stop terrorists or protect the privacy rights of our citizens.

It's clear that national security letters are important tools in international terrorism and espionage investigations conducted by the FBI. The inspector general's report, which details the audit of 77 case files in four field offices, shows a disturbing pattern: In 60 percent of those cases, the FBI's files were found to in violation of the FBI's internal control policies for issuing national security letters.

FORBES:

While the audit conducted concluded that there was no evidence of any intentional or deliberate act to violate the law, it's also clear that changes need to be made to the FBI's procedures so that they reflect the scope and intent of the law rather than the evolution of general practice.

I look forward to hearing from the FBI about what procedures were in place during the time of the inspector general's audit; and how, given the inadequacies identified by the inspector general, the FBI plans to correct this.

Mr. Chairman, I yield back the balance of my time.

CONYERS:

Thank you.

All other opening statements will be included in the record.

Mr. Glenn A. Fine, inspector general at the Department of Justice, a post held since he was confirmed by the Senate on December 15th, 2000. Mr. Fine's worked for the department's Office of Inspector General in a variety of capacities since January 1995. He's had several years in private practice, and also served as an assistant United States attorney in Washington, D.C.

We're also privileged to have with us the general counsel of the Federal Bureau of Investigation, Ms. Valerie Caproni, a position she's held since August 2003.

Prior to that, Ms. Caproni served as an assistant United States attorney in the Eastern District of New York, as a supervisor at the Securities and Exchange Commission, and also worked in private practice.

All your statements will be made a part of the record in their entirety. And we will have a five-minute time for each of you.

CONYERS:

And we ask Inspector General Glenn A. Fine to begin our testimony.
Welcome to the committee.

FINE:

Mr. Chairman, Congressman Smith and members of the Committee on the Judiciary, thank you for inviting me to testify about two reports issued by the Department of Justice Office of the Inspector General, regarding the FBI's use of national security letters and its use of Section 215 orders to obtain business records.

The Patriot Reauthorization Act required DOIG to examine the FBI's use of these authorities. And on March 9th, we issued reports detailing our findings.

Today I will summarize the key findings from our reviews, focusing my comments on the national security letter report.

Under five statutory provisions, the FBI can use national security letters -- NSLs -- to obtain, without review by a court, records such as customer information from telephone companies, Internet service providers, financial institutions and consumer credit companies.

Although most of the statutory provisions regarding NSLs existed prior to the enactment of the Patriot Act, the act significantly broadened the FBI's authority to use NSLs in two primary ways.

First, it eliminated the requirement that the information sought must pertain to a foreign power or an agent of a foreign power, and substituted the standard that the information requested must be relevant to or sought for an investigation to protect against terrorism or espionage.

Second, the Patriot Act significantly expanded approval authority for NSLs beyond a limited number of FBI headquarters officials to the heads of all FBI field offices.

Our review examined the FBI's use of NSLs from 2003 through 2005. The OIG will conduct another review, examining the FBI's use of NSLs in 2006, which we are required to issue by the end of this year.

In sum, our review found 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.

FINE:

We also found that the FBI did not provide adequate guidance, adequate controls or adequate training on the use of these sensitive authorities.

Before describing the main findings of our report, however, I believe it is important to provide context for these findings.

First, we recognize the significant challenges the FBI was facing during the 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 it could have obtained properly through national security letters if it had followed applicable statutes, guidelines and internal policies.

Third, we did not find that the FBI employees sought to intentionally misuse NSLs or sought information that they knew they were not entitled to obtain. Instead, we believe the misuses and the problems we found generally were the product of mistakes, carelessness, confusion, sloppiness lack of training, lack of adequate guidance and lack of adequate oversight.

I do not believe that any of my observations, however, excuses the FBI's misuse of national security letters.

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 those 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 Patriot Act, the FBI issued approximately 8,500 NSL requests. After the Patriot Act, the number of NSL requests increased to approximately 39,000 in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005.

In total, during the three-year period, the FBI issued more than 143,000 NSL requests.

FINE:

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 than were 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 various 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 investigations, and they provided us with examples and evidence of the 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 26 possible intelligence violations involving its use of NSLs.

We visited four FBI 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 the large number of NSL-related violations throughout the FBI have not been identified or reported by FBI personnel.

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, the CAU, a unit of the Counterterrorism Division in 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.

FINE:

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 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 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 months after the fact to cover the information obtained.

We concluded that the FBI's use of these exigent letters inappropriately circumvented the requirements of the NSL statute and violated attorney general guidelines and FBI policies.

In response to our report, we believe that the department and the FBI are taking our findings seriously. The FBI concurred with all our recommendations and the department's National Security Division 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 is also conducting a special investigation on the use of exigent letters to determine how and why the problems occurred.

The OIG will continue to review the FBI's use of national security letters. In addition to issuing a second report on the use of NSLs in 2006, we intend to monitor the actions that the FBI and the department are taking to address the problems we found in that 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 to be 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. And I would be pleased to answer any questions.

CONYERS:

Thank you, Attorney General (sic).

Will the person in the back row standing up please sit down or leave this committee room?

I'm now pleased to welcome the general counsel for the Federal Bureau of Investigation, Ms. Valerie Caproni.

CAPRONI:

Thank you.

Good morning, Mr. Chairman, Ranking Member Smith and members of the committee.

It's my pleasure to appear before you today to discuss the recent report by the Department of Justice Office of Inspector General regarding the FBI's use of national security letters.

I've submitted a detailed written statement, and, in the interest of time, will stress only a few points.

The I.G.'s report is a fair report that acknowledges the importance of national security letters to the ability of the FBI to keep the country safe and the difficult environment in which our employees have been working since 9/11.

The I.G. found no deliberate or intentional misuse of the national security letter authorities, A.G. guidelines or FBI policy. Nevertheless, the I.G. review identified several areas of inadequate auditing and oversight of these vital investigative tools, as well as processes that were simply inappropriate.

The FBI fully supports each of the I.G.'s recommendations and have implemented other remedial steps not proposed by the I.G. Collectively, these reforms will ensure full compliance with both the letter and the spirit of the law.

NSLs generally permit us to obtain the basic building blocks of an investigation from third-party businesses. Unlike grand jury subpoenas used in criminal cases, however, national security letter authority comes from several distinct statutes and they have very specific rules that accompany them.

The NSL authority used most frequently by the FBI is that provided by the Electronic Communications Privacy Act, or ECPA. Through an ECPA NSL, the FBI can obtain subscriber information for telephones and electronic communications. It can obtain toll billing information and electronic communication transaction records.

Significantly, the FBI cannot obtain the content of communications through an ECPA NSL. That requires a court order.

ECPA NSLs are by far the most common NSL that we use.

CAPRONI:

Pursuant to the Right to Financial Privacy Act and the Fair Credit Reporting Act, we also have the authority to issue different types of national security letters.

The authority to issue an NSL lies at a senior level within the FBI. It can only be issued by an official who ranks not lower than special agent in charge or deputy assistant director. All such officials are career government employees.

And before an NSL can be issued, such employees must certify that the information sought is relevant to an authorized national security investigation.

As directed by Congress, in connection with the I.G.'s report, we endeavor to declassify as much information as possible, in order to maximize the transparency of our use of this important national security tool.

To that end, for the first time, the public has a real sense of the frequency with which the FBI uses national security letters.

In the period covered by the report, the number of NSL requests -- that's not letters; remember that one letter can have multiple requests -- has ranged from approximately 40,000 to 60,000 per year. And we have requested information on fewer than 20,000 persons per year.

For a variety of reasons that will be discussed below, those numbers are not exact. Nevertheless, for the first time, the public can get a sense of the order of magnitude of these requests.

There are three findings by the I.G. that were particularly disturbing to me, and it is those three findings that I wish to address at some length this morning: first, inaccurate reporting to Congress; second, the use of so-called exigent letters; and third, violations of law and policy with respect to the usage of NSLs.

I am particularly distressed by the fact that the I.G. found significant inaccuracies in the numbers that we report to Congress. The responsibility to gather the data for congressional reporting lies with my division, and we did not do an acceptable job. The processes we put in place for tabulating NSLs were inadequate, and we had no auditing process in place to catch errors.

Although we realized we had a problem prior to the I.G.'s report and we're working on a technological solution, that realization came later than it should have, and for that I bear responsibility.

CAPRONI:

At some point several years before I arrived at the FBI, our process for congressional reporting shifted from a totally manual process to a stand-alone database. While the OGC database was a giant technological step forward from 3x5 index cards, it quickly became an unacceptable system given the increase in our use of national security letters since 9/11.

The OGC database is not electronically connected to ACS, the system from which we derive the data. Instead, there's a manual interface between ACS and the database: An OGC employee is responsible for taking every NSL lead that is sent to OGC and manually entering the information into our database.

Nearly a dozen fields must be manually entered, including the file number of the case in which the NSL was issued, which is typically at least 15 digits and letters.

Needless to say, human error creeps in.

Approximately a year ago, when we were unable to tick and tie numbers in the database to previously reported numbers, we recognized that our technology was woefully inadequate. We began at that point to develop an automated system to improve our ability to collect this data.

That system, in addition to improving data collection, will automatically prevent many of the errors in NSLs that we will discuss today by automating much of the work associated with preparing NSLs.

The system will also allow us to automatically ensure that required reporting data is accurately collected.

The NSL system is being designed so that the FBI employee requesting an NSL will enter data only once.

For example, an agent or analyst who wishes to get telephone toll billing records will only have to tell the system that he is seeking an ECPA NSL for toll records and type the telephone number once.

The system will then automatically populate the appropriate fields in the NSL and the authorizing electronic communication. The system will ensure that the two documents match exactly and will minimize the opportunity for transcription errors that gave rise to unauthorized collections.

Agents and analysts will still be required to provide the narrative necessary to explain why the NSL is being sought, the factual basis for making a determination that the information is relevant to an appropriately predicated national security investigation, and the factual basis for any determination that the NSL should include a nondisclosure provision.

CAPRONI:

We're optimistic that we'll be able to pilot the system this summer and roll it out to all the field offices by the end of the year. At that point, I will be much more confident that in the future the data we provide to Congress is as accurate as humanly possible.

In the meantime, we're taking several steps to correct the numbers we previously reported. We've discussed our methodology with the I.G. and we will offer him the opportunity to review our work. We're striving to have the corrected reports to Congress as soon as possible.

The next significant finding of the I.G. I would like to discuss this morning involved the use within one unit at headquarters of so-called exigent letters. These letters, which numbered in excess of 700, were provided to telephone companies with requests for toll billing information.

All of the letters stated that there were exigent circumstances. And many stated that federal grand jury subpoenas had been requested for the records, even though, in fact, no such requests for grand jury subpoenas has been made.

From an audit and internal control perspective, the FBI did not document the nature of the emergency circumstances, did not keep copies of all of the exigent letters it provided to telephone companies, and did not keep records to track whether it had subsequently provided further legal process.

Moreover, some employees told the I.G. that there was not always an emergency relating to the documents that were sought.

OGC has been working with the affected unit to attempt to reconcile the documentation and to ensure that any telephone record that we have in an FBI database was obtained because it was relevant to an authorized investigation and that appropriate legal process has now been provided.

If we are unable to determine the investigation to which a number relates, they will be removed from our database, and the records will be destroyed.

The I.G. rightfully objected to the FBI obtaining telephone records with a letter that stated that a federal grand jury subpoena had been requested when that was untrue. It's unclear why that happened.

The director has ordered a special inspection in order to better understand the full scope of internal control failures and to make sure that in fact every record obtained pursuant to a so-called exigent letter has been appropriately connected to a national security investigation.

That review will also determine whether the practice discussed by the I.G. existed anywhere other than in the headquarters unit identified in the report.

In response to the obvious internal control lapses this situation highlights, changes have already been made to ensure that this situation does not recur. Any agent who needs to obtain ECPA-protected records on an emergency basis must do so pursuant to 18 USC Section 2702. 2702 permits a carrier to provide information regarding its customers to the government if the provider believes in good faith that there is a life-or-death-type emergency that requires disclosure of the record.

By FBI policy, a request for disclosure pursuant to that provision generally must be in writing and must clearly state that the disclosure without legal process is at the provider's option.

The emergency must also be documented to our files so that the use of the letter can be audited.

The policy allows for oral requests, but any oral requests have to be approved and documented to the file.

CAPRONI:

The I.G. also examined misuse of NSLs that had been reported and some that had not as part of the IOB process. As this committee knows, pursuant to executive order, the president has an Intelligence Oversight Board that receives from the intelligence community reports of intelligence activities that the agency believes may have been unlawful or contrary to executive order or presidential directive.

The I.G. found that from 2003 to 2005 the FBI had self-reported 26 potential violations involving NSL authorities. The I.G. also found, however, a number of potential IOBs in the files it examined that had not been reported to OGC for adjudication.

Although press accounts of this report have implied that the I.G. found massive abuses of the NSL authorities, a careful read of the report does not bear out the headlines.

The I.G. examined 293 NSLs; a reasonably small, nonrandom sample. We do not suggest that the sample was not a fair sample, but only point out that it's questionable from a statistical standpoint to attempt to extrapolate from a very small sample to an entire population.

Of the 293 NSLs the I.G. examined, 22 were judged to have a potential unreported violation associated with them. Of that 7 percent, 10, or almost 50 percent of that group, were third-party errors; that is, the NSL recipient provided the FBI with information that we did not seek.

CAPRONI:

Only 12 of the NSLs examined, or 4 percent of the total group, had mistakes that the I.G. rightfully attributes to the FBI.

Examining the 12 potential errors that were attributable to the FBI reveals a continuum of seriousness relative to the potential impact on individual rights.

Four of them, or just over 1 percent of the sample, were unquestionably serious violations. Specifically, two of the violations involved obtaining full credit reports in counterintelligence investigations, which is not statutorily authorized.

One involved issuing a national security letter when the authorization for the investigation to which it related had lapsed. And one involved issuing an NSL for information that was arguably content, and therefore not available pursuant to NSL.

The remaining eight potential errors involved lack of attention to detail, and did not involve the FBI seeking or obtaining any information to which it was not entitled.

We do not excuse lack of attention to detail. And I have admonished the lawyers in the field who review NSLs that they must be careful so that they can avoid this sort of error.

But we do believe that such mistakes pose different challenges and risks, in seeking information to which you are not entitled.

In short, approximately 1 percent of the NSLs examined by the I.G. had significant errors that were attributable to FBI actions and that had not been, but should have been, reported as potential IOB violations.

A 1 percent error rate is not acceptable, and we have taken steps to reduce it. Those steps are discussed at length in my written testimony, and I will not repeat them here.

But among the steps I do want to mention is the director's order to special inspection of all field officers' use of national security letters, an inspection that began on Friday.

We offered to fully brief the committee on the results of that inspection when it is complete.

Several of the actions we are taking involve changes to FBI rules and policy.

Rules will, of course, only eliminate errors if they are followed. The I.G.'s report has painfully demonstrated for us that, while establishing policy -- that while we are good at establishing policy and setting rules, we are not as good as we must be at establishing internal controls and auditing functions to make sure that the rules are followed.

CAPRONI:

The full parameters of an FBI-compliant program have not been set, and the inspection that is currently under way will clearly influence the parameters of the program.

In short order, however, the FBI will establish a vigorous multidisciplinary compliance program that assures as well as any compliance program can that our employees faithfully adhere to all of rules and policies, particularly those that are designed to protect privacy and civil liberties.

The FBI is acutely aware that the only way we can achieve our mission of keeping the country safe is if we are trusted by all segments of the American public.

With events like the London terror attack of two years ago, we were all worried about the risk of a catastrophic attack from homegrown terrorists. Our single best defense against such an attack is the eyes and ears of all Americans, but particularly in those segments of the population in which the risk of radicalization is at its highest.

We need people in those communities to call us when they hear or see something that looks a mess. We know that we reduce the probability of that call immeasurably if we lose the confidence of any part of the American public.

CONYERS:

Counsel, can you wind down at this point?

CAPRONI:

Yes, sir.

CONYERS:

All right.

CAPRONI:

We will put into place a compliance program to maximize the probability that we do not lose the confidence of the American public by dint of the sort of errors highlighted in this report.

I appreciate the opportunity to appear before the committee and look forward to answering your questions. Thank you.

CONYERS:

Well, General Counsel Caproni, I want to thank you for your candor and forthcomingness in coming before us today. And we will include the rest of your testimony, of course.

CONYERS:

Now, let me begin the questioning. And I thank both the witnesses.

Mr. Inspector General Fine, I'm curious as to how you've come to the conclusion that these errors that have been reported and that bring us to this chamber were either sloppy - the results of sloppy book-keeping, recordkeeping or compliance with the law, but none of it was intentional.

How could that be if they've known about these excesses since the year 2004, their communications analysts unit warned them about it in early 2005, and we have something like at least over 700 exigent letters and somewhere in the neighborhood of 40,000 to 50,000 NSL letters for three years?

FINE:

Let me separate some of those issues.

I don't believe that they intended to go out and obtain information that they knew they could not obtain and said, "We're going to do it anyway."

I think what they did was complete carelessness, did not follow the rules, did not follow appropriate procedures, and obtained information that they could have obtained properly but by taking shortcuts.

Now, we didn't do a review to ask everybody what was in their mind and what exactly they did. But we saw instances where people just simply didn't follow the rules and didn't take appropriate action.

CONYERS:

But they were being warned.

FINE:

Yes.

CONYERS:

This didn't just come up recently. This goes back to 2004.

FINE:

In 2004, it is correct that attorneys in the Office of General Counsel had concerns about the exigent letters and weren't saying, "Stop it," but were saying, "We need to take different measures to issue these letters."

CONYERS:

Do you think that the law was so complicated that people in good faith just couldn't figure out what it was we were requiring?

FINE:

I think what they did was inappropriately take a model from another context and applied it to this context, which was wrong, it clearly was, and that they did not think carefully and they did not take appropriate actions.

Now, I know that the FBI is conducting a special inspection to look exactly at what everybody knew and when they knew it and why they took the actions that they did.

We didn't do that kind of review. We didn't ask everybody up and down the line. And it is possible that people had motivations that were inappropriate.

CONYERS:

There's no way we can tell. There's no way I can tell, but there's no way you can tell either.

FINE:

It is true that we did not do a performance review of every individual. So I think that's an appropriate point, Mr. Chairman, I really do.

And I do think it's incumbent upon the FBI to go back and look and see exactly what people were doing, at what stages, and why they did what they did, and take appropriate action to hold people accountable.

CONYERS:

Now, do you make a distinction between the national security letters and the exigent letters in terms of the severity of the offense that brings us here today?

FINE:

I do. I think the exigent letters were the most troubling aspect of this.

CONYERS:

And why is that?

FINE:

Because there's a process in the law to allow voluntary disclosures from these telephone companies if there is a true emergency. And we believe the FBI should have followed that voluntary process.

Instead, they went with these exigent letters, which they use in a different context, and applied it to this context, which, in our view, was inappropriate.

With regard to the national security letters, there were many of them, and many of them did comply with the requirements of the law we saw. And we tried to do a review to see how many didn't. We found a significant number didn't.

But with regard to the exigent letters as a whole, that whole practice was very troubling to us in and of itself

CONYERS:

Now, are you satisfied with the steps that have been described here today by the general counsel in terms of how we clean this mess up?

FINE:

Well, we have been briefed by the department and the FBI about the steps they're taking. I think they are taking this seriously. But I'm not in a position right now to say, "I'm completely satisfied, I trust all this."

We need to see what happens with these steps, see whether they're concerted efforts over time, to see whether they really are adequately implemented.

So I can't say right now that it is -- they've done all they can.

FINE:

But I think they are taking important steps and taking this very seriously.

CONYERS:

All right. Thank you so much.

And I recognize Lamar Smith.

SMITH:

Thank you, Mr. Chairman.

Mr. Chairman, I'm hoping my first question won't count against my time.

Mr. Fine, I noticed in reading your bio that when you were a senior in college and co-captain of the basketball team, you were recruited by the San Antonio Spurs. They happen to be my hometown team.

My question is this: Don't you regret not playing for the Spurs...

(LAUGHTER)

... rather than becoming a Rhodes scholar and graduating from Harvard Law School?

CONYERS:

The gentleman's time has expired.

(LAUGHTER)

FINE:

Congressman, I was drafted in the 10th round by the San Antonio Spurs. And if I was maybe a little taller than 5'9", I might have had a chance to play.

So I don't really regret that my future was in the law, rather than professional basketball.

But I tell people who don't believe I actually played basketball when they see me at 5'9", before I started this job as the I.G., I was 6'9".

(LAUGHTER)

SMITH:

Very good answer.

Mr. Fine and Ms. Caproni, let me address a more serious question to both of you all, and it is this: We've unearthed these problems that are recognized and that are being dealt with. And some of the reasons for those problems have already been seen and the practice has been discontinued.

But my question is this: Do you all feel that the problem is with how the law was enforced rather than with the law itself? In other words, if the law were carried out as intended, doesn't that solve our problem?

Mr. Fine, first.

FINE:

You know, Congressman, I'm really not in a position to say what the law should be or if there should be modifications to the law.

My job is to look at the law and look at the application of the law and see the problems that occurred.

I do believe that if the FBI had assiduously and carefully applied the law, we wouldn't have seen as many problems as we have. And it really was unacceptable and inexcusable what happened here.

SMITH:

Ms. Caproni?

CAPRONI:

From our perspective, the problem is not with the law. Although, I would note that unlike other areas that our agents -- where they get these sorts of records, there are very specific rules and they have to wend through those rules. That, in my sense, is our responsibility as the lawyers to make sure that the agents understand what they can do and what they can't do.

CAPRONI:

Again, there is no doubt that the problem with the national security letters was a colossal failure on our part to have adequate internal controls and compliance programs in place.

The laws themselves provide us with a needed tool. And it's a tool that we should use responsibly.

SMITH:

OK, thank you.

Mr. Fine, Ms. Caproni, why are national letters of security -- national security letters important in our investigation of terrorism?

CAPRONI:

They are critical. They are -- national security letters provide us the basic building blocks that we need to build an investigation.

For those of you who had prior criminal AUSA experience -- and I know a number of you did -- you're used to issuing grand jury subpoenas to provide -- to obtain telephone records and banking records.

Frequently, in terrorism investigations, we don't have an open criminal investigation.

In fact, that was one of the things that the 9/11 Commission really encouraged us to do, and this committee encouraged us to do, and the intelligence committees, to move more - - when we're thinking about terrorism case, move from simply a criminal mindset to thinking in intelligence mindset.

So a national security letter is the tool that we use in order to get the basic building blocks of those investigations: again, like phone records for almost every terrorism, financial records when we're building terrorism financing cases.

So without national security letters, our national security investigations would really be stopped before they even got started.

SMITH:

OK, thank you.

Mr. Fine?

FINE:

I do think that they are important investigative tools. They can connect terrorist individuals with terrorist groups. They can find out where terrorist financing can occur. They're indispensable in counterintelligence investigations. And the FBI did tell us, from

folks in the field to headquarters, how important they were to the investigations, and showed us examples of that.

Having said that I think they're important, there needs to be important checks on these tools because they are obtrusive, and there is information that is obtained and retained for significant periods of time.

And so, while they are important investigative tools, there also needs to be appropriate checks on them as well.

SMITH:

Mr. Fine, in your conclusions -- it's the second one -- you say, "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."

SMITH:

What percentage would you guess is that? In other words, what percentage of the problems could have been resolved if they had obtained national security letters?

FINE:

We found instances -- a few instances where they obtained information inappropriately and could not have used a national...

SMITH:

How many of the 739 would you guess that is?

FINE:

Well, the 739 is hard to tell, because they could not tie them to appropriate investigations all the time; and there were many times where they couldn't tell if it was an emergency. So I don't know how many in the 739. That's the most troubling aspect of it.

With regard to the others, the national security letters and the files we reviewed, I'd say we found about seven where there were illegal uses of them where it was attempting to obtain information through confusion, through error, information that they were not entitled to obtain through a national security letter -- either an educational record or obtaining information -- a full credit report in a counterintelligence case, which they're not allowed to obtain; or not using an NSL.

SMITH:

You said seven times?

FINE:

Seven of the ones that we found. And we found in our -- well, seven of the individual ones. And, as you recall, we didn't do a review of every NSL that was issued. We did a small sample of them.

SMITH:

OK. Thank you, Mr. Fine.

Thank you, Mr. Chairman.

CONYERS:

Thank you very much.

The gentleman from New York. Jerry Nadler?

NADLER:

Thank you.

Ms. -- well, Mr. Fine, I suppose: You stated in your report that there were no intentional violations of NSL policy procedure; that these were basically carelessness, but there were no intentional violations. No crimes.

FINE:

Correct.

NADLER:

OK.

But we also read in the report that agents intentionally went around the statute to provide phony information requests to telephone companies based on false statements. For example, the FBI's Communications Analysis Unit went around the NSL statute because it felt that the statute was insufficient, and contracted with the telephone companies to access information directly.

These contracts were approved by the Office of General Counsel and exploited by issuing exigent or emergency letters which -- well, let me ask the general counsel.

What is the statutory basis for an exigent letter? As far as I can tell, there is no basis for it.

CAPRONI:

Well, under 2702, we have the authority to get records from a phone company in an emergency circumstance without a national security letter.

The exigent letters were undoubtedly an inappropriate shortcut to the process, though.

NADLER:

Well, under 2702, if you were going to get information in an emergency, what do you have to do?

CAPRONI:

You simply have to tell the carrier that there's an emergency, explain -- we recommend that you explain to the carrier what the emergency is.

CAPRONI:

And it's then up to the carrier to decide whether or not to provide us records.

So it's not a compulsive system.

NADLER:

It's not a compulsive. But, of course, the carrier has no particular interest in protecting -- if you're looking at my records or you want my records, for example, the phone company has no particular interest in protecting my privacy rights, and I never find out about it, so I can't go to court to protect them. Correct?

CAPRONI:

I don't represent the carriers, but I would disagree with the theory that they have no particular interest in protecting your records. In fact...

NADLER:

What is their interest?

CAPRONI:

In fact, the carriers were diligent in making sure that any record they gave to us they subsequently obtained a national security letter for.

NADLER:

But wait a minute. But Mr. Fine's report says that in many, many instances, hundreds of instances, that never happened.

CAPRONI:

As of right now there are still some numbers that have not received national security letters to back up the requests.

NADLER:

Well, back up years later after the report. But that's backfilling. In other words -- and that's certainly not evidence that the phone companies were diligent in seeking these things. That's saying that after this report was done someone said, "Wow, we got a problem on our hands. We better go get these letters four years later, or three years later." So that's not evidence of what we're talking about.

CAPRONI:

Respectfully, even though I'm not defending their practice, it is not the case that it was only after Mr. Fine's report came out that they were attempting to make sure that the paperwork documentation was appropriate for every record they obtained.

And let me also say...

NADLER:

And you think the paperwork documentation should be done and appropriate.

CAPRONI:

And if it's not, the records are going to come out of our database and be destroyed.

NADLER:

And in this morning's Washington Post it says, "Under past procedures, agents sent exigent circumstances letters to phone companies seeking toll records by asserting there

was an emergency. Then they were expected to issue a grand jury subpoena or national security letter which legally authorized the collection after the fact. Agents often did not follow up with that paperwork, the inspector general's investigation found." That we know.

The new instructions -- which according to The Washington Post were just issued to the FBI -- tell agents there is no need to follow up with national security letters or subpoenas. The agents are also told that the new letter template is the preferred method -- preferred method in emergencies, but that they may make requests orally, with no paperwork sent to phone companies.

So in other words, it appears from this morning's Washington Post that instructions are now being given to the FBI not to bother with any backup documentation after an oral request to the phone companies for records invading people's privacy.

CAPRONI:

No. Quite the contrary.

The instructions are that if they get information based on an oral request -- and just to give an example of why that -- when that might be appropriate. If a child has been kidnapped and the ransom call comes in...

(CROSSTALK)

NADLER:

Oh. I don't -- obviously, in those -- I'm not questioning the need in an emergency like that for getting records right away. Obviously.

(CROSSTALK)

CAPRONI:

... get them on an oral request.

NADLER:

I don't doubt it.

What I'm questioning is that, according to today's Washington Post, the opposite of what the two of you are saying is the case and that now they seem to be saying, "Well, we'll take care of this lack of follow-up by documentation by simply declaring it unnecessary."

CAPRONI:

No, Congressman, that's not the policy.

The policy now is that if a request is going to be made on an emergency basis for records, that has to be documented. It has to be documented in the first instance in the request. But if there is not time to do that so that you need an oral request, then that has to be documented to the file, together with the approval for it.

So it is, again, an internal control to avoid the problem that was existing in CAU, which was "emergency" had become a flexible term...

NADLER:

OK. And I have one final question, and that is to Mr. Fine, just a quick clarification on accessibility of PIN numbers and Social Security numbers of individuals through this process.

On page 73 of your report, there's a discussion of a potential intelligence review board violation because an agent accessed a bank balance by getting a person's bank account and PIN number from the result of a FISA order.

The agent was faulted for not using an NSL, but was not faulted for the fact that the PIN number was readily available.

And the reason I flagged this, because this reference makes clear that through an NSL or a 215 order the government can secretly obtain the PIN number for someone's credit or debit account along with their account number and all their identification.

CONYERS:

The gentleman's time has expired.
Finish.

NADLER:

Well, what limits are there on this and what protections are there on this power to get PIN numbers and credit account numbers?

FINE:

The FBI can get bank records and records like that. There has to be predication for it, and they have to show the need for that.

And that is one of the tools that the FBI has used and can use. And as we pointed out, that's one of the reasons there need to be controls on this.

CONYERS:

The gentleman's time has expired.

The chair turns to the former chairman, Jim Sensenbrenner from Wisconsin, whose letter to the Department of Justice first triggered the inquiries that have flown from this. And I congratulate him and recognize him at this time.

SENSENBRENNER:

Well, thank you very much, Mr. Chairman.

Just by way of background, we did some oversight when I was the chair of the committee, and received a letter in late 2005 that indicated that there were problems with national security letters. And the audit that the inspector general conducted was as a result of a provision that I put in the Patriot Act reauthorization that required this audit to be made, as well as the subsequent audit that Mr. Fine is doing that I'm sure we're going to talk about extensively later when the report is issued.

I'd also like to point out that national security letters were not authorized by the initial Patriot Act in 2001, but have been around since 1986 in legislation that was authored by Senator Patrick Leahy of Vermont, who is the chairman of the Judiciary Committee on the other side of the Capitol.

The Patriot Act reauthorization put in a number of civil liberties protections relative to national security letters because we knew that there were problems afoot and decided that even though NSLs were not a part of the Patriot Act, that they needed to have civil liberties protections.

And I am proud of that work that this committee did, and eventually found its ways into the Patriot Act reauthorization act which was signed by the president in March of last year.

One of the things, Ms. Caproni, that I am really concerned about is that the Justice Department, and the FBI in particular, have come to the Congress repeatedly over the last dozen years asking for administrative subpoena authority, meaning that subpoenas could be issued without judicial supervision.

SENSENBRENNER:

This Congress has repeatedly rejected each and every one of those requests.

Now, a national security letter is kind of like an administrative subpoena, although it is limited to the type of information that can be obtained.

I'd like to know from both of the witnesses whether the FBI simply turned around and used NSLs to get huge amounts of information, after Congress said no again to administrative subpoena authority.

CAPRONI:

No, we didn't.

National security letters are always focused on a particular case. There's no bulk collection via national security letters.

And while our congressional reporting numbers are off, as Mr. Fine correctly found, they are not off by an order of magnitude. That is, that we reported that we collected data on less than 20,000 people a year. While that number may go up, it's not going to go up to above, you know, 200,000.

SENSENBRENNER:

And how can you account for the fact that the number of NSLs that were issued before 9/11 was about 8,000-plus per year, and then it went up to 150,000?

CAPRONI:

I think there are...

SENSENBRENNER:

Do we have that many potential terrorists running around the country? If so, I'm really worried.

CAPRONI:

I think it's a function of two things.
(CROSSTALK)

CAPRONI:

First off, I think it's a function of the fact that, post-9/11, a number of agents were moved into the counterterrorism area and the director directed that no lead in a counterterrorism case would go unpursued.

So there is a directive to agents that they must cover all counterterrorism leads. That's point one.

But I think point two was, because we were focusing much more on an intelligence-driven reaction to counterterrorism threats, the toolbox that we were using was focusing mostly on national security letters, as opposed to the prior reaction, which would have used grand jury subpoenas to get the same records.

SENSENBRENNER:

OK.

Mr. Fine?

FINE:

I agree with Ms. Caproni. Prior to the September 11th attacks, it was rarely used. There were delays in getting them, and they were not following the leads that they would have followed after the 9/11 attacks.

FINE:

After the 9/11 attacks, they were attempting to connect the dots, they were attempting to track down leads. When there are indications from a terrorists overseas that there might be connections to the United States, they try and follow it.

SENSENBRENNER:

My time is running out.

You know, I just make the observation that one of the things that gets people in this town in big trouble is overreaching.

I think that, given your report, Mr. Fine, the FBI has had a gross overreach. What this does is it erodes support for the function that the FBI does to protect all of us from future terrorist attacks.

You know, I hope that this would be a lesson to the FBI that they can't get away with this and expect to maintain public support for the tools that they need to combat terrorism.

Given the way the FBI has acted, I have my doubts. But let this be a warning.

And my time is up.

CONYERS:

The chair recognizes the gentleman from Virginia, Bobby Scott.

SCOTT:

Thank you, Mr. Chairman.

Mr. Fine, you've suggested that there's some confusion in how to work these things. There were, as I understand it, representations that there was an emergency when, in fact,

there was no emergency; and representations at grand jury subpoenas had been issued when, in fact, they had not been issued.

SCOTT:

Is that right?

FINE:

That is correct.

SCOTT:

Has anyone been sanctioned?

FINE:

No, the FBI, as a result of this report, is going and looking at -- a special inspection to look at exactly what happened with this, how the problems occurred and to determine accountability. And I think that is appropriate.

SCOTT:

To your knowledge no one has been sanctioned so far.

FINE:

Not yet, no.

SCOTT:

OK.

Ms. Caproni, you indicated that we need to change our mindset from criminal investigation to intelligence gathering.

CAPRONI:

I'm saying that post-9/11 that's been what the FBI has been charged with doing, is really not thinking of our terrorism investigations as wholly criminal.

SCOTT:

OK, now, when we use these letters, are we obtaining information regarding United States citizens?

CAPRONI:

Sometimes.

SCOTT:

That's a yes?

CAPRONI:

The national security letters...

SCOTT:

Not always, but sometimes.

CAPRONI:

Right, it's about half and half.

SCOTT:

You're using this mindset against United States citizens.

OK, when you get all this information, like Social Security numbers and phone records, how long is this information retained?

CAPRONI:

The issue of retaining national security -- data that's obtained via national security letters is subject to a working group that the DNI is chairing together with the Department of Justice and that we will participate on in terms of how long we should keep it.

As of right now, it's subject to the normal archive rules, and so we keep it for whatever the law under archives requires, which is typically 20 years.

SCOTT:

Twenty years.

Now, how many criminal convictions have you gotten from NSL letters, information -- how much information from NSL letters has resulted in criminal convictions for terrorism-related offenses?

CAPRONI:

That was one of the questions that the I.G. was charged with answering. And I think deriving it is very difficult, because while national security letters are typically used in the beginning of an investigation, we don't tag the data, and so tracing it through to know whether national security data started in a case that ended in an investigation.

SCOTT:

Well, Mr. Fine, can you answer the question?

FINE:

No, we tried to, but you cannot tell how many convictions resulted. It's not specifically segregated or tagged or tied. And when we tried to follow it through the system, it was very hard to do that. So I can't give you a number.

SCOTT:

If somebody said one, would that surprise you? Could you contest that number?

CAPRONI:

I would.

FINE:

I would think it would be higher, but I can't tell you one way or the other.

SCOTT:

What information is obtained through NSL letters that could not have been gotten through going through the normal FISA process, even in emergencies, when there's an after-the-fact process with the FISA Courts?

CAPRONI:

Anything that we can obtain through a national security letter could be obtained from a FISA 215 order.

I would tell this committee that I think if you changed the law in that way, you would be doing grave disservice.

CAPRONI:

It would essentially sink the system.

We issue, as you can tell from the report, thousands of national security letters to get information. We do not have an infrastructure in place to take every one of those to court any more than an AUSA in any district has the infrastructure in place to go to court to get every grand jury subpoena.

It's simply not -- we don't have the infrastructure to do that.

SCOTT:

So you're not getting any information you couldn't get through FISA but just administratively...

CAPRONI:

Well, the Patriot Act...

SCOTT:

You would have a judge looking at what you're doing and not having a process that lacks oversight?

CAPRONI:

Congressman, under the FISA statute, Section 215 of the Patriot Act gave us the authority to get an order for any type of record.

SCOTT:

Well, that's what we're talking about.

Mr. Fine, did I understand that in these cases there's an actual ongoing investigation prior to issuing these letters, or there's not an identifiable investigation ongoing when they issue the letters?

FINE:

It has to be tied to some investigative file. They have to open an investigative file or a threat assessment or preliminary inquiry, a full inquiry. It has to be tied to one of those. It can't be issued out of a control file.

SCOTT:

That's what they're supposed to do. Are they doing that?

FINE:

We found that there were instances where they didn't; that they were issued out of control files and they were not tied to a specific investigation.

SCOTT:

Well, if there's no ongoing investigation, what is the standard for deciding when to issue one and when not?

CAPRONI:

The standard is that it has to be relevant to an authorized investigation.

What Mr. Fine was talking about with the control files is, while it's a difficult situation to understand, those NSLs were -- in fact, they related to an authorized investigation. There was a bureaucratic problem, which nobody likes to hear that it's a bureaucratic problem that we believe we have worked out.

None of the NSLs that were issued out of control files did not relate to an authorized investigation. They all were tied to investigations that were appropriately opened.

CONYERS:

The distinguished gentleman from North Carolina, Howard Coble?

COBLE:

I thank the chairman.

And good to have you all with us.

Mr. Fine, your report recommends a number of changes on the FBI's use and tracking of national security letters. The attorney general issued a press release on March 9th responding to those recommendations.

COBLE:

And I presume each of you is familiar with that report -- are you not? -- the March 9th report.

Let me put this question to each of you: Will those recommendations submitted by the A.G. restore the FBI's accountability for its use of NSLs?

Mr. Fine, let me start with you.

FINE:

I believe that the response to the recommendations and what the FBI and department is doing is appropriate.

Is it sufficient? Is it all that needs to be done? I'm not sure. We'll have to see what the results of those steps are.

We tried to provide recommendations to ensure that these very important but sensitive tools are used in full accord with national security letter authorities, with A.G. guidelines and internal control policies.

They hadn't been in the past. We'll have to see if they are now.

COBLE:

Ms. Caproni?

CAPRONI:

I think we're going to have to work to get the trust of this committee back. And we know that that's what we have to do, and we're going to do it.

COBLE:

Let me ask you this, Ms. Caproni: Can the FBI implement the attorney general's directions within the four months when the A.G. has requested Mr. Fine to report on your progress?

CAPRONI:

I hope so. There's some that are going to require some, sort of, interagency work. But, certainly, we will -- if not, all of them will be fully implemented in four months since we will have made substantial progress.

COBLE:

And you may have address this earlier, Ms. Caproni, but let me put it to you in case you did not: Does the FBI have any discrepancy or challenge with the report that Mr. Fine has issued?

CAPRONI:

No. We accept the report. To the extent we had factual quarrels, we worked those out and either we persuaded them or they persuaded us.

COBLE:

What do you think -- you may not be able to respond to this -- what do you think, Ms. Caproni, are the greatest obstacles that your office faces in implementing the A.G.'s directions?

CAPRONI:

I think that any obstacles there are, the director is going to make sure are removed. I think it's time, it's energy and effort, and we're going to do it.

COBLE:

I thank you both for being here.

Mr. Chairman, if I may. I would like to submit for the record the March 9th press release submitted by the attorney general.

CONYERS:

Without objection, so ordered.

COBLE:

And I thank the chairman, and I yield back my time.

CONYERS:

The other gentleman from...

PROTESTER:

(OFF-MIKE) not any of these FBI (OFF-MIKE)

CONYERS:

I ask the lady to -- no, don't sit down now. I ask you to please excuse yourself from this hearing. No visitors can interrupt a hearing in the Congress.

PROTESTER:

(OFF-MIKE)

CONYERS:

Just a moment.

Would the officers escort this lady out please?

The chair recognizes the other distinguished member from North Carolina, Mr. Mel Watt.

WATT:

Thank you, Mr. Chairman. And I thank the chairman for convening the hearing.

Mr. Fine, I'm looking on page seven of your testimony in which you indicate that you reviewed 293 national security letters in 77 files and found 22 possible violations that had not been identified or reported by the FBI.

WATT:

And I'm trying to extrapolate that, although Ms. Caproni seemed to take some issue with whether that was a reliable sample.

I'm trying to assume for the moment that it is, without trying to figure out how many there would be of the total national security letters that were possible violations.

My formula is I'm starting with 143,000 national security letter requests, on page five. Would that be an appropriate place to start? Or have you done the extrapolation for me?

FINE:

I haven't done it, but there are 143,000 requests. And, as you know, a request -- there can be multiple requests in a letter. So there are approximately 45,000 letters during the time period, with 143,000 requests.

So I think the starting point would be about 44,000 letters during the time period.

WATT:

And if you extrapolated the possible violations out, what would that come to, according to your math?

FINE:

If you're talking about 7 percent, approximately 7 percent of the 293 had a violation. So 7 percent of 44,000 would approximately be about 3,000.

WATT:

So you're telling me...

FINE:

That's quick math; I hope that's correct, but I think it is.

WATT:

It is possible that my FBI and my people who are supposed to be protecting my interests violated the law how many times?

FINE:

Well, I think there are possible violations of either the law, the attorney general guidelines or the FBI's policies several thousand times if you statistically extrapolate. It was a small sample.

FINE:

We didn't think it was skewed or biased. But if it held up for the entire population of files, several thousand; some more serious than others, but that's a lot.

WATT:

Ms. Caproni, why ought not our public be concerned about that kind of disregard of the law and internal process?

CAPRONI:

Well, I think the public should be concerned. We're concerned. And we're going to fix it.

I would say, as Mr. Fine said, the sort of errors range, sort of, on a long continuum of seriousness. The most serious errors that Mr. Fine identified were obtaining full credit reports in counterintelligence cases.

We have had a concerted effort to find all such errors.

WATT:

That's seven of the 22 files, where you say they were real serious violations. Extrapolate that out for me, Mr. Fine.

CAPRONI:

That -- 1 percent...

FINE:

Well, I think, in Ms. Caproni's testimony, she talked about how -- the level of seriousness and which were FBI errors and which were company errors, and came up with the figure that about 1, a little bit over 1 percent of them were serious violations involving FBI errors.

If you extrapolate that to the entire population, that would be about 600 cases of serious FBI misconduct.

WATT:

Ms. Caproni, is there some reason that this committee and the American public shouldn't be concerned about law enforcement violating the law...

CAPRONI:

Again, we are...

WATT:

... 600 times?

CAPRONI:

We are quite concerned about this, Congressman. And we are making every effort to figure out where those errors are, to sequester the material to pull it out of our files, and to destroy it.

We will also take appropriate action...

WATT:

How many files have you all destroyed, based on this investigation, up to this point?

CAPRONI:

When we identified data that we have...

WATT:

Isn't that a number, rather than an explanation?

CAPRONI:

Congressman, I don't know the number. I know that, when we identified data, we have...

WATT:

Has the FBI destroyed any files, up to this point, based on this investigation?

CAPRONI:

We destroy data all the time, when we discover it was improperly collected. So, both outside of Mr. Fine's investigation and he...

WATT:

Have you destroyed any files based on this investigation?

CAPRONI:

Again...

WATT:

Have you destroyed any files based on this investigation?

CAPRONI:

Not a file -- not a file, but we...

WATT:

Have you destroyed any information based on this investigation?

CAPRONI:

Yes.

WATT:

What have you destroyed?

CAPRONI:

The destruction would have been of the full credit reports that were obtained improperly. And I think there was also some telephone...

WATT:

How many is that, Ms. Caproni?

CAPRONI:

It's not much. It's -- but this process is going forward.

WATT:

In these 600 cases that you've identified as possible real serious areas, or several hundred, have -- you intend to prosecute anybody for violating the law?

CAPRONI:

We'll have to look at what the facts are. I'm not going to prejudge what the inspection...

WATT:

How long is it going to take you to look at that?

CONYERS:

The gentleman's time has expired.

CAPRONI:

The inspectors are in the field now, and I think that they will have completed their inspection visit, which is a sampling process, but that we anticipate that they'll have completed it within a week or so.

WATT:

You've got a more reliable sampling process than Mr. Fine...

CAPRONI:

No, it's just bigger. It's bigger and it's across all field offices.

WATT:

Thank you.

CONYERS:

The gentleman from California wants an attorney general for his state.

(LAUGHTER)

Dan Lungren?

LUNGREN:

Thank you very much, Mr. Chairman.

Ms. Caproni, I was one of the ones who have defended the FBI and the Justice Department in the use of these as we went through legislation the last two years. And to say that I'm disappointed doesn't give justice to what I feel about this.

Mr. Fine has said that this is the result of mistakes, carelessness, confusion, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight. That sounds like a report about a first or second grade class.

We're talking about agents of the FBI who are lawyers in many cases, who have college degrees, who have other kinds of education. We're talking about people who have gone through the FBI Academy. We're talking about people who presumably have been trained to go into this. We are how many years past 9/11?

And in response to the question, I believe it was of Mr. -- well, I'm not sure who asked you this, but whether you could get this done in four months, you said you hoped so.

I hope you'll deliver a message that we expect it will be done. I mean, because I don't think if you can't get it done in four months you're going to have to worry about improving your procedures for NSLs, because you probably won't have NSL authority.

I just -- I just want to convey to you how upset many of are who have defended this program and have believe it is necessary to the protection of our country. And you, the FBI, have an obligation, yes, to try and find out who the potential terrorists are, but also to make good on the promise we made to the people of America that the terrorists are not going to succeed by indirection what they can't do by direction, that is destroy the Constitution.

LUNGREN:

And I just -- I'll tell you this. I talked with Mr. Mueller yesterday -- because I've known him for 30 years. He's "Mr. Fix It." He goes in and fixes messes. He's done it all over this government. I've seen his work in San Francisco. I've seen his work here at the Department of Justice.

If I didn't know him, if I didn't know his record, if I didn't know he's the man we put in many places to fix things, I would have no confidence in the FBI right now.

So I hope you'll deliver a message to all your people that it's not good enough to tell us you hope it's going to be done in four months. I hope you're going to deliver a message that it better be done in four months or you're not going to have NSLs to worry about.

And I say that as someone who supports him and will fight on the floor to have that authority given to you if there is proper oversight, but I probably won't get a majority of votes on the House floor if you don't fix it.

So can you tell me you're going to do better than you hope to fix it in four months?

CAPRONI:

Congressman, you're absolutely right. Yes, it will be done.

LUNGREN:

I appreciate that.

Now, Mr. Fine, you're the inspector general for the FBI. I want to congratulate you on what you've done. We say -- we take some satisfaction in your carrying out the authority we gave you, but sometimes that doesn't happen. And we appreciate the job you have done here.

But maybe you won't want to answer this question. Maybe you can help me: How do you explain carelessness, confusion, sloppiness, lack of training, lack of adequate guidance and lack of adequate oversight with the FBI?

I just turned on the television last night and watched one or two or three of these shows that always shows the FBI as being far better than local government -- that little burr under my saddle, because I'm a former A.G. of California. I appreciate the FBI, but how do you explain this?

I'm not sure what would be worse, frankly. At first I was relieved that you said this: "And it wasn't intentional action by the FBI." At least we haven't found that.

I would at first been more worried about that.

LUNGREN:

Now, as I think about this, should I be more worried about the fact that the FBI now, in something as important as NSLs, has marks of carelessness, confusion, sloppiness, lack of training, lack of adequate guidance and lack of adequate oversight?

Is this exceptional in your experience, in your oversight of the FBI?

FINE:

I think the FBI worked hard to get these authorities, but didn't take it seriously enough putting in controls over these authorities. And I think there is often a problem sort of between the receipt of the authority and the execution of that authority. And that's clearly what happened here. And we were very troubled by it.

We've seen problems in the FBI in terms of information technology. In trying to upgrade their information technology we've seen problems. But these are difficult tasks and they are trying to do this as they're changing their mission.

And, quite honestly, there really is no excuse for it. There is no excuse for it.

LUNGREN:

Did you have any question that the NSLs are of some value?

FINE:

Yes, I do believe they're of value.

LUNGREN:

And that if we lost them, that would be a loss?

FINE:

I believe that they're a valuable investigative tool that are indispensable in many cases to counterterrorism and counterintelligence investigations. And that's why it is so troubling that they didn't...

LUNGREN:

So we better fix this so we don't lose a tool that's truly effective?

FINE:

I think they need to fix it.

LUNGREN:

Thank you.

Thank you, Mr. Chairman.

CONYERS:

The gentlelady from Houston, Texas, Sheila Jackson-Lee.

JACKSON-LEE:

Again, Mr. Chairman, my appreciation for your continuing effort of establishing transparency in government.

I welcome both of the witnesses here today and recount just a limited history that troubles me as we find ourselves here today.

I know the good intentions of the witnesses, but certainly I'd need not remind you of the era of McCarthyism and certainly the role that law enforcement played in that misdirected era of the United States of America.

As a young lawyer, I participated in the investigations into the assassination of Dr. Martin Luther King and John F. Kennedy right here in this Congress. And what was

exposed was the extensiveness of the co-intel problem of Dr. Martin Luther King; wrongheadedness, as far as I'm concerned, as it relates to the utilization of protecting this country.

A civil rights leader who happened to be outspoken against the heinous governmental acts of segregation and all of a sudden he became a major target of the Federal Bureau of Investigation, with any number of officers -- agents, if you will -- probing and looking over paperwork that he might have generated.

That smacks, as far as I'm concerned, of where we are today even though, Mr. Inspector General, you've indicated that it has been without malice, without intentions.

And we all know that there is a phrase that says: A journey to a certain place is paved on that road with good intentions.

So I'm not very happy as to where we are today because I argued vigorously about the extensive powers that we were giving to the president of the United States out of fear.

And one thing that the Constitution reminds us, and certainly in the founding fathers, who left a tyrannical society to be free, that tyranny can get the best of us. And lack of control can get the best of us.

So I ask to the general counsel of the FBI: Did you determine what percentages of those letters that were sent without national security letters generated into terrorists responses or terrorist incidences or terrorist prosecutions? I'd be interested in that number.

And why don't you just answer that, yes or no, you have the percentage?

CAPRONI:

I do not.

JACKSON-LEE:

OK. I'd like to get the percentage, frankly.

CAPRONI:

The directorate ordered a special investigation of the whole exigent letter instance, and we will brief this committee when we have the results of that.

JACKSON-LEE:

And I will join my colleague on the other side of the aisle.

How quickly can you get that information?

This is about protecting the Constitution and securing the homeland, two very important jurisdictional responsibilities. And I happen to serve on both committees, Homeland Security and this.

So my question is, how soon can you get those numbers? It makes a real difference to know whether you generated potential terrorist threats that would secure the homeland or whether or not the FBI was on a fishing expedition.

CAPRONI:

Congresswoman, let me assure you that that group was not on a fishing expedition.

But having said that, I understand that my assurance to this committee at this point isn't worth a lot. The Inspection Division is conducting the inquiry. They know that they have to proceed quickly. But I regret I can't tell you when they're going to be done.

But I will make sure that the director understands that you want it done as quickly as possible.

JACKSON-LEE:

And certainly we wish the director well. We would have wanted to have his appearance before this committee, but we do wish him a speedy recovery.

CAPRONI:

Thank you. I'll let him know that.

JACKSON-LEE:

Mr. Inspector General, I assume you will say to me that you don't speculate, but let me quickly ask you a question.

And will you be thinking, the general counsel, on this question?

The president signed on the Patriot Act a signing statement, which indicated that he was going to interpret or have the act interpreted in a manner consistent with the president's constitutional authority to supervise the unitary executive branch and to withhold information.

Just be thinking about that. And I want to know, did that give you a free ride? That's why I have legislation that indicates that agencies should not be running, I must say, amuck because of the signing statements.

Mr. Inspector General, what you looked at. And you've said it has not been intentional. Help me out, however. Don't you believe there should be restraints put in place, strictures put in place? And might the Patriot Act be entirely too broad to even be a valuable tool that would restrain people in balancing both security and, as well, balancing civil liberties?

FINE:

I do believe that there needs to be controls. I do believe that there needs to be a balance, a balance of effective tools to prevent terrorism; at the same time, effective controls on the use of those tools.

And what was most troubling to us was that those controls were not implemented and not followed. And I share the concerns expressed by the members of this committee, and that's why we did the report.

FINE:

We were not -- we were not restricted or limited in what we did.

And I know there was a presidential signing statement, but the department did cooperate with us. We did provide all the information that we had. We provided it in the most unclassified way we could, and the department actually did unclassify a fair amount of this information so that it could be fully aired.

And we also provided a classified report to this committee and other committees describing the additional information.

So we did what we could to identify the problems in this program.

CONYERS:

The gentleman from Florida...

JACKSON-LEE:

Mr. Chairman, could I just let the -- can she answer yes or no on the signing statement? Would you indulge me?

CAPRONI:

The signing statement had absolutely no impact on how we interpret our national security letter authority.

JACKSON-LEE:

I thank you.

CONYERS:

The gentleman from Florida, Mr. Ric Keller?

KELLER:

Thank you, Mr. Chairman.

Ms. Caproni, let me begin with you.

If the FBI didn't have national security letters as an investigative tool, you could get the same information via prosecutor through a grand jury subpoena or by going before a FISA Court and getting a court order, isn't that correct?

CAPRONI:

Yes.

KELLER:

And the concern that you have with those two options is that you essentially don't have the manpower -- I think you said it would, sort of, sink the system.

CAPRONI:

I was responding to a suggestion that all of these should be obtained via court order. If that were the law, that would create substantial obstacles to our national security program.

KELLER:

But that's why you aren't using in all cases the grand jury subpoenas or the FISA Court orders, because you don't have the manpower to do that and still do your investigations.

CAPRONI:

I would say it's perhaps slightly more nuanced than that. On grand jury subpoenas, there are cases where we don't have a criminal case open. so a grand jury subpoena is not an option.

Further, the whole philosophy of making sure that you're thinking -- we're thinking from an intelligence perspective rather than immediately cutting to the chase of a criminal investigation encourages agents to use national security tools versus criminal tools. The grand jury subpoena is a criminal tool.

KELLER:

All right, let me follow up, because the challenge we have is getting this in the strike zone. We want you to have this information that you need as an investigative tool, but we want there to be some sort of check on your authority. And if you use the grand jury subpoena, for example, to get my phone records, I have the ability to move to quash that subpoena and have a judge hear it, correct?

CAPRONI:

You only have the ability to do so if someone tells you that the subpoena has been served, which is not the typical route of a grand jury subpoena.

KELLER:

OK, or if you went before a FISA Court, you have a set of eyes through the FISA Court judge looking at it, correct?

CAPRONI:

That's correct.

KELLER:

In terms of using the national security letter, let's say you served it on my phone company, the phone company's not necessarily looking out for my personal privacy interests, and so there's not a set of eyes looking at it, at least from an individual's perspective, right?

CAPRONI:

And, again, that's the same as with a grand jury subpoena, that's correct.

KELLER:

So all we have really is our inspector general as a check on the controls to make sure that you're applying it in an appropriate way.

CAPRONI:

Well, again, I think this report has told us we internally have to do a far better job at making sure that we are maintaining internal controls over the use of this tool.

CAPRONI:

I fully expect Mr. Fine to come back to visit us in future years, and will dutifully take us to task if we have not accomplished that.

KELLER:

All right.

And, Mr. Fine, imagine a housewife in Orlando, Florida. And she does absolutely nothing relevant to terrorism or espionage. She's never met or spoken with a terrorist or a spy.

Based on your investigation, does she have any reason to worry about national security letters violating her privacy, by looking at her phone records, bank records or Internet search records?

FINE:

I think that there are times when the FBI looks for telephone records of potential terrorists and looks to see who they've contacted or they've been in contact.

Now, it could be intentional contact; it could be inadvertent contact. And as a result of that contact, there can be efforts to look and see what telephone numbers have been called.

Now, if they have had no contact whatsoever with the subject of a potential terrorist investigation, it's less likely that there will be -- the records would be obtained here.

KELLER:

Well, in framing my question, I said no contact, either writing or spoken.

So let me ask you, based on your investigation, were there any situations where you saw national security letters being used when there was no relevance whatsoever to international terrorism or espionage?

FINE:

We couldn't, in our review, look at all the investigative case files and say, "This was -- there was an adequate predicate; there wasn't an adequate predicate."

We looked at how they were used and whether on their face they were improper. So it's impossible for us to say that the relevancy standard was met.

One thing that we did find, however -- and I would note this -- is that, in many cases, the counsel of the FBI field offices, either the chief division counselor or the assistant counsel, did not aggressively and independently look for that. And they're the ones who should be checking on that. They're the ones who need to be sure that there's adequate predicate for this investigation.

And we saw, in many cases, that didn't happen, that they acceded to the wishes of the - - or the arguments of the case agents or the special agents in charge, without independently and aggressively looking at that...

KELLER:

Let me cut you off there because I have one final question.

Ms. Fine (sic), can you give us an example to help make your case, if you have one, as to what's a scenario where a national security letter is your best investigative tool

because, for whatever reason, a grand jury subpoena or a FISA Court order is insufficient?

CAPRONI:

Any time I would say that we were at the very beginning of an investigation -- say, for example, after the London bombings, when the British authorities provided us with telephone numbers of the British bombers, so we were looking to see did we have anyone in the United States that had telephone contact with the London bombers -- in my view, the appropriate way to pursue that investigation is via national security letter.

KELLER:

Because you wouldn't have time under the other options?

CAPRONI:

Well, we wanted to know that very quickly. And, again, I think the American people would want us to know very quickly after the London bombings took place whether we had any cells or groups of people who were tightly related to the London bombers.

So we needed to move very quickly. And, in fact, the investigators did move very quickly on that to figure out who here was connected to there and was it an innocuous connection or was it a dangerous connection.

KELLER:

Thank you.

My time has expired.

CONYERS:

The distinguished gentlelady from Los Angeles, California, Maxine Waters?

WATERS:

Thank you very much, Mr. Chairman. May I ask: Were these witnesses sworn in?

CONYERS:

They were not.

WATERS:

May I respectfully request that they be sworn in?

CONYERS:

Too late.

WATERS:

Then, Mr. Chairman, I suppose we're going to have to rely upon them, particularly the general counsel, continuing to tell us that they're acting within the law.

I shall proceed with my questions.

CONYERS:

If the gentlelady will yield...

WATERS:

Yes.

CONYERS:

... testimony before this committee can constitute a violation in and of itself.
(CROSSTALK)

CONYERS:

A misstatement -- any deliberate misstatements.

WATERS:

Well, I would have preferred that they be under oath. But, however, the chair has made that decision and I shall proceed.

Let me just ask about the use of these exigent letters. As I understand it, these letters are used basically to get around having to get the NSL letters, is that right, Mr. Fine?

FINE:

These letters were used in advance of or in lieu of national security letters, that's right.

WATERS:

And there was information collected as a result of these letters, particularly the operation, I believe, that was set up with the contract with the three telephone companies or telecommunications companies, is that correct?

FINE:

Well, there were contracts with the telephone companies so that they would provide information to the FBI on an expedited basis.

WATERS:

Ms. Caproni, do you still have contracts with those telephone companies, any other telephone companies, or any other private businesses to supply you information in the manner that those companies did?

CAPRONI:

We continue to have contracts with the telephone carriers that obligate us to provide them with appropriate process to get records.

I don't -- I can't answer the balance of your question. I don't know if we have other contracts with other private parties.

The telephone companies, it made sense because of the volume of our requests.

WATERS:

How much do you pay them for the service? How much are the taxpayers paying the telephone companies that they pay to provide them services to spy on us?

CAPRONI:

I don't know what the dollar value of the contracts are.

WATERS:

You have no idea?

CAPRONI:

I actually don't.

WATERS:

You've never heard any discussion about it?

CAPRONI:

I'm sorry, I don't. I just don't know what the amount is.

WATERS:

Information was collected on millions of Americans using this as a tool. Now that you know that they were innocent, they probably should not have been under investigation, has all of this information been purged and gotten rid of?

CAPRONI:

We did not collect records on millions of Americans through...

WATERS:

How did it work?

CAPRONI:

The exigent letters were provided to the carriers, which promised future process. That future process, unfortunately, it was not always promptly provided.

WATERS:

What did they do? What did they do?

CAPRONI:

What did who do?

WATERS:

The companies. How did they mine the information? And did they mine information of innocent people?

CAPRONI:

The carrier has provided us with toll billing information, which was then placed into our databases. There is no connection between their databases and our databases. The information comes out electronically and moves into ours.

But, again, we're talking about -- I believe that the number of numbers at issue, according to the inspector general, is somewhere in the neighborhood of 3,000.

And it is my belief, though, again, we'll have to wait and see what the special inspection finds, that all of those numbers were tied to authorized investigations.

To the extent any were not, the records will be removed from our databases and destroyed.

WATERS:

When will they be removed? How long will it take?

CAPRONI:

Again, I am anticipating that that special inspection will take a couple of weeks, at least, but probably -- I just actually don't want to speculate.

As I have...

WATERS:

Did you have a court order relative to your contracts with these telephone companies?

CAPRONI:

No, ma'am.

WATERS:

Was there a court decision relative to the manner in which information was obtained?

CAPRONI:

The information was obtained from the carriers pursuant to -- it was supposed to be obtained pursuant to the laws of ECPA.

WATERS:

But they were not.

CAPRONI:

Well, again, as Mr. Fine has indicated, there were these exigent letters that were used.

What we're trying very hard to do is to unravel and to make sure that we do not have the records of anyone who -- as to which there was not -- it wasn't relevant to an authorized investigation.

(CROSSTALK)

WATERS:

How long have you been trying to do this?

CAPRONI:

We began the process with them last fall. And we are -- we, within OGC, are to the point that if they cannot demonstrate to our satisfaction very quickly, then any of those records have to be removed from the database and destroyed.

WATERS:

Certificate letters: Are you still issuing certificate letters?

CAPRONI:

No.

WATERS:

When did you stop?

CAPRONI:

Shortly after OGC learned about them, that process was stopped.

We entered into discussions with the Fed, the Federal Reserve Bank, in terms of whether or not it required a national security letter. There was some back and forth between lawyers that the decision was made that they would prefer a national security letter, and we've always now provided them.

WATERS:

So you collected information using these certificate letters. Had that information been destroyed?

CAPRONI:

No.

WATERS:

When are you going to do it?

CAPRONI:

I don't believe we're going to do it.

WATERS:

Why are you going to keep information that was improperly collected on financial records of innocent people? Why would you keep it?

CAPRONI:

One, it's not innocent people. And, second, it wasn't improperly collected.

The Federal Reserve Bank is not directly covered by the right to financial privacy. They can ask for a national security letter, which they now have done. And because they're asking...

WATERS:

Well, why did you stop using certificate letters if they were legal and proper?

CAPRONI:

Because we thought the better process was a national security letter. And the Fed asked us to provide them with national security letters.

WATERS:

How have you determined whether or not the information that you collected was on individuals who were suspicious, guilty, had committed a crime? I mean, how do you determine whether or not these people are innocent and the information should be destroyed?

CONYERS:

The gentlelady's time has expired.
Please answer the question.

CAPRONI:

Certainly.

The issue is whether the information is relevant to an investigation. There are times when we gather information that is relevant to an investigation but it turns out that the person was not engaged, for example, in terrorist financing.

Now, we don't then destroy the information, though the investigation is closed. So it's much like any other information that's gathered during the course of an investigation.

And the issue of whether that policy will continue is a matter that's under discussion by a group that's being chaired by the DNI, in terms of whether we should or we should not continue to retain information that's gathered via national security letters after the investigation is closed.

CONYERS:

The gentleman from Virginia, Mr. J. Randy Forbes?

FORBES:

Thank you, Mr. Chairman.

Mr. Chairman, I hope I can emulate your very calm and fair manner of handling this committee.

And I just want to tell the witnesses what I said at the beginning. I want to thank you both for being here. We know you have a tough job, and we appreciate you coming in here and answering our questions today.

I've listened to the committee as we've gone through this process, and we've had testimony from The Washington Post, we've had testimony from members of the audience, testimony from members of this committee. You're the only witnesses we have here.

And I think that you get the message, both of you, you had it when you came in here, that no one on this committee condones any of these lapses or feels that it's not urgent that they be corrected and corrected as quickly as possible.

We're also grateful that this committee requested this audit, because, Mr. Fine, through your good work we were able to find out what these problems were so that we can correct them.

The other thing, Ms. Caproni, you've been asked to take a lot of messages back to the FBI, all of which are good and valid messages.

But another one I want to ask you to take back today is that, although the FBI messed up in handling the NSLs, I wanted you to take a message back to those agents in the field who I know are working around the clock, they're away from their families a lot of times, and thank them for not messing up on what Mr. Fine said was one of their key missions, and that was to detect and deter terrorism and espionage in this country.

Because if you had messed up on that one, we'd have a lot more people in this room and we'd be a much harsher hearing than what we're having today.

The other question I'd just like to ask either of you to respond to, do either of you have any evidence today that anyone in a supervisory position gave instructions, either expressly or impliedly, to any person under his or her supervision to misuse the NSI.s?

CAPRONI:

Not to my knowledge.

FORBES:

Mr. Fine?

FINE:

We didn't find that evidence. We did not find that there was an intent by people who knew they were misusing it to misuse it. So, no.

On the other hand, we did not do a thorough review of what people up and down the line knew and did. So we reported what we found.

FORBES:

And that's being conducted, as I understand it, now. Is that correct, Ms. Caproni?

CAPRONI:

Correct.

FORBES:

And if you find that information, you'll present that back to the committee, correct?

CAPRONI:

Absolutely.

FORBES:

Second question for either of you: Is there any evidence that any member of the FBI or the Justice Department provided any information, either orally or in writing, to this committee or to Congress which they knew to be inaccurate or false?

CAPRONI:

Not to my knowledge.

FORBES:

Mr. Fine, you don't have that?

FINE:

I don't have that information, no.

FORBES:

And just the balance that we've talked about -- we know the harm that comes from violation of privacy interests of our citizens. That's huge.

But I wish you would go back, Ms. Caproni, and, again, just take a minute and talk about what Mr. Fine has put in here about -- it says that these tools are indispensable to the FBI's mission to detect and deter terrorism and espionage.

We know there's been a lot on your plate since 9/11 and you had to do that. Can you tell us with as much specificity as you can exactly how these NSL letters have helped to do and accomplish that mission?

CAPRONI:

Again, national security letters provide the basic building blocks of an investigation, and starting with phone records. Phone records are critical to the counterterrorism agents to figuring out who is connected to whom. And that permits us to trace foreign terror acts that have occurred, obviously, since 9/11 and trace them in to individuals who are in the United States, and to determine whether those individuals are up to no good or, in fact, there's just an innocent connection.

But for national security letters, I don't know how we would do that.

They've also been absolutely indispensable in the area of terrorist financing. We've done a tremendous amount of work of getting bank records on individuals that we believe were funneling money to foreign terrorist organizations overseas.

And again, without national security letters, I'm not -- you know, could we go through a FISA order? We probably could. But we certainly couldn't do that very efficiently.

So a national security letter is an efficient way for us to get the basic building blocks of an investigation.

FORBES:

Have they stopped any terrorist attacks that you know of that could have possibly happened in the United States? You may not have that information.

CAPRONI:

I'm sorry, I don't.

FORBES:

OK. That's good. Thank you both.

And, Mr. Chairman, I yield back the balance of my time.

CONYERS:

I thank the gentleman.

The chair recognizes Stefan Cohen, the gentleman from Memphis, Tennessee.

COHEN:

Thank you, Mr. Chairman.

Stephen, yes, that's all right.

(LAUGHTER)

But you can call me "Stefan."

(LAUGHTER)

CONYERS:

Stephen.

COHEN:

Thank you, sir.

Mr. Fine, did you do any study of the people whose records were looked at illegally for any similarity in demographics?

FINE:

No. We looked at whether they were U.S. persons or non- U.S. persons. But, within those categories, we did not look at the demographics of those individuals.

COHEN:

Ms. Caproni said they were all within investigations that were ongoing. Did you find that to be true also?

FINE:

We could not verify that they were all connected to an ongoing investigation.

I know the FBI is trying to do that now. But as part of our audit, we could not do all of that.

COHEN:

Do you think it might be a good idea to look at those people, so see if there are any demographic consistencies, if there's a group of the American public that might be looked at in a closer manner than others and that that might...

FINE:

It's possible. That would be quite an undertaking. And one also has to realize a lot of these are not on individuals. They're on telephone numbers and things like that. There are certainly consumer credit reports and other things that do relate to individuals.

So that kind of a review is possible, but it would be incredibly intensive and require additional resources while we're trying to comply with this committee's and the Congress'

directive to do a review of the use of them in 2006 according to the guidelines that were set out here.

COHEN:

Thank you.

Ms. Caproni, you said that these were all tied to investigations. is that correct?

CAPRONI:

I said that I believed they were all tied to investigation, and that's what we're trying to work through with that unit now.

COHEN:

If you find that they're not tied to investigations, could you make a report to this committee of who those individuals were and why their records were sought when they weren't tied to investigations?

CAPRONI:

Yes. We will provide this committee with what we find through the course of the special inspection.

If I could just say, though, based on -- so there's no misunderstanding -- the unit at issue typically gets simply a telephone number. So they don't know -- that's part of what they're charged with finding out is who belongs to this telephone number? What are the toll billing records for this phone number? So the name of the person associated with the phone number is typically not part of what CAU does.

And for the exigent letters, to my knowledge -- though, again, the special inspection will reveal much more in terms of the ins and outs of what they were doing -- they were working off of telephone numbers and not off of names.

COHEN:

In the report, it says that some of these violations demonstrated FBI's agents' confusion and unfamiliarity with the constraints on national security letter authorities. Other violations demonstrated inadequate supervision over the use of these authorities. This is from Mr. Fine's statement.

Ms. Caproni, do you think that this is, maybe, indices of a systemic problem in the FBI, where the agents have confusion and unfamiliarity with other policies and other laws. And if so, are you doing something about it?

CAPRONI:

Congressman, that is exactly what I'm concerned about. And in the discussions that we've had -- and I can tell you that we've had a lot of soul searching at the FBI since then -- this is, you know, we got an F report card when we're just not used to that. So we've had a lot of discussions about this.

And one concern is, are we -- you know, most of the agents grew up, the agents my age in the FBI, all grew up as criminal agents in a system which is transparent, which, if they mess up in the course of an investigation, they're going to be cross-examined, they're going to have a federal district judge yelling at them.

CAPRONI:

The national security side occurs largely without that level of transparency.

And our concern is, and what this report has shown us, is that we have simply got to do a better job making sure that, although the actions that are taken in national security investigations are typically taken in secret and they don't have the transparency of the criminal justice system, that that imposes upon us a far higher obligation to make sure that we have a vigorous compliance system, that we have in place the training that is necessary, that we refrain agents, that when agents are working in this area...

COHEN:

I appreciate that. I think you're getting...

CAPRONI:

... we make sure they know.

COHEN:

I think that's what we need. And I appreciate your candor.

There's some signage in the Capitol, and one of them's a statement by Brandeis -- Louis Brandeis, and something to the effect that the greatest threats to liberty come from insidious men of zeal, well-meaning but without knowledge or understanding.

And I think that you'll find that if our agents, FBI agents, even though well-meaning and zealous, don't know what they're doing, then it's a threat to people having faith in the whole system.

And I hope you'll correct that. And I feel confident you will.

CAPRONI:

You're absolutely correct. And we will.

COHEN:

Thank you.

CONYERS:

I thank the gentleman, Stephen Cohen.

(LAUGHTER)

And the chair recognizes now the gentleman from Virginia, Bob Goodlatte.

GOODLATTE:

Thank you, Mr. Chairman. And thank you for holding this hearing.

And, Ms. Caproni and Mr. Fine, thank you for your testimony today. These are very serious concerns. And we appreciate your helping us understand how they occurred, why they occurred, and what is being done to correct them.

I have several questions I'd like to ask, starting with you, Ms. Caproni.

In Mr. Fine's report, on page eight, paragraph three, he notes: "In addition, we found that the FBI had no policy requiring the retention of signed copies of national security letters. As a result they were unable to conduct a comprehensive audit."

Can you explain why something as important and serious as a national security letter would not have a signed copy retained in the records of the bureau?

CAPRONI:

I can say that there were different processes in different field offices but, no, I can't. I mean, there's no reason why there wasn't a policy that said, "You have to keep a copy of the signed copy."

What we keep, which is typical of how our records are, is the carbon copy, in essence, which is typically initialed.

But no, in the world of Xerox machines, there's no reason why we hadn't told people to hang onto a signed copy.

GOODLATTE:

Mr. Fine, did you draw any further conclusions from that? And do you know why they were not retained? Or is there any...

FINE:

They weren't retained because there wasn't a clear policy that was enforced.

GOODLATTE:

No ulterior motive that you know of?

FINE:

We don't believe there is an ulterior motive. But this was an example of the incredibly sloppy practice that was unacceptable.

GOODLATTE:

I agree.

Let me ask you: When did you first learn of the problem with the FBI's improper use of exigent letters?

FINE:

Well, we began our audit in, as required by the Patriot reauthorization act, around the beginning of 2006. As you can see from this report, there are a lot of issues. And we did interviews and document request and field files.

FINE:

I think, sort of, the first indications that we learned about it were in the spring or summer of last year, but we had to work through those issues.

GOODLATTE:

And who did you learn that from?

FINE:

We learned it from, I believe, people in the Office of General Counsel, the National Security Law Branch of the FBI, about these issues. I think that's the first people we learned it from -- as well as review of documents and e-mails and things like that.

GOODLATTE:

And what steps have you taken to ensure that the practice was stopped?

FINE:

And what steps have we taken? The steps we've taken is to inform the FBI about the unacceptability of this practice, to note it, to report it, to let the people who were in charge of the FBI and the general counsel's office know about it, and make a recommendation that it do stop -- that it does stop.

GOODLATTE:

When did you make that recommendation?

FINE:

I think we made the recommendation when our report was issued to the FBI in draft, and I think that was in either December or January of this year -- December of last year or January of this year.

GOODLATTE:

And, Ms. Caproni, has that practice been stopped?

CAPRONI:

Yes.

GOODLATTE:

And what steps have you taken to ensure that it does not persist in any of the offices of the FBI?

CAPRONI:

Well, first, we're trying to find out whether it did happen in any office other than the unit at headquarters. And we should know that answer probably by the end of this week or sometime next week.

Second thing is, the practice of providing a letter with a promise of future legal process has been banned. And, again, we are also developing a vigorous compliance program to make sure that we don't simply make the rule, but we actually have in place some kind of process to make sure that the rules are being followed.

GOODLATTE:

Current law authorizes a full credit report request for only counterterrorism investigations. The inspector general discovered two instances in the same field office of a full credit report request under counterintelligence investigations.

How is this being corrected?

CAPRONI:

This is being corrected by we -- the deputy director ordered a full audit of every counterintelligence file that has been opened since January 1, 2002. This authority went into effect in the Patriot Act. So realistically we think the earliest one could have been issued would have been 2002.

So they have to review every file since then in which a Fair Credit Reporting Act NSL was issued and find out if they have any full credit reports. If they do, they need to remove them from their files and report it as a potential IOB violation.

Those will, in turn, be reported on to the IOB.

GOODLATTE:

One last question: In at least one instance, a national security letter issued under the Electronic Communications Privacy Act was determined by the inspector general to be seeking content. How was this remedied?

GOODLATTE:

And what steps do you field agents take to delineate between content and transaction information?

CAPRONI:

In that case, there was no need to remedy it because the Internet service provider refused to provide us with any records. So we actually did not have an overcollection.

GOODLATTE:

And have you remedied the...

CAPRONI:

Yes.

GOODLATTE:

... request? I mean, they shouldn't be asking for that. This was a big issue when we wrote the Patriot Act...

CAPRONI:

Correct.

GOODLATTE:

.. and was subject of a great deal of discussion with the administration about making sure that we had a clear line between what could be requested and what could not be requested.

CAPRONI:

The statute defining electronic communication transactions records actually doesn't define the term. And there had traditionally been the debate that says, "So we'll leave it up to the ISP to decide what is content and what is not."

We think that's a trap for the unwary, it's bad for our agents, and that we do better with bright lines.

And so OGC -- we're in the process of making sure that we have a list that makes sense: what is content and what isn't.

In the abstract, that seems like a very clear line. In practice, it is not. There are some difficult issues because some of the answers revolve around how the ISP keeps their records.

So we're working on it. My anticipation is that within the next week or two we will have out to the field, "These records you can seek; these records you cannot seek," and it will be a very bright line.

GOODLATTE:

Thank you, Mr. Chairman.

CONYERS:

The gentleman from Georgia, Mr. Hank Johnson?

JOHNSON:

Thank you, Mr. Chairman.

In these reports that I have read, it indicates that there were three phone companies that the FBI, particularly the FBI Communications Analysis Unit, the CAU, contracted with three telephone companies between May 2003 and March of 2004.

JOHNSON:

Who were those telephone companies?

CAPRONI:

The telephone companies were AT&T, Verizon and MCI, which has now been acquired by Verizon.

JOHNSON:

Now, are those contracts still in force at this time?

CAPRONI:

Yes, they are.

JOHNSON:

And are there any other phone companies that are contracted with the FBI through the Communications Analysis Unit or any other unit of the FBI?

CAPRONI:

Not through the Communications Analysis Unit. Broader than that, I don't know. We may have contracts -- not for this sort of information. We may have other contracts with phone companies, but not like this.

JOHNSON:

And nobody put a gun to these telephone companies' heads and made them sign the contracts, did they?

CAPRONI:

No.

JOHNSON:

They were just simply agreements with the FBI and the phone company.

CAPRONI:

Correct.

From our perspective, because these originated, given the volume of our requests, that this permitted us to get our records very quickly.

JOHNSON:

Well, I understand.

And then the phone companies received compensation for engaging in this contract with the FBI, is that correct?

CAPRONI:

That's correct.

JOHNSON:

And these -- this compensation, was it merely for expenses or was there profit involved, or you have no way of knowing?

CAPRONI:

I don't know.

JOHNSON:

And, really, you don't really care, as long as you get the information, correct?

CAPRONI:

Again, from our perspective, the goal was to get the information in a form that is readily usable for us, so that we don't have -- some phone companies give us paper records. That requires a lot of data entry.

JOHNSON:

All right. I understand.

And earlier in your testimony, ma'am, you stated that the phone companies were responsible for a lot of the errors that are cited in the compliance with the national security letters.

CAPRONI:

We do see third-party errors, correct.

JOHNSON:

You saw a substantial number. And so you are placing upon the phone company the obligation to properly document whether or not there has been a follow-up with an exigent letter.

CAPRONI:

Oh, no, sir. There are two separate things.

I do not excuse our lack of recordkeeping in connection with the exigent letters. They did keep the records, which was fortunate.

JOHNSON:

And it's important to note, Mr. Fine, that your analysis of the FBI's compliance with the Patriot Act found that there were woefully inadequate mechanisms for the collection of data on these national security letters.

JOHNSON:

In other words, the recordkeeping by the FBI was woefully inadequate as far as the issuance and follow-up on these national security letters and also the exigent letters, isn't that correct?

FINE:

We did find serious and widespread misuse and inadequate recordkeeping, absolutely.

JOHNSON:

And do you have any idea, Mr. Fine, how much the telecommunications companies were paid for their so-called contract with the government?

FINE:

I don't know it, no.

JOHNSON:

All right.

Which agency -- can you, Ms. Caproni, provide my office with that information, along with copies of the contracts between the CAU and the phone companies?

CAPRONI:

I have great confidence that we're going to get a number of questions for the record after this, and I'm assuming that will be one of them and we will respond appropriately.

JOHNSON:

Will it take a subpoena for us to get that information?

CAPRONI:

I don't believe so. I don't know what's in the context...

JOHNSON:

Will you provide it...

CAPRONI:

I don't know if there are any sensitive issues...

JOHNSON:

Will you provide it to my office?

CAPRONI:

Again, we'll respond to questions for the record as they come in.

JOHNSON:

All right.

Why is it that, if the NSLs are the FBI's bread-and-butter investigative technique, could the inspector general only identify one terrorism prosecution out of 143,074 people whose letters were -- or who investigatory information was obtained on?

CAPRONI:

Again, Mr. Fine can explain his methodology.

But I think the issue, and the difficulty of that question is that because there was no congressional -- we were not legally obligated to tag the data, so tracing it through is difficult.

JOHNSON:

So one out of 143,000 -- how does that equate into being the bread-and-butter investigative technique for uncovering terrorism by the FBI?

CAPRONI:

Again, we disagree that in only one case did NSL data contribute to a criminal prosecution.

JOHNSON:

But would you say more than 10 or less than 10?

CAPRONI:

I don't know. It is my belief that virtually every...

JOHNSON:

But you don't know?

CAPRONI:

... counterterrorism case that began in its normal course of affairs is likely to have a national security letter used sometime during it.

JOHNSON:

And it's also...

CONYERS:

Time has expired.

JOHNSON:

Thank you.

CONYERS:

And, Mr. Johnson, any records that you request will come to the committee and then you will be advised.

The chair is pleased now to recognize the gentleman from Florida, Mr. Tom Feeney.

FEENEY:

Thank you very much, Mr. Chairman.

And, earlier, Mr. Smith alluded to your illustrious basketball career. I wish. I went to the same high school as Mr. Fine. He graduated a few years before me. And I wish I'd have had a jumpshot like Mr. Fine did, but not nearly so much as I wish I would have been able to hit a fastball like Mr. Reggie Jackson, who graduated a few years before Mr. Fine did.

But we thank you for your work.

By the way, none of us is the most famous graduate, because Benjamin Netanyahu, former prime minister of Israel, is a Cheltenham High grad.

I had to get that plug in.

We are very grateful for your work here, because a lot of us were supporters of the Patriot Act, but only with some serious restrictions. And I guess the first question I want to ask you, to remind people, is that it was the reauthorization of the Patriot Act that actually required the report that you've just completed, is that right?

FINE:

Yes.

FEENEY:

And I hope that not just your report, but the tenor of the questions from supporters of the Patriot Act as well as the critics is being listened to very carefully in the Justice Department and the FBI.

FEENEY:

We have got to get this balance correct.

And nothing could be more critical, because some of the most unthoughtful critics of the Patriot Act candidly will be the first ones when there's another 9/11 and when we didn't get the information accurately ahead of time to stop, maybe not 3,000 or 4,000 people, but 300,000 or 400,000 people -- they'll be the first ones jumping on the administration, the Justice Department and the FBI for not doing its job.

But those of us trying to strike a thoughtful balance between civil liberties and between the need to protect America from this new threat are very, very concerned about what we've heard.

And if the FBI doesn't take this to heart, we will correct the problem. I don't think anybody could have said it better than Jim Sensenbrenner -- again, a supporter of the Patriot Act -- who said that the overreaching that's apparent here within the FBI is going to erode support, if it hasn't already, from very important national security initiatives.

And I would hope that everybody down at Justice is listening, because this is the supporters -- people like Lungren and Feeney and Sensenbrenner -- that are telling you this isn't right, and it can't continue.

Mr. Fine, do you have an opinion as to whether or not the serious problems that you've discovered in initial compliance with the Patriot Act are largely because of ambiguities or poorly structured legislation? Is it statutory language that was the problem largely here, or is it abuses within the FBI in compliance?

FINE:

I don't think it was the statutory language that was ambiguous. I think it was the execution of the policy by the FBI that was woefully inadequate.

FEENEY:

And just to follow up, can you identify or does your -- does your report and investigation lead you to conclude that there are any important statutory improvements we could make?

I realize it's not in your typical arena to give us advice, but are there any specific pieces of advice that you would give the Congress in terms of oversight or statutory reforms here?

FINE:

Well, you're correct: It is not in my arena to do that. What I try and do is present the facts to this committee and Congress, and let the facts lead this committee and Congress to do what they believe is appropriate.

There is one section of the report that does talk about an ambiguity in the meaning of toll billing records. I think there ought to be something done about that, because that was a concern of what that meant, and it should be clarified.

I do think in...

FEENEY:

Could the A.G. do that by opinion?

FINE:

I don't think so. It has to be done by Congress.

I do think that the committee does need to strike a balance and, sort of, balance the need for protections and controls over civil liberties with the need for tools to prevent and detect and deter terrorism.

And that's the difficulty in this task. And that's the real concern that we have about how the FBI implemented this.

FEENEY:

You said you sampled 77 case files, your report indicates. How many case files are there all together, roughly?

FINE:

That I couldn't tell you.

FEENEY:

Do you believe that the 8,850 failed reportings are systemic and that if you extrapolate we'd probably see that elsewhere?

FINE:

I do believe that the files we looked at were a fair sample and that there's no reason to believe that it was skewed or disproportionate. We didn't cherrypick them.

FEENEY:

Do you have any reason to believe that there were more abuses in the 8,850 requests that were not properly reported? Are they any more likely to be abuses of civil liberties or the law or the A.G.'s rules than the requests that were properly recorded?

FINE:

Well, we don't know how many requests were not recorded in the FBI's databases. There were some problems with the database structurally so that things weren't in there. There were delays in entering the database so Congress didn't get the information they wanted.

And when we looked at the files, there were NSLs that were in the files that didn't go into the databases -- approximately, I think it was, 17 percent of the ones we found weren't in the database. Now, that's a significant number.

And now I know the FBI's trying to find them in the database as we speak, but we have no confidence in the accuracy of that database.

FEENEY:

Finally, if I could, Mr. Chairman, Ms. Caproni, you alluded to the culture of the FBI, which was traditionally a crimefighting institution.

Some people have called for an MI5 type of intelligence agency with a different culture. And it might be interesting that you take back the interest that some of us in

Congress have. If the FBI can't change its culture or have a separate culture for intelligence than it has had traditionally, we may very much need a different type of institution to get intelligence right to protect this country on a day-to-day basis.

CAPRONI:

Again, I believe that we can do this. we're going to do this, we can get this right, and we're going to get it right.

FEENEY:

Mr. Chairman, I yield back the balance of my time.

CONYERS:

Thank you. There wasn't any left.
(LAUGHTER)

FEENEY:

That's why I did it.
(LAUGHTER)

CONYERS:

I see.
OK. We're now going to recognize the gentleman from California, Mr. Adam Schiff.

SCHIFF:

Thank you, Mr. Chairman.
Inspector General Fine, you've said that you didn't find that any of the violations were deliberate or intentional.

SCHIFF:

And yet you also report the issuance of blanket NSLs, which, to me, appear to be an effort to cover up what was recognized to be flawed issuance of these exigent letters.

Given that NSL letters are supposed to be case-specific, the NSLs were a blanket violation of the law, weren't they? And how can they be described as unintentional or anything but deliberate?

FINE:

I think what you're referring to, Congressman Schiff, is issuance, of what we've heard about, of blanket NSLs in 2006. We haven't reviewed 2006 yet. We reviewed 2003 to 2005.

We've heard about this. It happened past the review period. And we're concerned about it, and we'll look at that.

SCHIFF:

Well, Ms. Caproni, in your briefing on the Hill last week, you acknowledged that when agents realized that they had been issuing these letters -- these exigent letters saying that

subpoenas were forthcoming when they were never forthcoming, that blanket NSLs were issued as a way of basically trying to clear up or cover up or in other words make up for the failure to use correct processes in the past.

Assuming those are the facts, Inspector, doesn't that show a level of deliberateness and intention that far exceeds what you describe in your report?

FINE:

It certainly shows us concern, and what were they thinking? They clearly were not following the procedures. They clearly were not providing NSLs in advance or even quite reasonably soon thereafter. And it did give us concern.

And there were a lot of people who did this. It was done as a sort of a routine practice, which is in our view completely unacceptable.

But I am -- I think it is important for the FBI to look at this and to interview these people and find out what happened, up and down the line, and we will be looking at it as well in 2006.

SCHIFF:

Well, even the false statements themselves, these exigent letters that said that subpoenas were forthcoming when they weren't -- let me ask you, Ms. Caproni, if a local cop in the city of Burbank, in my district, wrote letters to the phone company or went out and served letters on the phone company saying that federal grand jury subpoenas would be forthcoming, because that local cop wanted to get information, that maybe they couldn't get another way or couldn't get as quickly another way, and you learned about this practice, that cop would be under federal investigation, wouldn't they?

CAPRONI:

Congressman, I really don't know. I don't think you've given me enough facts to say that whether that would or wouldn't be (inaudible).

SCHIFF:

Well, a local police officer, acting under color of federal law, demanding records that - - claiming a federal process that's nonexistent, that wouldn't be an issue for federal investigation?

CAPRONI:

It would certainly be troubling, much as the practices that were taking place in the CAU unit are troubling.

SCHIFF:

Well, you know, having worked in the corruptions section in the U.S. attorney's in L.A., I can tell you, it would be more than troubling. You'd have FBI agents assigned to investigate that local cop.

It doesn't seem to me any different to have FBI agents giving telecommunications providers letters saying that subpoenas are forthcoming when they're not.

When did your office discover that these old New York form letters were being used to get information?

CAPRONI:

Sometime in '06.

SCHIFF:

You know, there's a report in The Washington Post indicates the head of the Communications Analysis Unit, the same unit that drafted most of these letters, warned superiors about the problems in early '05. Do you know anything about that?

CAPRONI:

I know what I've read in the paper. And I know that the Inspection Division is going to do a full inspection of this to see what exactly the unit chief said..

SCHIFF:

Well, I'm asking you beyond what you've read in the paper, and we all know what the I.G.'s going to do.

When did you first learn about the fact that the head of the unit that was drafting these letters had warned superiors?

Do you know who those superiors are?

CAPRONI:

I don't know who he says he warned.

SCHIFF:

Were you warned by him?

CAPRONI:

No.

SCHIFF:

Do you know if anybody in your office was warned by him?

CAPRONI:

I'm not sure that I even necessarily agree that there was a warning.

I don't -- I know that there were -- and I knew generally that there were some what I understood to be bureaucratic issues within that unit. That did not include...

SCHIFF:

You keep on describing these bureaucratic issues. I mean, I find an interesting, kind of, mix of acceptance of responsibility in your statement and denial of responsibility. You seem to accept responsibility for mistakes others made, but acknowledge very little responsibility on behalf of the office you run.

It's primarily your office that is intended to advise the agents about how to comply with the law, particularly in an area where the courts aren't scrutinizing it, as you pointed out, in a process that lacks transparency.

SCHIFF:

Isn't that fundamentally the job of your office?

CAPRONI:

That is fundamentally the job of my office.

CONYERS:

The time of the gentleman has expired.
The chair recognizes Louie Gohmert of Texas.

GOHMERT:

Thank you, Mr. Chairman. I appreciate that.

And I am very pleased that, when we renewed the Patriot Act, we did insert the provision that would require this inspector general report so that we could find out this information that is so very important.

In your report, your indications, Mr. Fine, was the FBI did not provide adequate guidance, adequate controls, adequate training on the use of these sensitive authorities; oversight was inconsistent and insufficient.

And Ms. Caproni, as I understood Director Mueller to say last week that he took responsibility for the lack of training and experience. And that troubled me a great deal.

You'd indicated earlier that people of, I guess, our generation and especially those in the FBI have grown up with accountability, knowing that you're going to be cross-examined. And yet it seems that the overzealousness that Mr. Cohen spoke of often is found in maybe new agents that don't have the time on the ground, the experience.

Wouldn't you agree that's sometimes found in newer agents that lack the training and experience?

CAPRONI:

I don't know in this case if this is an issue of young agents versus old agents. I just don't know the answer to that.

GOHMERT:

Well, are you familiar with the new personnel policy that this director instituted in the FBI that's affectionately -- or unaffectionately -- called the up-or-out policy?

CAPRONI:

Yes, sir, I am.

GOHMERT:

And, you know, I appreciate the director last week saying that, "We welcome more oversight." I appreciate your openness in that regard.

But just in my couple of years of being in Congress is it seemed to me that the FBI, at the very top at least, was not interested in oversight and was set on intimidating anybody that really wanted to pursue that.

I know we have one members of Congress, a former FBI agent, who had indicated to me that because many of us who are very familiar with many FBI agents, we've been hearing that this policy was causing the FBI to lose some of their best supervisors.

The policy basically, as I understand it: Once you've been a supervisor for five years, then you either have to move up to Washington or move out; that you can't be a supervisor; and that we've lost many of our best supervisors, which has put new, inexperienced people in supervisory capacities; and that this was something that Mike Rogers, a former FBI agent, a member of Congress, wanted to talk to someone about. And when he finally was able to get somebody to agree in a supervisory position, he goes back to his office, and his whole office staff is out in the hall because the FBI's come over and done a sweep of his office that was really unnecessary and seemed to be more about intimidation.

GOHMERT:

One of the most outspoken critics of the FBI the last couple years has been Kirk Weldon, and we know that back in September and October, the FBI announces, "Well, gee, he's under investigation," just at a perfect time to get him defeated.

And so, it seems that -- and then we find out there were all these 143,000 letters that were inappropriately requested, well, gee, somebody asks tough questions of FBI personnel, they may very well be the 143,001st letter in the next batch inquiring about their own records; that there has not been this desire for oversight, but there's been quite some intimidation.

So I'm curious, has there been any revisiting of this up-or-out policy to get rid of the best-trained and experienced supervisors, since this lack of training and experience and inadequate guidance and controls has come to light?

CAPRONI:

Congressman, the period of time covered by Mr. Fine was at a period of time when those supervisors would have still been in place.

What we've seen, actually, is that the five-year up-or-out has encouraged people to bid for and seek promotion to higher positions, which has been a net positive.

Now, I know that you have an interest in this, and I know that there were agents who were not happy about the policy. The director feels very strongly that it's an appropriate policy, that it does move good supervisors up in management so that they have a greater span of control, so that we can further benefit from the skill set that they have from their tenure at the bureau.

GOHMERT:

So the answer is no, you're not revisiting the policy, is that your answer?

CAPRONI:

That is correct.

GOHMERT:

OK, just wanted to wade through and get to the answer.

Thank you.

Now, with regard to these letters, it is deeply troubling, because we've been hearing about how important they were in order to get this information, but, you know, we had assurances from everybody, from the A.G. on down, that there was adequate oversight, that there was adequate training.

What suggestions -- since you're not changing any personnel policies, what actual, structural policies within the FBI are going to change to make sure that there would be adequate oversight, just in case the NSLs were allowed in the future?

CAPRONI:

Again, we're going to do substantially more training. Agents are now being placed into career paths and they're going to be required, after their time at Quantico, to return to Quantico for, sort of, a post-graduate period. That will have extensive training for those agents who are on the national security career track.

We're also implementing an auditing practice that will include Department of Justice lawyers, inspectors in the FBI and FBI lawyers to go out and methodically audit the use of the national security letters.

More generally, we are going to create a compliance program within the bureau that will be interdisciplinary and it will make sure that not just with national security letters -- I mean, this is one tool, and it's a tool that, as indicated in this report, we need better controls on.

Our concern is that there may be other things that we need to make sure that we've got better controls on; that we think we've given perfectly clear guidance but, in terms of execution in the field, we've got some problems.

So again, I can't say enough that we take this report extremely seriously. We know we've got issues. We know we've got problems. The director and upper management is absolutely committed that we're going to fix this.

CONYERS:

Time has expired.

GOHMERT:

Thank you, Mr. Chairman.

CONYERS:

Mr. Artur Davis from Alabama is recognized.

DAVIS:

Thank you, Mr. Chairman.

Ms. Caproni, give me your best legal assessment: Will the exclusionary rule apply to any evidence obtained from the improper issuance of these letters?

CAPRONI:

Probably not. But I haven't quite, frankly, given that a great deal of thought.

It's not a Fourth Amendment violation. Exclusionary rule clicks in usually when you've got a Fourth Amendment violation. These records are being held by third-party businesses. So it's not a...

DAVIS:

Why would there not be Fourth Amendment implications if information was obtained as a result of the improper use of federal statutory authority?

CAPRONI:

There would be other problems, but I don't think there's a Fourth Amendment problem.

DAVIS:

Well, do you think that there would be a practical problem -- classic hypothetical -- if a national security letter was improperly issued and it turned out later on there were perhaps a valid basis for the issuance of a warrant? Wouldn't that possibly be compromised, or the emergence of a valid basis later on be compromised by the misuse of an NSL?

CAPRONI:

Again, I'm always leery of responding to hypotheticals. All I can say is there's no -- we are not -- we're not minimizing this. We do not...

DAVIS:

So you're not sure.

Let me follow up on Mr. Schiff's questions.

Are you familiar with the name Bassem Youssef?

CAPRONI:

Yes, sir, I am.

DAVIS:

And Mr. Youssef, as I understand it, was in charge of the Communications Analysis Unit at the bureau, is that right?

CAPRONI:

He was, beginning in the spring of '05.

DAVIS:

And is it accurate that Mr. Youssef raised concerns about the misuse of the NSLs to his superiors?

CAPRONI:

That will have to be determined through the inspection. I do not know the answer to that question.

DAVIS:

Well, you know that that's been reported. And I assume, Mr. Fine, neither you nor Ms. Caproni have any basis to dispute what Mr. Youssef's lawyers are saying about him making that report.

CAPRONI:

I would note that Mr. Youssef is in litigation with the FBI.

DAVIS:

That's not what I asked you. I asked you if you had any basis to dispute the report.

CAPRONI:

I don't know one way or the other...

DAVIS:

Mr. Fine, do you have a basis to dispute that there were complaints raised by the former head of the Communications Analysis Unit?

FINE:

We didn't review what he did...

DAVIS:

Mr. Fine, how is it possible that you did not review the fact that the former head of the unit raised questions about the misuse of the NSLs? How is it remotely possible that was not reviewed?

FINE:

We reviewed what happened in that unit and what was issued. And we did review the discussions that occurred between the Office of General Counsel and...

DAVIS:

Mr. Fine, if the head of the unit, not a secretary, not an intern, not a line officer, but the head of the unit raised concerns, how is it possible that you didn't conduct an interview of Mr. Youssef?

FINE:

We did interview Mr. Youssef. And he did not -- we did not hear that concern from him. And, in fact, from the interview of Mr. Youssef, and also from the review of the records, we saw that he signed a letter. And many...

DAVIS:

Are you disputing that Mr. Youssef complained about the improper issuance of NSLs?

FINE:

To his superiors?

DAVIS:

Yes.

FINE:

I don't know that. I do know...

DAVIS:

Did you ask him?

FINE:

I don't believe -- I don't believe -- I'm not sure whether we asked that question.

DAVIS:

Mr. Fine, how do you possibly not ask the head of the unit if he had any concerns about whether or not the statute was followed? How does that possibly not come up as a question?

FINE:

We did ask him and we questioned him extensively, our attorneys did, about the communications between the Office of General...

DAVIS:

Well, did he say that he raised questions?

FINE:

Not that I'm told, no.

DAVIS:

Not that you remember or not that you're told, which one?

FINE:

Well, I actually didn't -- but let me just check.

DAVIS:

And while you're working on the answer there, Mr. Fine, that rather obvious observation -- I hope that your time to get the answer is not taken out of my time -- if you have the head of the Communications Analysis Unit raising questions about how that unit does its work, it's a little bit amazing to me that you're having to search your memory as to what happened during the interview.

But let me move on.

FINE:

Well, can...

DAVIS:

Is it true that -- well, my time's limited, Mr. Fine -- is it true that Mr. Youssef won the Director of Central Intelligence Award in 1995 for his work infiltrating the group that tried to blow up the Trade Center in 1993?

FINE:

I have heard that.

DAVIS:

Do you have any reason to dispute it?

FINE:

No.

DAVIS:

Is it true that Mr. Youssef was the legal attache to Saudi Arabia during the time of the Khobar Towers bombing was being investigated?

FINE:

I have no reason to dispute that.

DAVIS:

Is it true that Mr. Youssef received outstanding personnel evaluations during the time?

FINE:

I have no reason to dispute that.

DAVIS:

So you have someone who was the head of a unit, who had won awards for his intelligence work, who apparently received superior evaluations, raising concerns about how his unit was being conducted, is that accurate?

FINE:

No, I'm not sure it is accurate. I am...

DAVIS:

What is inaccurate about it?

FINE:

What is inaccurate is that it is not clear what concerns he raised and what he did to stop this. And we did look...

DAVIS:

Well, again, Mr. Fine, how -- I know my time is up, but if the chair will indulge me one question -- I guess I'm searching for what is opaque about this. This gentleman was in a very important position. He was in charge of the unit.

You admit that you interviewed him, but your memory seems foggy as to what you asked him and your memory seems foggy as to whether or not he raised concerns to his superiors and what the concerns were.

I can't imagine a more important interview that you could have conducted.

FINE:

We did conduct that interview, and we went over extensively what the concerns were between him and the General Counsel's Office and the attempts to put the exigent letters...

DAVIS:

Who did he register his concerns with?

CONYERS:

The gentleman's time has just about expired. What I'd like to do is give the inspector general an opportunity to fully finish his answer.

FINE:

We did interview Mr. Youssef, Congressman. And we did not find that, as a result of his actions, that the problems were corrected.

We did find through review of the NSLs that he signed, one, that under his leadership these exigent letters continued, and we saw the efforts between the Office of General Counsel and the CAU to correct this, which did not occur. And we did not see that he put a stop to this.

However, we did not do...

DAVIS:

Was he empowered to put a stop to it?

FINE:

He was the head of the unit.

DAVIS:

What if his superiors didn't consent?

CONYERS:

Just a moment. If my colleague will suspend, I want him to be able to complete his answer before we go on to the next member.

FINE:

We did not see that this practice was stopped during his time.

There was an attempt, to sort of, provide NSLs reasonably soon after the exigent letters. But the exigent letters continued. And it is important to determine who did what, when and how.

FINE:

And the FBI's going to do that. And we are going to look at that very carefully as well.

But our review was not to look at everybody's actions up and down the line, including his or others', to determine what steps each one of them took. What we tried to do is present the problem and the issue and make sure that it stopped as a result of it.

CONYERS:

The gentleman's time has expired.

The chair recognizes Darrell Issa, the gentleman from California.

ISSA:

Thank you, Mr. Chairman.

I guess I'll start off slow and just follow up on Mr. Gohmert for a second.

It does seem amazing that an organization of excellence, as the FBI has historically been, would adopt a "We've got you to the Peter principle achievement level" with this up-or-out policy.

And I would strongly second Mr. Gohmert's -- what I think he was saying, which is if you have people who can be very good at what they do at the beat level, so to speak, of the FBI, in various positions, if they can, in fact, be superb leaders at a level that they're comfortable, and, quite frankly, in a community that they're comfortable living and working in and building more capability, rapport and analysis capability, and you adopt an up-or-out program, what you do is, you force them either to leave because they don't want to leave communities they're attached to, or, quite frankly, you force them to a management level they may not be comfortable with.

It's bad enough that the Army will not allow a great company commander to continue being a company commander and must force them to a staff position somewhere where they endlessly see papers in the hopes that they someday will get a battalion command, but there's a certain amount of history there.

I strongly suggest that the FBI shouldn't have a history that people doing a good job at a given level be forced on.

ISSA:

Having said that, that's a management decision that the next administration, hopefully, will straighten out.

But speaking of management decisions, Mr. Fine, I am -- or General Fine -- I'm a little shocked that, under this attorney general, this administration seems to look at violations of constitutional rights for limited capabilities that we have granted from this body as, as the general counsel said, troubling.

If what the FBI did was done by a private-sector individual, wouldn't the FBI be arresting them? Wouldn't the U.S. attorneys be prosecuting people who played fast and loose with these rules?

FINE:

It depends on the intents involved and what happened.

ISSA:

OK. Let me back up.

If there was a pattern over time, as there is, of abuses piling up to where it was clear that people knew it was happening, even some people clearly made comments that it shouldn't be happening, that it was inconsistent with the law, but it continued, isn't that a poster child for the FBI and the U.S. Attorney's Office criminally prosecuting people who do these things?

FINE:

Again, if there was an intent to do that, as opposed to a pattern of negligence, and also a knowledge of this.

And we went in and looked at it after the fact and found all sorts of problems and compiled a 126-page report which lays it out in pretty black and white. And it is a serious, serious abuse.

But at the time, were they aware of it, did they know about that, and what their intent was -- that's much harder to say.

We did not find evidence of criminal misconduct, but we certainly found evidence...

ISSA:

Well, wait a second. Wait a second.

Piling up evidence that crosses the guidance we allow to pile up that evidence, and you're saying that it's not criminal.

FINE:

Well, you have to look at the individual allegations as well. We looked at the files. We found in many files that there were no abuses. We found in others that there were problems with them.

ISSA:

But there are no prosecutions and no dismissals, is that correct?

FINE:

Well, there are no prosecutions.

The FBI is looking at the evidence right now to see what people knew 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 of this to lay out the problems for the Congress.

ISSA:

Well, I would suspect that I join the chairman and many members on both sides of the aisle in saying I have serious doubts about whether or not the Congress can continue to extend capabilities that are not 100 percent adhered to and there are no significant results when they're not adhered to, and then not feel that what we're doing is giving the FBI the ability to violate people's constitutional rights.

And, you know, I heard today, "Well, geez, we wouldn't exclude this" --and Congressman Schiff brought it out -- "we won't exclude this information, even though we played fast and loose. And we won't dismiss and we won't prosecute."

Well, with all due respect, from the attorney general on down, you should be ashamed of yourself.

We stretched what we could give in the Patriot Act. We stretched to try to give you the tools necessary to make America safe. And it is very, very clear that you've abused that trust.

And when the reauthorization of the Patriot Act comes up or any bill coming down the pike, if you lose some of these tools, America may be less safe, but the Constitution will be more secure. And it will be because of your failure to deal with this in a serious fashion.

I yield back.

CONYERS:

Thank you very much.

The chair recognizes Keith Ellison, the gentleman from Minnesota.

ELLISON:

Thank you, Mr. Chair.

Mr. Fine, I want to talk to you about your report recommendations, starting with the exigent letters.

Wouldn't it be better, simply, to adopt the FBI's current practice of simply banning the use of exigent letters? I noticed that in your recommendations -- or in what I believe are your recommendations -- your suggestion is to take steps that the FBI not improperly use the letters. But why not just say: "No exigent letters"?

FINE:

Well, there shouldn't be an exigent letter of the sort that they use. There is a process under the statute to get emergency information under certain conditions. And that's the way they ought to do it. So that is a proper use of such a request.

They surely should ban the way they did it in the past.

ELLISON:

And that would be a change by statute or a rule change?

FINE:

Well, it doesn't need to be a statute. There is a statute that allows voluntary disclosure if there is an imminent threat and danger to the safety of an individual or others.

And if there is that exigent circumstance, they can get the information and should use such a letter.

But what they shouldn't do is combine it with an NSL, the way they did in the past. They ought to completely separate that and follow the statute..

ELLISON:

Right.

So what you're saying is that if the practice in which the FBI was using the exigent letters combined with the NSL, if the statute were properly followed, then there wouldn't be the problem that we see today, is that right?

FINE:

That's correct.

ELLISON:

Now, what sort of sanctions do you think should be applied, given the way that the FBI did use the NSL and the exigent letters?

FINE:

I think the FBI ought to look at this and look at the individuals involved and find out if they inappropriately and knowingly misused the authorities. They ought to take appropriate action against individuals, either management individuals who allowed it to occur or individuals in the field. And if they had poor performance, that ought to be assessed as well.

So I think that ought to be something that the FBI is looking at. But I don't think they ought to say, simply because there was a misuse of the statute inadvertently, that that would necessarily require misconduct charges against them.

ELLISON:

Right.

Well, you know, part of the problem here is the very nature of the act that allows for the expanded use of the NSL is below the radar; it's not subjected to neutral.

And so it by nature lacks transparency, which is why people are so upset that the abuses took place.

But I guess my next question is -- another recommendation that you have made is that there be greater control files for the NSLs. How would you envision that working?

FINE:

There should be greater controls on the use of NSLs. They ought to make sure that the people know when they can be used and under what statute they can be used. There need to be signed copies of the NSLs so that there can be an audit trail. They have to be connected to an investigative file, not a control file.

ELLISON:

Excuse me -- I'm sorry, Mr. Fine. Do you see this as essentially a training problem?

FINE:

I think it's a training problem. I think it's a supervision problem. I think it's an oversight problem. And I think it's a lack of adequate internal controls in auditing problem as well.

ELLISON:

Now, that brings me to a few questions I had for Ms. Caproni.

Ms. Caproni, do you have a staff to make all the changes that are needed in order to have this program work properly?

CAPRONI:

I would always like more resources.

ELLISON:

No, I'm asking you -- that's not my point.

My question is: In order to -- we could just simply go back to the status quo ante, back to the pre-Patriot Act, where NSLs were authorized but not the expanded use of them that we have now. That could be one way to simply solve this problem.

But my question is: At this time, do you have the staff to provide the training, provide the controls that are called for by the recommendations?

CAPRONI:

I do. We're going to get some more staff that we've already discussed. We're going to get some more analytic help, because we think that some of this would have been detected if we had had good analytic help so that we could see trends.

But I think that we have enough lawyers. I think we can do what needs to be done. We're going to have assistance from Department of Justice lawyers for some of this, but I think we have sufficient resources.

ELLISON:

Ms. Caproni? If you have the sufficient resources, why didn't you use them before?

ELLISON:

I mean, I guess the question that comes up in my mind is that you either don't have the resources to effectuate the changes that have been recommended, or you do; and if you do, why weren't they applied?

CAPRONI:

This report told us a lot that we just didn't now. I mean, I will fall on that sword again, which is, we learned a lot from this report, and we're going to make changes.

I think I've got the personnel to do it. I think we've got the resources. We're going to make the resources available. This is important to us. It is important to us to regain the confidence of the American people and to regain the confidence of this committee. You're one of our oversight committees and you're very important to us.

So we're not -- trust me, I'm not happy that we have this report and that I'm in a position of saying, you know, we failed.

ELLISON:

Excuse me, Ms. Caproni, if I could just go back to Mr. Fine.

Mr. Fine, one of the changes that was made in the Patriot Act was to say, I think, people other than headquarters officials could issue these letters.

Should the authority for issuance of the letters be retracted to what it was before the Patriot Act?

FINE:

I'm not sure of that, and I don't want to necessarily give legislation that should occur.

I do think it's important, if that authority is out there, that it has to be overseen.

And bringing things back to headquarters may or may not be the answer. As you recall in the September 11th attacks with the Moussaoui case, one of the concerns was headquarters was controlling the field too much.

And so, there are considerations on both sides of this issue. I do think that when it does go out there, it has to be used appropriately and overseen appropriately.

ELLISON:

But if you had a narrower route through which these letters were authorized, wouldn't you have greater accountability?

FINE:

You could. You could have greater accountability. On the other hand, the effectiveness could be diminished significantly.

So I think that's the balance that has to be struck, Congressman.

CONYERS:

Time of the gentleman has expired.

But I would like to say to Mr. Ellison, he's raised the point that we need to try to figure out at this hearing: Are there in existence the resources that are required and needed to reveal all of these people who have been abused or violated by this system?

CONYERS:

For this hearing to close down with the gentleman from California, Mr. Berman, who will be recognized next, without us having figured out, for example, that we don't have anywhere near the resources, as I've been talking with the gentleman from California, Mr. Lungren, about, either in the Federal Bureau of Investigation or in the Office of the Inspector General.

If resources don't exist here, we may end up very well correcting everything from this point on, but how many thousands of people will have been violated that will -- we'll all be saying from now on, "Not to worry. It's all over with."

And that is a troubling consideration, Mr. Lungren, that we've had under discussion, that I'm still looking for the answer to.

So I recognize the gentleman from California, Mr. Berman.

BERMAN:

Thank you very much, Mr. Chairman.

Mr. Fine. Section 126 (a) of the Patriot Act requires that not later than one year after the date of enactment of this act, the attorney general shall submit to Congress a report on any initiative of the Department of Justice that uses or is intended to develop pattern-based data mining technology.

The one-year deadline expired March 9th of this year. To my knowledge, we haven't received this report. Can you give us an update on the progress of this report?

FINE:

From the attorney general? No, I don't -- I can't give you progress. That's not my office.

But I certainly can bring back that question to the department.

BERMAN:

But I thought...

CAPRONI:

Congressman, I, unfortunately, can tell you. Yes, it was not submitted on time. I think we sent a letter indicating that. It's still being worked on. I saw a draft going back across between us and DOJ. So it's being worked on.

BERMAN:

OK, well, then, let me ask you: As I understand the audit that the inspector general has undertaken, information from the national security letters is routinely added to the FBI's internal automated case system, which has about 34,000 authorized users, and then, is periodically downloaded into the investigative data warehouse, which has approximately 12,000 users.

Is it possible that other agencies of the federal government or anywhere are using information in that investigative data warehouse for data mining purposes?

CAPRONI:

For data mining purposes -- I don't know the answer to that.

I mean, they could get access to it as appropriate for their agency.

BERMAN:

So it is possible.

CAPRONI:

I don't know the answer. I don't know.

BERMAN:

You don't know if it's possible or you don't know if they are?

CAPRONI:

I don't know what they're doing with it. And I don't know what rule and restrictions govern them, so I just can't answer that question.

BERMAN:

Well, let me get one thing clear. Maybe I'm under -- is the report that we are awaiting an inspector general's report or an attorney general's report?

CAPRONI:

It's attorney general.

BERMAN:

Attorney general's report. All right.

So will that report include data mining of information in the investigative data warehouse by agencies not within the Justice Department -- this report that you've seen circulating, will it include data mining of information by other agencies from the Justice Department's Investigative Data Warehouse?

CAPRONI:

No, it does not. But I don't know whether that means that no such that no such activities are occurring or because it's not within the scope of the request.

BERMAN:

Well, we think -- since I was involved in this language -- we think that since the database is under the purview of the Department of Justice, use of it by other agencies would be included in that report, under Section 126(a).

CAPRONI:

I will make sure that the people at DOJ understand that that's your interpretation of it. I just, unfortunately, I've been in the world of NSL and this report, and I haven't been in the world of the data mining report, so I just haven't read it. So that's why I can't answer your question.

BERMAN:

So you have not been personally involved, then, in determining whether other agencies are being cooperative on how they're using the data from the IDW. I take it you don't...

CAPRONI:

I have not. I just haven't been involved in it.

BERMAN:

If you, subsequent to this hearing, could get that information and pass it on to me, I'd be very grateful.

CAPRONI:

Certainly...

BERMAN:

The information about whether the report will talk about other agencies' use of the Justice Department's Investigative Data Warehouse for data mining purposes.

CAPRONI:

Again, I will make sure that the department understands your position.

BERMAN:

Thank you.

(UNKNOWN)

Will the gentleman yield to me?

BERMAN:

I'd be happy to.

(UNKNOWN)

To ask a question.

Ms. Caproni, one question just came to my mind, and that is, part of this testimony today has talked about how agents in the field and special agents in charge in the field didn't get the proper legal advice from, I presume, people that report to you, that they were not challenged as to the legal sufficiency of the NSLs or the exigent letters.

Is that correct?

CAPRONI:

Let me -- I think that comment was relative to the lawyers in the field who actually do not report to me.

(UNKNOWN)

Who do they report to?

CAPRONI:

They report to the special agents in charge.

They report to their field office head. That's one of the things that Mr. Fine has suggested that we look at, and that is actively under discussion at the bureau right now, whether that reporting structure should change.

(UNKNOWN)

So they don't report to you at all?

CAPRONI:

No, sir, they do not.

(UNKNOWN)

So they were on their own in the advice they were giving of a legal nature to the agents and the special agents in charge to whom they report.

CAPRONI:

On a reporting basis, they do not report to me. I do not supervise them. I am in charge of the legal program. So we provide the CDCs -- that's their title -- we provide them with substantial legal advice, and they frequently call us when they have questions. But I do not rate them, and they do not report to me.

I don't hire them; I don't fire them.

(UNKNOWN)

I know, but what I'm trying to figure out is if these attorneys report to the SAC, does that make it more difficult for them to tell the SAC that he or she's wrong when they're asking for one of these letters?

CAPRONI:

That's the concern that Mr. Fine has raised. I mean, I...

(UNKNOWN)

Well, do you share that concern?

CAPRONI:

I do share that concern.

(UNKNOWN)

And could that be one of the real problems we've got here?

CAPRONI:

I will say there are arguments both ways, Congressman. It is not -- and the reason I say that is because I report to the director of the FBI, and I don't have any problem telling the director of the FBI my legal advice. And if he doesn't like it, it's still my legal advice. That's what the CDCs should be doing. But whether they...

(UNKNOWN)

But at least my experience has been SACs are pretty important people in their various offices and most people generally think they're the top dog. And we have this problem where, apparently, good legal advice either was not given or not accepted, and maybe that is something we ought to look at, if you folks won't look at it.

CAPRONI:

Again, we are actively looking at that very question, of whether the CDC reporting structure should change.

(UNKNOWN)

And I thank the gentleman from California for yielding, although he's not here to receive it back.

CONYERS:

I thank you all.

The gentleman from Minnesota had one last question that I've agreed to entertain, if you will.

ELLISON:

Thank you, Mr. Chair.

My question is, of all the letters that have been issued and all the inaccurate and improper data that has been sent forth, clearly some information came back. And in the cases where individual's information was obtained in violation of the rules and statutes, what has happened? Have these individuals been notified? What recourse do they have? What's the story on the people?

CAPRONI:

The people are not notified. The records are removed from our databases and the records are destroyed.

FINE:

That's correct.

CONYERS:

Thank you very much.

Ladies and gentlemen, this has been an excellent hearing. We thank the witnesses for a continued and extended period of examination. We'll all be working together.

There are five legislative days in which members may submit additional questions to you, and send them back as soon as you can.

CONYERS:

We also want to enter into the record Caroline Fredrickson's statement on behalf of the American Civil Liberties Union; Congressman Coble's Department of Justice fact sheet release.

We also have the New York Times, which officially alerted FBI to rules abuse two years ago, dated March 18. And we also have a letter being hand-delivered to the general counsel, dated today, March 20th, which asks her for additional information.

The record will be open for five additional days. And without any further business before the committee, the hearing is adjourned. We thank you for your attendance.



NSL GUIDANCE BY NSLB

DATE:	TO:	SUMMARY
10-26-2001	EC: All Divisions	Summarizes recent changes to FCI/IT legal authorities relating to NSLs, and describes implementation procedures. <ul style="list-style-type: none">- Advises of 2001 Patriot Act signing- States and explains new standard predication- Explains statutory delegation authority- includes redline version and clean version of 3 statutes governing NSLs (ECPA, RFPA, FCRA)
10-1-2003	EC: FO, CTD, CD	Guidance on preparation, approval and service of NSLs to obtain Credit Reports in IT cases pursuant to 15 U.S.C. § 1681v of FCRA. <ul style="list-style-type: none">- Introduction to Procuring Credit Information- General Policy on the Use of NSL Authority- The Mechanics of Producing NSLs- NSL Preparation Assistance
3-4-2005 b6 b7C	Email to CDCs from <div style="border: 1px solid black; width: 100px; height: 20px; margin-top: 5px;"></div>	Full credit reports in CI cases are available through grand jury subpoenas Followup to email sent 2-25-2005 which stated that full credit reports in FCI cases with no nexus to terrorism is inappropriate. No 1681v full credit report in a CI matter but can get a 1681u NSL for limited credit information.
5-27-2005	EC: All FO, CTD, CD, CYD	Guidance on change to NSLs to allow for a return date. Due to problems receiving information requested through NSLs in a less than timely fashion, OGC opines: <ul style="list-style-type: none">- NSLs may contain a return date which info must be provided.- Date must be reasonable & not oppressive, but should also account for how quickly the info is needed.- Actual time allotted is an operational call.- Suggest date be stated in terms of time that has elapsed since the NSL was served upon the recipient.- Absent extraordinary circumstances, OGC suggests a recipient be given at least 10 business days to produce- Suggestion of where return date should be inserted until OGC model is updated.

6-29-2005	<p>EC: All FO, CTD, CD, CYD</p> <p>(EC also sent via email to CDCs by [redacted] on 7/1/05)</p>	<p>Provides revised guidance on service of NSLs and the use of approved delivery services. In the past, OGC has opined that NSLs should be personally served or secure faxed to recipient, and responsive information personally delivered or secure faxed (extensive discussion on security issues in EC). Due to delays as a result of this policy, OGC revises restrictions on service as follows:</p> <ul style="list-style-type: none"> - Use of controlled delivery services (such as USPS & FedEx) to serve NSLs upon recipients now allowed to designated person. - Use of controlled delivery services to return responsive information to FBI. <p>Prohibition on use of non secure fax to serve NSLs and return responsive information to FBI remains unchanged.</p>
7-22-2005	<p>Email to CDCs from [redacted]</p>	<p>Email sending out the new NSL narrative that would be placed on our website.</p>
8-22-2005	<p>Email to CDCs from [redacted]</p>	<p>Regarding need to have a lead to NSL.B for us to report to congress; do not need to reference the 66 NSL file number anymore.</p>
8-25-2005	<p>EC: FO, Legats, CTD, CRIM, CYD, CTD</p>	<p>Emergency Disclosure Provision for information from Service providers under 18 U.S.C. § 2702(b). EC outlines emergency disclosure provision and provides a sample letter. Lays out approval requirements.</p>
11-10-2005	<p>Email to CDCs from [redacted]</p>	<p>Regarding standard that should be applied in getting NSLs - we generally cannot get second generation calls unless we know something about first generation calls.</p>
11-22-2005	<p>Email to CDCs from [redacted]</p>	<p>Improper NSL collection Provides stopgap measures on how to handle information on what to do if FBI obtains information improperly from issuance of an NSL, whether it be from FBI mistake or carrier mistake. - seal & sequester; remove any information uploaded into ACS.</p>
2-17-2006	<p>Email to CDCs from [redacted]</p>	<p>Advising CDCs not to hesitate in requiring more facts to support an NSL. EC forms on our website were changed to reflect that the agent had to give a full explanation of the investigation, not just a barebones explanation.</p>

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3-9-2006	<p>EC: All Divisions from the Director</p> <p>3-9-2006 new Standard NSLs and ECS sent out via email to SACs & CDCs</p> <p>email sent to CDCs on 3 16 2006 advising them of new delegations under the new Patriot Act.</p>	<p>Inform of delegation of: signature authority for NSLs; non-disclosure certification authority; non-disclosure recertification authority.</p> <p>2005 USAPA IRA enacted 3-9-06 provides for procedural changes in the issuance of NSLs:</p> <ul style="list-style-type: none"> - FBI must certify that certain harm may come if the NSL recipient disclosed the request. - If NSL is challenged more than one year later, FBI must recertify that certain harm may come if NSL request disclosed. - Recipient of NSL can challenge receipt of NSL. - FBI has explicit enforcement authority and contempt penalties that attach to unlawful noncompliance with NSLs. <p>EC includes director's delegations of authority to sign NSLs, make the initial non-disclosure certification and any necessary subsequent non-disclosure recertification.</p>
3-16-2006	<p>Email from [redacted]</p>	<p>Email requesting that 7 NSL forms be replaced on website.</p>
3-20-2006	<p>EC: FO, CTD, CD, CYD</p>	<p>Guidance on service of NSLs by fax, and follow-up EC on expansion of approved methods of delivering NSLs. Use of non-secure fax is now permissible by FBI in its service of an NSL upon the recipient. EC outlines conditions to do this.</p> <p>The same is not true of faxing of NSL return information.</p>
3-21-2006	<p>Email to CDCs from [redacted]</p>	<p>Classification guidelines regarding all NSLs. Generally all NSLs should be declassified automatically in 10 years.</p>
4-5-2006	<p>Email to CDCs from [redacted]</p>	<p>email on IOBs and issuance of NSLs</p>
4-7-2006	<p>Email to CDCs from [redacted]</p>	<p>Email stating current IOB policy, including with respect to receiving information pursuant to an NSL that was not sought by the NSL.</p>
4-11-2006	<p>EC: CTD, CD, CYD, FO</p> <p>email with EC sent 5-2-2006</p>	<p>FBI Policy re: reimbursement of costs to recipients of NSLs.</p> <p>Details requirements, or lack thereof, in the 4 statutes that provide for issuances of NSLs.</p> <p>Touches on current variations in cost reimbursement policies among field offices.</p> <p>Provides policy on reimbursement costs incurred by recipients of NSLs under ECPA, and FCRA §§ 1681v, 1681u.</p>
4-14-2006	<p>Email to CDCs from [redacted]</p>	<p>Email of an example of what needs to be in an EC for more accuracy in Congressional reporting.</p>

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4-21-2006	Email to CDCs from [REDACTED]	Email sent out documenting a change in the standard attachment for telephone billing records so that it is clear what we consider "toll billing records;" so that we get additional relevant information; and to obviate some potential IOBs where we get additional account information we didn't ask for.
5-31-2006	Email to CDCs from [REDACTED]	In response to carriers giving us more than we asked for because of convenience, we changed the transaction record attachment sent with NSLs.
10-27-2006	Email from [REDACTED]	email to change narratives on website with respect to NSLs.
10-31-2006	Email to CDCs from [REDACTED]	Reiterating importance of including the following in NSL ECS: whether subject is USP or non-USP; and what kind of NSL is being issued. These details are important for Congressional reporting requirements.
11-16-2006	EC: All Divisions	Provides revised procedures on IOBs. Details potential IOBs involving NSLs and set forth procedures on sequestering overcollected material.
12-7-2006	Email to CDCs from [REDACTED]	OGC believes Congressional reporting requirements apply to the subject of the NSL even though it is unclear that NSL ECS have only been reporting the USP status of the target of the investigation.
12-8-2006 b6 b7C	Email to CDCs from [REDACTED] on behalf of DGC Julie Thomas	FBI should not issue NSLs in cases involving leaks to the media..
1-3-2007	EC: FOs, CTD, CD, Cyber	NSL-derived information should be reviewed before being uploaded.
2-23-2007	EC: FOs, CTD, CD, Cyber	Provided guidance requiring NSL authorizing ECs to cite the investigative case file to which the request information relates.
3-1-2007	EC: All Divisions	Provided guidance on the appropriate use of 18 USC 2702 emergency disclosure provision. Required use of "exigent letters" to cease.
3-5-2007	Email to all CDCs from [REDACTED]	Informed CDCs of update to NSL website reflecting change to narrative on reporting requirements.
3-5-2007	EC: FOs, CTD, CD, Cyber	1681v NSLs cannot be obtained for counterintelligence investigations. EC required a review of NSLs to determine whether full credit reports were obtained through NSLs for counterintelligence investigations.
3-9-2007	EC: All Divisions from RMD	Interim guidance on the retention of NSLs.
3-19-2007	EC: All Field Offices	Requirement of a monthly count of NSLs by field office.

3-21-2007	Email to all CDCs from [redacted]	Guidance on IOB Issues Relating to the Inspection Division's Audit.
3-28-2007	Email to all CDCs from [redacted]	Additional guidance related to IOB issues.
4-04-2007	EC: All field offices	Guidance on CDC handling of overcollected information in the context of an NSL.
4-13-2007	Email to all CDCs from [redacted]	Informed CDCs of changes to the NSL website regarding model cover ECs.

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From: [redacted] (OGC) (FBI)
Sent: Friday, March 23, 2007 4:31 PM
To: [redacted] (OGC) (FBI); [redacted] (OGC) (FBI)
Cc: THOMAS, JULIE F. (OGC) (FBI)
Subject: RE: DOJ Testimony (Wainstein) for HPSCI Hrg; Deadline IMMEDIATE - TODAY, 3/23 5:30pm (FIRM) RFC

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NON-RECORD

Please see attached.



Wainstein
mt-HSP.doc (93 KB)

-----Original Message-----

From: [redacted] (OGC) (FBI)
Sent: Friday, March 23, 2007 3:48 PM
To: [redacted] (OGC) (FBI); [redacted] (OGC) (FBI)
Cc: THOMAS, JULIE F. (OGC) (FBI)
Subject: HOT: DOJ Testimony (Wainstein) for HPSCI Hrg; Deadline IMMEDIATE - TODAY, 3/23 5:30pm (FIRM) RFC

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Importance: High

UNCLASSIFIED
NON-RECORD



Recommend that we look at this draft NSL testimony ASAP.

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Deadline is this afternoon.



-----Original Message-----

From: [redacted] (DO) (FBI)
Sent: Friday, March 23, 2007 3:37 PM
To: KALISCH, ELEN P. (OCA) (FBI); [redacted] (OCA) (FBI); [redacted] (CD)



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(OGC)(FBI); CAPRONI, VALERIE E. (OGC) (FBI); [redacted] (OGC) (FBI);
LAMMERT, ELAINE N. (OGC) (FBI); [redacted] (OGC) (FBI);
Cc: [redacted] (DO) (FBI); [redacted] (DO) (FBI); [redacted] (DO) (FBI); [redacted] (DO) (FBI);
(FBI); [redacted] (DO) (FBI); [redacted] (DO) (FBI); [redacted] (DO) (FBI); [redacted] (DO) (FBI);

Subject: DOJ Testimony (Wainstein) for House Intelligence Committee (HPSCI) Hrg on March 28th; Deadline IMMEDIATE - TODAY, 3/23 5:30pm (FIRM) RFC

Importance: High

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<< File: 070323 DOJ Wainstein NatSecLtr03 doc.doc >>

The attached testimony is being provided for your review.

RE: Statement of Kenneth Wainstein, Assistant AG, National Security Division, Dept of Justice, on the FBI's use of NSIs and the IG's recent report; Hearing is before the House Permanent Select Committee on Intelligence (HPSCI) on March 28th

If you feel there is someone else who should see this and who has not been included, PLEASE forward it to them and then let me know that I should add them on to the lists for future distribution.

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If you have comments, please provide them IN WORD FORMAT ONLY to [redacted] in OCA with a cc to [redacted] Please attach your comments as a separate document to your reply.

- Please indicate if your division is in favor or opposed to the testimony, as well as the reasons for your division's position.
- If your division opposes the testimony fully or in part, but believes that it can be remedied by changes in the verbiage, please describe in detail what should be added, deleted, or changed, including recommendations for substitute language sufficient to correct the objectionable section(s).
- If your division is not taking a position and has no comments, please send an E-mail stating such.

DEADLINE: IMMEDIATE - TODAY, FRIDAY MARCH 23rd - 5:30pm (FIRM)

As always, I appreciate your attention to this matter.

[redacted]
Acting Unit Chief, Legislative Affairs
FBI OCA
324 [redacted]

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