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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

SECOND SESSION

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OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION

WEDNESDAY, SEPTEMBER 17, 2008

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 9:31 a.m., in room SH–216, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

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

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

Chairman LEAHY. Good morning. We are gathering today on Constitution Day. It is the 221st anniversary of our Nation's founding charter, and it is fitting that we continue our oversight of the Department of Justice today. And so we are going to examine the effectiveness of the Federal Bureau of Investigation in carrying out what we all agree is a critical role and responsibility in keeping us secure while at the same time upholding the rule of law. And we welcome back the FBI Director, and we thank the hard-working men and women of the FBI for upholding their motto: Fidelity, Bravery, and Integrity.

I want to thank the Director for joining me in Vermont last month where together we visited the Joint Terrorism Task Force and the Internet Crimes Against Children Task Force based in Burlington, Vermont. We talked with members of the Federal, State, and local law enforcement organizations who work cooperatively on these task forces. They are working every day to keep us safe from terrorists and also to keep our children safe from those who would do them harm, and we appreciate it. And, Director, I thank you for going over and complimenting the men and women who work on those task forces. I know it meant a lot to them.

In commemorating the 100th anniversary of the FBI earlier this year, Director Mueller said: "It is not enough to stop the terrorist—we must stop him while maintaining his civil liberties. It is not enough to catch the criminal—we must catch him while respecting his civil rights. It is not enough to prevent foreign countries from stealing our secrets—we must prevent that from happening while still upholding the rule of law. The rule of law, civil liberties, and civil rights—these are not our burdens. They are what make us better. And they are what have made us better for the past 100 years."

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I agree. I was so impressed with the speech, I then put it into the Congressional Record and referred to it on the Senate floor. And this oversight, of course, is making sure that the FBI carries out its responsibilities while maintaining the freedoms and values that make us Americans.

We learned last month that the Attorney General was planning to revise the guidelines for the FBI's investigative activities. Allowing the FBI authority to use a vast array of intrusive investigative techniques with little or no predicate facts or evidence raises concerns and may potentially lead to the kinds of abuses we have seen with national security letters and with other vast grants of authority with minimal checks in the past.

Senator Specter and I requested a delay in the approval and implementation of the Attorney General's new guidelines. The Department of Justice only agreed to a limited delay and pointed to today's oversight hearing as a key opportunity to explore questions or concerns—somewhat difficult to do because the Attorney General has refused to provide us with copies of the proposed guidelines. Senator Specter and I sent another letter to the Attorney General last week. We requested that the Committee be provided copies of the proposed guidelines in advance of today's hearing in order to allow for a meaningful exchange with the Director on this issue. The Department again said no, indicating that they could not share guidelines that have not been finalized.

I remember as a young man enjoying reading Joseph Heller's novel "Catch-22." I suspect the Attorney General has read the same book because his response is right out of "Catch-22." He is saying he cannot give us copies of the proposed guidelines until they are finalized, but, of course, once they are finalized they are no longer proposed and subject to change.

Also impairing our ability to make progress today is the administration's refusal to cooperate in oversight. As of yesterday morning, we still had not received the answers to our questions from our last oversight hearing with the FBI Director last March. Those questions have been pending more than 6 months, with the Department of Justice holding up the answers.

Now, even as we try to get a handle on the administration's latest expansion in the FBI's investigative authority, we are reminded of the problems that followed other recent expansions. Last month, Director Mueller apologized for the misuse of "exigent letters," in violation of the law, to obtain phone records from reporters. I am hoping that you will be able to assure us, and the Inspector General will confirm, that appropriate steps are made to prevent such abuses in the future.

I am glad that we finally are going to be hearing of progress in getting through the backlog in the FBI's name checks for citizenship. I hope we will be able to go through those because, otherwise, we are going to have a whole lot of people who are going to get their final citizenship right after the election and too late to do the cherished part of a new citizen—that is, to vote in this country.

We have to work together to ensure that adequate resources are being dedicated to investigating public corruption and corporate fraud—types of crime that the FBI is uniquely suited to inves-

tigate. They have to be comprehensively prosecuted to restore the public's faith in our Government and most recently in our economy.

I am also concerned that the FBI's Cold Case Initiative has not led to a single prosecution for Civil Rights Era crimes, and I look forward to a response on that.

In the area of violent crime, despite modest progress last year following several years of increases in crime, crime rates have remained essentially stagnant in this decade after years of consistent and substantial declines in crime in the 1990s. This is an area in which Senator Biden has raised a number of questions, and I hope the Director will join me and Senator Biden and others in supporting State and local law enforcement and collaborative efforts directly involving our communities in combating violent crime.

I do applaud the Director's efforts to recommit the FBI to its best traditions. I would say he is doing that through his personal example and leadership. I appreciate the openness to oversight and accountability. I wish the rest of the Department of Justice would do that.

I should also say that there will be questions here about the biological weapons that were used on the American people and the Congress in the fall of 2001. Biological weapons used on the Congress and the American people. It is still a matter of great concern not just to me as one who was the object of one of those attacks, but it should be a concern of all American people that are on our soil. Biological weapons were used to attack us.

Senator Specter.

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

Senator SPECTER. Thank you, Mr. Chairman.

I begin this oversight hearing, as I always do when Director Mueller appears, by thanking him for his service—a very distinguished public servant. Notwithstanding that, there is a certain tension between the legislative branch on oversight and the executive branch, and we have a number of serious questions to take up today. And I begin with the new guidelines and note the tremendous, tremendous difficulty this Committee has had on discharging its oversight function because the executive branch does not make, in my judgment, appropriate disclosures to this Committee.

So I begin with a substantial amount of skepticism when I look at your new regulations—regulations which say the traditional standard for having a reason or a predicate for an investigation will not be undertaken, so that an agent on his or her own can start an investigation without any significant reason or basis for starting the investigation such as an anonymous tip, which we know cannot be relied upon for personal reasons often made.

We have had in the past couple of days further information about what happened with the incident when White House officials went to the hospital bed of then Attorney General Ashcroft to try to get a certification for the warrantless wiretapping program, and that whole episode is a very, very unsatisfactory episode in the relations between congressional oversight and the executive branch.

Senator Leahy, as Ranking Member then, and I as chairman were never told about the warrantless spying program, although it

was, I think, fairly stated, the obligation of the executive branch to do so. And the specific statutory provisions were violated in the Foreign Intelligence Surveillance Act and the National Security Act of 1947, which required the Intelligence Committees to be told. And then sitting at that desk in early January of 2005, Attorney General Gonzales said that he would authorize the former Attorney General John Ashcroft to tell this Committee what happened on that incident, which we knew almost nothing about. And between the time the Attorney General made that commitment and I as Chairman contacted Mr. Ashcroft, the approval was withdrawn. And only lately has it come out what happened. Really a disgraceful episode in the effort by White House officials to get the Attorney General to certify that program of very dubious constitutionality.

So when we are looking at new standards, Director Mueller, I approach them very skeptically. What might seem like a minor matter to some is the inquiry which I have made as to what happened on the leak of information from the FBI and the glare of publicity on Congressman Curt Weldon a few days before his reelection effort in 2006. And notwithstanding repeated efforts by me to get the information from you, it was not forthcoming. And, finally, you punted to the Attorney General, and I cannot get the information from him. It is a full-time job to pursue the executive branch on a relatively—well, no matter is minor when you have a Congressman involved, or any citizen involved, and there is an FBI leak and the reporters are there before the agents get there, and it is a few days before his election, which cost him the election. What happens?

The Congressional Research Service has provided an extensive analysis of the oversight authority of Congress, and that is, to have access to information even on pending investigations to talk to line attorneys and to talk to agents, and official who has come before this Committee, the prior Attorneys General and Deputy Attorneys General committed to that proposition. You were confirmed, Director Mueller, before I was Chairman or Ranking and did not extract that commitment from you. But that commitment is applicable to you as well. It is the law on congressional oversight. But it is tougher than pulling teeth to get the information. It requires full-time pursuit. And I still have not gotten an answer to what happened on that FBI leak with respect to Congressman Weldon.

So when I look at these guidelines, I am very skeptical. And subpoenas are issued. You cannot run Government on separation of power without good faith among the branches. And you cannot pursue the matters to the courts to have them adjudicate disputes between the legislative and executive branches. But that is what it has come to. And those disputes will be decided goodness knows when.

So there a lot of questions which remain to be answered, Director Mueller, and when you and I talk privately, as we frequently do, you are a frequent flyer, a frequent guest in my office, and conversations are always satisfactory. But there is not much followup. And I know that you are under a lot of constraints when you are a participant in that visit to Ashcroft's hospital room. But I think

you should have told us about that, and I am going to come to that when we come to the Q&A.

Now for just a moment or two on the anthrax investigation, lots of questions are unanswered. Dr. Ivins got a letter on April 9th of 2007 that he was not a target, and then a warrant to search his home and cars was issued a few months later on October 31st of the same year. Well, what happened? We do not have any idea as to what happened in the interim.

According to the October 31, 2007, affidavit, there was a contaminated mailbox with human Caucasian hairs. Well, why wasn't there DNA on Dr. Ivins until a few days before he committed suicide? The DNA was not requested, the swabbing, until July 23rd and 24th. And what is the situation between the October 31, 2007, affidavit for probable cause for a search warrant and proof beyond a reasonable doubt, which you came to later? And was the anthrax weaponized—that is, engineered to make it more deadly—or not? And how do you have an investigation where you come to the conclusion as to who the culprit is when the investigation is still ongoing? How do you do that?

It is highly unusual to charge somebody after they are dead? There is no opportunity to defend themselves in a court. But I can understand with the high visibility of this anthrax investigation that it is an unusual circumstance which may—and I emphasize the word "may"—justify breaching that rule of not charging somebody after they are dead when they do not have an opportunity to defend themselves.

But there are just so many questions which remain unanswered, and I thank you for the briefings. You have been very forthcoming on the briefings, even though they are very problemsome from the point of view of your Bureau. And I know you have a dual responsibility to protect your Bureau, which I respect, and also a responsibility to be forthcoming. And I note in the House hearing yesterday you committed to an independent inquiry, and when the time comes to ask a question or two, I am going to ask you if you would permit this Committee to make a designation to sit on that committee—not that we have any doubt as to the objectivity of your selections, but a little oversight would not do any harm.

Thank you, Mr. Chairman.

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

Mr. MUELLER. I do.

Chairman LEAHY. Thank you.

Director, before we go to questions—and we will have a number of people here—please go ahead and give your opening statement?

STATEMENT OF ROBERT S. MUELLER, III, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION

Mr. MUELLER. Thank you, Chairman Leahy and Senator Specter and other members of the Committee, for having me here today.

When I have come before this Committee in the past, I have discussed the FBI's transformation and I have recounted our many improvements and accomplishments. But marking milestones is

about more than looking backward; it is also about looking forward. And so today I want to—in understanding and anticipating the questions, I do want to spend a moment focusing on what the FBI is doing—and will continue to do—in order to ensure that we can serve the American public for the next 100 years. And in the interest of time—and I know you wish me to keep this short—I will focus on four specific areas: first is intelligence, second is technology, third, briefly, human capital, and then the Attorney General guidelines. And by giving attention to these and similar areas, we will be prepared to confront the threats of the future, from mortgage fraud to terrorism and from crimes against children to violent gangs.

First, intelligence. Intelligence is crucial to every investigation and operation the Bureau undertakes. The FBI has always excelled at gathering intelligence, even if we did not always call it that, and using it to build cases that led to courtroom convictions. After the September 11th attacks, we realized that we also had to strengthen our intelligence analysis and sharing.

I have discussed our efforts in great detail in the past, from ramping up hiring and training of intelligence analysts to establishing the Directorate of Intelligence and the National Security Branch at headquarters. But intelligence gathering does not happen at headquarters; it happens out in the communities we serve.

And so each field office established a Field Intelligence Group, made up of agents, analysts, linguists, and surveillance specialists. These are the operational arms of our intelligence program, and crucial to their efforts are our partnerships with Federal, State, and local agencies.

Their work is not limited to counterterrorism threats. For instance, field offices near research universities or defense contracting firms are also focusing on potential espionage or proliferation threats. Offices along the Southwest border are focusing on violent transnational gangs. And our offices around the country from large cities to rural areas are concerning themselves with violent crime.

To accelerate improvements to our intelligence capabilities, we have established a Strategic Execution Team to help us assess our intelligence program, evaluate best practices, and decide what works and what does not work, and then standardize it across the Bureau. That effort continues and has been integral to the FBI's effort as a full partner in the wider intelligence community.

Second, we have made substantial progress in replacing and transforming the FBI's information technology systems to help us confront current threats and mission needs. Sentinel, a web-based case management system designed to support both our law enforcement and intelligence mission, is progressing on time and within budget. And the first phase was successfully deployed in June, and the remaining phases will continue to deliver additional capability through the end of the program in the summer of 2010.

We have expanded our desktop Internet access to over 19,000 agents, analysts, task force, and support personnel. And when completed, we anticipate approximately 39,000 Internet desktops will have been deployed at all FBI locations. We have added and deployed over 20,000 BlackBerrys that have e-mail, Internet brows-

ing, and custom features to FBI personnel around the world. And we are deploying other information technology systems that will dramatically enhance our ability to efficiently carry out our mission.

Third, as you know, we have been hard at work continuing to build a strong human resources program to ensure we have optimal recruiting, hiring, training, and retention of our employees.

Historically, the FBI has attracted recruits from the law enforcement, legal, and military communities, particularly to fill our special agent ranks. And this has served us well as a law enforcement agency. We have developed into a national security organization, and also we require employees with specialized skills—intelligence analysts, scientists, linguists, and computer experts.

We are also strengthening our relationships with universities as a primary source of recruiting individuals who want to build a career in national security at the FBI.

Fourth, while our employees are collecting, analyzing, and sharing intelligence under an improved internal framework, they will also be operating under new intelligence investigative guidelines.

I would like to spend a few moments discussing the new Attorney General guidelines for domestic FBI operations which are in the process of being finalized and which have been briefed to your staff. With the input of this Committee, it is my hope and expectation that we can make these guidelines effective for agents operating in the field in the near term.

Up to now, special agents have depended on several sets of guidelines to guide their investigations. Each set was tailored to a particular program area and, therefore, different rules govern different types of investigations. These differences were especially pronounced for national security investigations versus criminal investigations.

To give you a few examples, the guidelines governing national security investigations prohibited recruiting or tasking sources unless the FBI had at least a preliminary investigation open. They also prohibited physical surveillance other than casual observation. The general crimes guidelines, on the other hand, which governed other criminal investigations, did not contain these limitations. And so, ironically, in many cases an agent could readily use physical surveillance to watch a suspected smuggling route for drugs or counterfeit blue jeans. He could not do so for a terrorist carrying a bomb.

In the past, these rules may have been sufficient and appropriate for the threats they were meant to address. But criminal threats and national security threats do not fall neatly into separate categories.

The threat of today, and of the future, is a dangerous convergence of terrorists, hostile foreign governments, and criminal groups operating over the Internet and through interconnected sophisticated networks. We may see organized crime laundering money for drug groups, drug groups selling weapons to terrorists, terrorists committing white-collar fraud to raise money for their operations, and, most threatening of all, hostile foreign governments arming terrorists with an arsenal of biological, chemical, or radio-

logical weapons. Different rules should not apply depending on how the agent decides to describe what he or she is investigating.

I must emphasize that the new guidelines are not designed to give the FBI any broad new authorities. The guidelines remove the last vestige of the walls separating criminal and national security matters. They will replace five separate sets of guidelines with a single uniform set of rules to govern the domestic activities of our employees. They set consistent rules that apply across all operational programs, whether criminal or national security. And they will give us the ability to be more proactive and the flexibility to address complex threats that do not fall solely under one program. And they will eliminate virtually all inconsistencies that have the potential to cause confusion for our employees.

Several bipartisan commissions, as well as the Congress and the American people, have asked and expect the FBI to be able to answer questions such as: Are there sleeper cells in this country planning attacks like those our international partners in London and Spain have suffered since September 11th? In order to answer these questions, the FBI has to expand its intelligence collection beyond that which is collected as part of predicated investigations. It must examine threats in a proactive fashion and not simply rely on information that is provided to us.

We have asked our employees to think proactively about the threats and vulnerabilities in their areas of responsibility, and our employees are up to the task. But they need consistent, clear guidelines that do not vary based on whether they are facing a threat from MS–13 or from Hezbollah.

The FBI has the responsibility, indeed the privilege, of upholding the Constitution. We know that if we safeguard our civil liberties but leave our country vulnerable to terrorism and crime, we have lost. If we protect America from terrorism and crime but sacrifice our civil liberties, we have lost. And we are always mindful that our mission is not just to safeguard American lives, but also to safeguard American liberties. We must strike the appropriate balance at all times.

Mr. Chairman, on a side note, I am certainly aware of the public's interest as well as the interest of this Committee and Senator Specter and others as well as yourself in the anthrax investigation. And as you know, the Department of Justice and the FBI do not typically publicly disclose evidence against a subject who has not been charged, in part because of that presumption of innocence afforded an accused. Because of the extraordinary and justified public interest and with special concern for the victims of the 2001 anthrax mailings, we, the Department of Justice, and the United States Postal Service briefed the victims, Members of Congress, and the media to provide information unsealed by the district court after the person we believe was responsible for the attack. This included information about science developed during the investigation and that was central to the ultimate focus of the case on Dr. Bruce Ivins. The science employed was developed and validated throughout the investigation with the help of more than 60 outside experts and researchers. Nevertheless, because of the importance of the science to this case and to future cases, we have initiated discussions with the National Academy of Sciences to un-

dertake an independent review of the scientific approach used during the investigation.

Chairman LEAHY. OK. Let me interrupt that point. And I have been very reluctant to even ask questions about this because my office and myself were put at risk in a letter that was addressed to me. And I realize we did not suffer like the families of those who had people die. But it is a matter I have thought about throughout this time.

I have watched your testimony. You briefed me in Vermont. I have read the material. These weapons that were used against the American people—and they are weapons. They are weapons, the weapons that were used against the American people and Congress. Are you aware of any facility in the United States that is capable of making the weapons that were used on Congress and the American people besides Dugway Proving Ground, Utah, or the Battelle Facility in West Jefferson, Ohio? Are you aware of any facility in the U.S. capable of making these weapons other than those two?

Mr. MUELLER. In the course of the investigation, we determined that there were 15 laboratories in the United States and we also identified three laboratories overseas that had this particular virulent strain of Ames anthrax.

Chairman LEAHY. Are there any facilities capable of making the weapons used in the United States other than Dugway Proving Ground or the Battelle Facility in West Jefferson, Ohio?

Mr. MUELLER. I do believe there are others, and amongst those would be those that have this strain of anthrax.

Chairman LEAHY. So there are more than just these two places that are capable of making the weapon?

Mr. MUELLER. I would have to get back to you because I have not asked that particular question. But my expectation is that there are others who do the research in these facilities that have that capability.

Chairman LEAHY. At some point we are going to take a break in here, because of either votes or otherwise. During that break, please get me the answer to that, because I know of none besides Dugway and Battelle. If you know of others before we close the hearing today, give me the names of those others that could make this weapon used on Congress and the American people. And I ask this because I am also aware of the article on September 4, 2001, before this, in the New York Times when they said, "Over the past several years, the United States has embarked on a program of secret research in biological weapons. Even the Clinton White House was unaware of their full scope. The projects, which had not been previously disclosed, have been embraced by the Bush administration, which intends to expand them." That was September 4th. The attack was on September 11th. The weapons used against the American people and Congress and this Senator were just after that time.

I apologize to my colleagues for interrupting at this point, but when we have a break, double-check that and tell me if there are any others besides Dugway and Battelle.

Mr. MUELLER. I will do that, sir.

Chairman LEAHY. Thank you.

Mr. MUELLER. Let me finish up, Mr. Chairman, with a comment in light of the headlines over the last several days describing the turmoil in the financial markets. I do want to take a moment to mention our activities in response to the subprime mortgage crisis. And I do want to assure this Committee that although we have over 1,400 open cases and almost 500 convictions in just the past 2 years, just like in the S&L crisis of the early 1990s as well as the corporate excesses at the beginning of this decade, the FBI will pursue these cases as far up the corporate chain as is necessary to ensure that those responsible receive the justice they deserve.

And, with that comment on that crisis, sir, I would be happy to answer any questions you might have.

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

Chairman LEAHY. Well, thank you, and as I told the distinguished Senator from Pennsylvania, I think that is a matter of some—OK. You have commented on the corporate scandals like those of Enron and WorldCom. And do I understand from you that there will be investigations and you will carry out investigations regarding possible fraud or lawbreaking in those areas?

Mr. MUELLER. Yes, we have. As I indicated, we have more than 1,400 investigations ongoing into brokers, appraisers, buyers, lenders, but we also have 24 investigations looking at the larger corporations who may have engaged in misstatements in the course of what transpired during this financial crisis.

Chairman LEAHY. And I ask this because, obviously, everybody is concerned where the U.S. Government is on the hook for anywhere from $800 billion to $1 trillion. It is almost as much as we spent in the Iraq war. And if people were cooking the books, manipulating, doing things they were not supposed to do, then I want people held responsible. And I suspect every American taxpayer—I do not care what their political background is—would like them held responsible. And this Committee will keep in touch with you to find out just what is happening on that.

Now, in your testimony about the Attorney General's proposed new guidelines, you stated that the new guidelines are not designed to give and do not give the FBI any broad new authorities.

Now, we are unable to get a real careful review of that because, notwithstanding the Department of Justice saying we were briefed, we have not been. They have refused to share copies with us. It has been as superficial a briefing as possible. But based on the limited review that we were permitted, I was surprised by your statement. Under the proposed guidelines—and you and I have discussed this privately in some lesser detail, but line FBI agents would now be able to use several new intrusive techniques in national security investigations and the threat assessment level, 24-hour surveillance, so-called pretext interviews, in which agents can misrepresent who they are while questioning people, recruiting sources to cover information about American citizens. Now, there is no predication, there is no evidence or factual basis that would be required for the FBI to conduct an assessment and use techniques. The guidelines do not require any supervisory approval. An FBI agent on his own could just go off and do this. They impose no time limit.

It seems like a very broad, new authority in the national security area.

Is it true there is no requirement under the proposed guidelines for anyone at FBI headquarters to approve a threat assessment and the techniques available for one?

Mr. MUELLER. Well, let me start by giving, if I could, an example, which I did mention yesterday. In terms of these techniques, if we got word from—it can be an anonymous e-mail that there was drug trafficking at a bar in a particular area, under the criminal rules we could establish a surveillance to determine whether or not that occurred, send an agent in in an undercover capacity, or recruit sources to do that.

If that same e-mail came in and said that Hezbollah was recruiting individuals, or al Qaeda, we would be barred from doing that. The only thing we could do under the current national security guidelines is go in as an FBI agent and announce ourselves as an FBI agent and followup on it. It does not make any sense.

Another example that—

Chairman LEAHY. Let's just back up a little bit on this. Let us say you just have a brand-new agent and he sees somebody driving, and he looks and he does not like what they had on as a bumper sticker on the car, and he says, "Boy, this guy might be a threat. That does not sound like something that I think is very pro-American." And he opens an investigation all by himself. He does all the other things that can be done on this with checking out everything from employers on through. And nobody—he does not have to get anybody to sign off on that. Shouldn't there be somebody in the supervisory level to them—nobody is asking us not to investigate possible terrorist threats. But you know and I know what happens if you get a brand-new agent who may just go off on their own. We saw this happen in the national security letters where they were issuing thousands upon thousands of this, where they were getting people's records and business records and everything else saying, "Don't worry. There is going to be a subpoena coming." Of course, no subpoena came. People's lives were disrupted, their businesses were disrupted. Their employers were looking and wondering, "Why are you under suspicion?" And then they say, "OK, now I am going to off to some other detail. I will just put that in my desk and go."

Shouldn't somebody be in the loop?

Mr. MUELLER. Well, in the course of the opening of that, it would be reviewed by a supervisor and assigned to that or some other agent. Also, in the internal guidelines of the Bureau, there would be a 30-day review of that. There would—

Chairman LEAHY. But there is nothing in these new guidelines?

Mr. MUELLER. Well, not in the guidelines, but in our policies within the Bureau that supplement the guidelines.

Chairman LEAHY. Which trumps?

Mr. MUELLER. Well, within the Bureau it is our policies that trump. In other words, there is a framework in the guidelines, which has always been the case, and then we have to implement them through policies. In a sensitive matter, for instance, whether it relates to a political or a religious organization and an individual wants to do an assessment, there is a specific requirement that

that go through the Chief Division Counsel, it goes through the SAC, and there be notification to headquarters. So there is a regime that we are establishing to flesh out the framework of the guidelines.

Chairman LEAHY. OK. Well, we will go back to that, because I want to know just what those—exactly how that works, because as you know, the concern we had on the exigent letters and the concern you expressed when this became public.

Mr. MUELLER. Yes.

Chairman LEAHY. I have also been concerned about the length of time many of the FBI name checks have been pending. I have raised this with you or raised it with Secretary Chertoff. Last summer, the Department of Homeland Security failed to recognize the perfect storm headed their way: an upcoming national election, you have the failure of comprehensive immigration legislation, you have stepped-up enforcement activities by ICE, a widely reported fee increase at USIS. And DHS was still unprepared to handle the volume of applications. So you have thousands of people that want to become U.S. citizens, who look at this country and say, "Here is a place where I can actually elect my leaders, and they are not appointed." And they are told, "Gosh, even though you have got your applications in in plenty of time, we are not going to process this until after the election." And these are people who have been lawful residents here for years, paid taxes and so on. They have earned the privilege to become citizens. Are we going to meet the deadline to process these pending applications? Some are over 2 years old.

Mr. MUELLER. What I can tell you is that when we had the backlog, recognized it, we sought the funding, received the funding to address the backlog. We have taken a number of steps. We have raised fees, revised the criteria, prioritized the workload, and hired over 200 contractors, which means that in July of this year, we had eliminated the backlog of individuals whose requests had been pending longer than 2 years. And by November of this year, we will have eliminated the backlog of requests that have been pending more than 1 year.

Now, I do not know whether it is going to be exactly by November 4th. They say by November of this year, and we actually have been ahead of our schedule.

Chairman LEAHY. USIS says there are 10,000 names still that have not been checked.

Mr. MUELLER. I would have to check that figure, sir. And I can tell you that by June of next year, 98 percent of all the background checks will be accomplished within 30 days. There will always be a few that take longer because we have paper records. We have miles and miles of records. And to the extent that we do a search of a particular file, we digitize it, but we have a number of files that have not been digitized. And so there will always be some delay on a very, very small percentage of those requests.

Chairman LEAHY. Again, we will go back to that, because it is not as though the election date is a surprise date.

Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Very briefly on the anthrax issue, because there are so many other subjects to be covered, did you personally review the evidence and come to the conclusion that there was proof beyond a reasonable doubt as to Dr. Ivins' guilt?

Mr. MUELLER. Yes.

Senator SPECTER. With respect to the hairs which were found on the contaminated mailbox, identify in the affidavit of October 31, 2007, why was there no request made as to swabbing Dr. Ivins for DNA until very close to the time he committed suicide?

Mr. MUELLER. I do not know the answer to that. I would have to get back to you, Senator.

Senator SPECTER. I am going to send you a letter, Director Mueller, setting forth a number of questions in this area, so I would ask you to get back to me there and on the other items.

When do you anticipate designating an independent group of experts to review the anthrax issue?

Mr. MUELLER. We have been discussing it for several weeks, and I believe a letter is going to be sent either this week or next week. But I will tell you that we are not going to be—we are asking the National Academy of Sciences to identify the experts to serve on the panel. We will have no role in selecting those experts.

Senator SPECTER. Would you commit to allowing this Committee to designate members of that group?

Mr. MUELLER. I would have to consider that. What I can do is give you a copy of the letter that we sent to—that we are or will be sending to the National Academy.

Senator SPECTER. What is there to consider, Director Mueller? We would like to have the authority to name some people there to be sure as to its objectivity. We are not interlopers here. This is an oversight matter. What is there to consider?

Mr. MUELLER. I am not familiar with how the Academy of Sciences does these reviews, whether they have some restrictions themselves. And I have to get the input from the Department of Justice as well.

Senator SPECTER. OK. Suppose this Committee decides we want to have an independent group. Would you commit to turn over all the evidence for oversight to our independent group? If we cannot designate a couple of members, maybe we will just pick a group.

Mr. MUELLER. Well, I am absolutely open to third-party review, particularly when it comes to the science.

Senator SPECTER. I am not talking about third-party review. I am talking about the Judiciary Committee of the U.S. Senate—

Mr. MUELLER. I understand that.

Senator SPECTER.—which has a constitutional responsibility and authority for oversight. And I am asking you for a commitment to let this Committee participate in the designation of this objective group.

Mr. MUELLER. To the extent that the rules of the science allow that to happen, I have no objection to that request.

Senator SPECTER. Well, that is not far enough, but that is as far as I am going to go at the moment.

Now on to these new guidelines. It was only as a result of the Inspector General's investigation which this Committee mandated in the law in the PATRIOT Act that we found out about the misuse

of the exigent letters supposed to be sent only when there were, as "exigent" says, exigent or unusual circumstances. The Inspector General said, "The FBI used the exigent letters in non-emergency circumstances, failed to ensure that they were duly authorized investigations to which the requests could be tied."

Now, in light of that very serious problem, why should we give you more powers, Mr. Director?

Mr. MUELLER. Well, as I indicated before, it is not new powers. It is the internal guidelines related to the techniques we can use at various stages of the investigation.

Senator SPECTER. Well, you are taking—

Mr. MUELLER. Going back to the question that you asked, we have taken steps since we understood the problems with the national security letters to assure that not only that we have procedures in place, but that also we have a compliance program to make certain that we are following those procedures. And that compliance program is a new office that we have set up to assure that where there is a legislative or other internal responsibility that we adhere to—

Senator SPECTER. I have got less than 3 minutes left. I have got to move on. We understand your assurances. We have heard them before. And that is why we are skeptical.

Let me go to the issue as to what you conceive your responsibility to report to this Committee when we do not know something. On December 15th, I was managing the PATRIOT bill in response to your personal request for more authority. And we were in the final stage and were going to go to final passage. And that morning the New York Times published a story disclosing that this warrantless wiretap program was in existence and just knocked that effort into a cocked hat. And Senators said on the floor, "We are about to support this PATRIOT Act. Now we found out about this secret warrantless wiretap program." Why didn't you inform me as Chairman and Senator Leahy as Ranking Member about the existence of this program?

Mr. MUELLER. Senator, it is a highly classified program. And, second, it was not our program. And, third, my understanding was that Congress had been briefed on the program and was continuously being briefed on the program.

Senator SPECTER. Well, you did not make an inquiry of me as Chairman or Senator Leahy as Ranking as to whether we had been briefed. We are the principal oversight officers for the FBI, and you knew about the program. And it is more than first cousin; it is a twin brother on your work in intelligence and security matters. Why weren't we briefed?

Mr. MUELLER. Because I believed that Congress was appropriately briefed—that was what I was led to believe—in the appropriate committees, which would have been in this case—

Senator SPECTER. Well, let's shift over to the National Security Act of 1947. You did know that that Act required Intelligence Committee members to be briefed. And you did know that the Intelligence Committees had not been briefed. Why didn't you report that?

Mr. MUELLER. I was of the belief that those who should be briefed in Congress were being briefed.

Senator SPECTER. Well, Director Mueller, I do not consider that an adequate answer. You and I talked too often for you not to use the occasion sometimes to say, "Arlen, you have been briefed on this top secret program." You did not know whether or not I had been briefed or Senator Leahy had been briefed. Don't you think you had an obligation to tell us as the principal congressional officers charged with oversight of the FBI about this program, especially when we were on the firing line for you, trying to get a PATRIOT Act passed? If you do not have a duty to tell us under those circumstances, who does, Director Mueller? We do not know what we do not know, which is obvious.

Mr. MUELLER. My understanding was that the intelligence agencies—

Senator SPECTER. And somebody has to tell us. Now, I cannot get a reply from Attorney General Mukasey about the Weldon letter. What am I supposed to do? Run into his office and start going through the files? A little self-help? People like you do not tell us, how are we supposed to find out?

Mr. MUELLER. I believe—

Senator SPECTER. Let the record—

Mr. MUELLER. I believed that the intelligence agencies responsible for the program had been briefed in Congress.

Senator SPECTER. Well, that is an unsatisfactory answer, but we were told by the New York Times. And now we are trying to protect New York Times sources, so if they find another top secret program that you do not tell us about, we can find out about it. And you wrote a long letter in concert with the Attorney General and the Director of National Intelligence and the Director of Homeland Security and every other investigative agency you could find in the alphabet soup saying, "Don't go for reporter's privilege." Now, how about that, Director Mueller? The Chairman wants to move ahead.

Chairman LEAHY. Go ahead.

Senator SPECTER. Well, good.

Chairman LEAHY. I am enjoying it.

[Laughter.]

Chairman LEAHY. I am enjoying it more than the Director is.

Senator SPECTER. He is doing fine. Bob Mueller comes from a tough line of trial lawyers, and I looked over a good bit of the evidence on the anthrax case just to contrast prosecutors' opinions, and I have grave doubts about sufficiency of evidence for proof beyond a reasonable doubt. But come back to the last pending question, and that is, if newspaper reporters do not have the privilege to get confidential sources, which they will not get if they are not protected, since you will not tell us and the Attorney General will not tell us, and then you have this horrendous scene in Ashcroft's hospital room, if we do not pave the way for the newspapers to tell us, how are we going to find out so we can conduct oversight?

Mr. MUELLER. Senator, as I have indicated before, my understanding was that Congress was being appropriately briefed by the intelligence agencies and the appropriate committees in Congress were being briefed on that classified program.

Senator SPECTER. Well, that is a classic non-answer, and I will let it stand for the record. You cannot do any worse than that.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you. I should not, just so people understand, you have briefed me about the Ivins case. I understand and have read all the reviews and all that. If he is the one who sent the letter, I do not believe in any way, shape, or manner that he is the only person involved in this attack on Congress and the American people. I do not believe that at all. I believe there are others involved, either as accessories before or accessories after the fact.

I believe that there are others out there. I believe there are others who can be charged with murder. I just want you to know how I feel about it as one of the people who was aimed at in that attack.

Mr. MUELLER. Senator, you have expressed that concern. I understand that concern, and I have told you that in the investigation to date, we have looked at every lead and followed every lead to determine whether anybody else was involved. And we will continue to do so. And even if the case does become closed, if we receive additional evidence indicating the participation of any additional person, we certainly would pursue that.

Chairman LEAHY. Thank you very much.

Senator Feinstein has been waiting very patiently, and I yield to Senator Feinstein.

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

Just to clear the record, as I understand it—I am a crossover member on both Intelligence and Judiciary—the full Committee was not briefed on the Terrorist Surveillance Program of the Intelligence Committee, to the best of my recollection, until 2006. It took 5 years for us to get briefed, just so you know. The so-called Big Four were briefed, I believe, in October of 2000. The New York Times broke a story in December of 2005. Seven members of Intelligence were briefed in 2006, and then the rest. So it really was an egregious violation of the Terrorist Surveillance Act of the administration functioning outside of the law. And what we tried to do when we passed the Foreign Intelligence Surveillance Act—and it was my amendment—was to so strengthen the exclusivity section of that law that it could never happen again. But I do believe that your comment that members were fully briefed—I hate to say this, Mr. Director—is simply not accurate.

Mr. MUELLER. I think I said "were briefed." I did not mean to make any comment on the appropriateness or the inclusion or the exclusion of any particular people in that briefing or those briefings.

Senator FEINSTEIN. OK. I would like to begin on one good note. In June, my Subcommittee on this Committee had a hearing, and former FBI agent Jack Cloonan testified, and I learned that, in fact, through FBI interrogation of detainees, a lot of information was pulled forward without any kind of enhanced interrogation techniques. And I particularly want to commend Agent Jack Cloonan, FBI Agent Ali Sufan, FBI Agent George Piro. It is my understanding that, including Cloonan and Sufan, they interrogated Ramzi Yousef that led to the 1993 World Trade Center bombings and produced valuable information following the USS Cole bombing. And I also want to say that, according to open sources, FBI interrogations of Abu Zubaydah were producing valuable al Qaeda-

related information until the point that the CIA took over the interrogations. So I would like to say a commendation to them.

Now, one of the things that has troubled me—and I am speaking as an Intelligence member now—is that on the 27th of November in 2002, Legal Counsel Marion Bowman, known as Spike Bowman, received a memo—the date the memo was sent from Guantanamo is redacted—but he did not receive the memo for months. It was held at Quantico.

I have that memo in front of me, and essentially it is a legal analysis of interrogation techniques, and it goes through each stage: Category 1, 2, 3, it lists various interrogation techniques, Category 4. And it goes on to say, "Information received through certain categories will not be admissible in any criminal trial in the United States. Information obtained through these methods might be admissible in military commission cases. The judge and/or panel may determine that little or no weight should be given to information that is obtained under duress."

And it goes on, on the third page, to say—talks about the United States torture statute: "The intent of the user will be a question of fact for the judge or jury to decide. Therefore, it is possible that those who employ these techniques may be indicted, prosecuted, and possibly convicted if the trier of fact determines that the user had requisite intent. Under these circumstances, it is recommended that these techniques not be utilized." And it goes on to essentially make the case that they could be war crimes.

Now, it is my understanding that this memo did not reach you.

Mr. MUELLER. Did not.

Senator FEINSTEIN. Correct. And according to the IG report, which I have here, you said that you did not become aware of a dispute between the FBI and the DOD over interrogation techniques at Guantanamo prior to the spring of 2004. Is that correct?

Mr. MUELLER. I believe that is correct.

Senator FEINSTEIN. OK. Reading from the report, "One SSA who served two rotations as OSC at Gitmo told us he initially told the agents to write up detainee abuse allegations to a war crimes file so the FBI could retrieve the information if it was needed for further investigation. Two agents described instances in which they made such reports." And it goes on to describe one agent told the OIG that during his orientation when he first arrived, he was told that we should write up any potential war crimes allegations for inclusion in war crimes trials.

Now, the first question I have is: Why weren't the concerns about torture that we now know was, in fact, going on at Guantanamo brought to your attention immediately or even a year later in 2003? That is the first question.

Mr. MUELLER. I would have to think some about that. I do believe that the persons who were handling that contacted and raised it with DOD, and they believed it was something that need not come up to my level. Quite obviously, when I heard that this was happening, I was upset, and that is not the case today.

Senator FEINSTEIN. Well, you know, this is reminiscent—we sat in this room with Ruby Ridge, and remember where the front office always gets protected. And as a product of the hearings on Ruby Ridge, the decision was made the front office would not be pro-

tected. So a memo like this, which is three pages long, which outlines what is going on does not reach you. You subsequently pull your agents out of interrogation—

Mr. MUELLER. Well, prior to that—

Senator FEINSTEIN. At some point you found out.

Mr. MUELLER. Well, prior to that, in 2002, there was a decision made when we heard that there were techniques that went beyond our techniques being utilized in, I believe it was, Pakistan, we made the determination that our agents would adhere to our protocols, would not participate in additional techniques, understanding that not them but some time later additional techniques had been approved by the Department of Justice with regard to DOD or with the agency.

So we early on made a decision that we would maintain our protocol, would not utilize—not only not utilize but not participate in any of those techniques.

Senator FEINSTEIN. When did you make that decision?

Mr. MUELLER. In 2002, upon the initial hearing that additional techniques were being utilized by another agency overseas, and our persons had left that particular interrogation. We did not know the full extent of what techniques were being used.

Senator FEINSTEIN. That applied to all black sites and Guantanamo?

Mr. MUELLER. It applied to FBI agents wherever they were located.

Senator FEINSTEIN. OK. Thank you.

Did you speak with DOJ or the White House about the concerns that FBI agents had, and specifically the Bowman memo?

Mr. MUELLER. Well, I made very clear my position that our agents would not participate in any such additional techniques. And I made very clear that that would be the case.

Now, my understanding is there were discussions between other agencies and the Office of Legal Counsel and DOJ with regard to particular techniques; but I was not a participant in those discussions, and I was not consulted in those discussions.

Senator FEINSTEIN. Did this Spike Bowman memo ever go to the Attorney General or the President?

Mr. MUELLER. I do not know. I would doubt it.

Senator FEINSTEIN. Thank you. My time is up.

Chairman LEAHY. Thank you. The next person on the list I have from Senator Specter is Senator Grassley.

Director, you made a comment earlier, and I will thoroughly embarrass the Senator from Iowa and wish him a Happy Birthday.

Senator GRASSLEY. Thank you very much. I appreciate it.

Chairman LEAHY. The first time in the 30 years I have known him that I have seen him blush.

Senator Grassley, go ahead, sir.

Senator GRASSLEY. Mr. Chairman, I am going to start out by asking unanimous consent of you and the Committee to have my full statement made a part of the record and ask that documents, letters, and other materials I reference also be a part of the record.

Chairman LEAHY. Without objection.

Senator GRASSLEY. Since our last FBI oversight hearing in March, there have been major developments, as already expressed,

in the anthrax investigation. After years of focusing on Stephen Hatfill as a prime suspect, the FBI paid him a multi-million-dollar settlement. Their new suspect, Bruce Ivins, committed suicide in August. And now the FBI is in the process of closing that case.

This is one of the longest and most expensive investigations in FBI history, and there will probably never be a trial. Congress and the American people deserve a complete accounting of the FBI's evidence, not just as selective release of a few documents and a briefing or two. There are many unanswered questions the FBI must address before the public can have confidence in the outcome of the case, and a thorough congressional investigation is needed to ensure that those questions are answered. And I appreciate the Director referring to the National Academy, but I would like to also suggest that the National Academy would not be reviewing FBI interview summaries, grand jury testimony, internal investigative memos, other investigative documents. The Academy would only be reviewing the science, not the detective work. And, of course, I believe we need an independent review of both.

On August the 7th, I wrote the Attorney General and Director Mueller seeking answers to 18 specific questions about the anthrax investigation. I have not received a reply. Director Mueller, we do not have time to go through all of those 18 questions here today, but I want to highlight one that you and I discussed last week. It has to do with when the FBI first learned of Dr. Ivins' late-night access to the lab around the time of the mailing. While the scientific evidence took years to develop, the lab access records were available from early in the investigation. Question No. 1 and No. 2 together, and then I will let you respond: Shouldn't his late-night lab access, which the FBI now cites as a key part of the case against Dr. Ivins, have led you to focus on him much earlier in the investigation instead of focusing on Dr. Hatfill? And, No. 2, exactly when did the FBI obtain those lab access records?

Mr. MUELLER. I would have to get back to you on the specific questions, Senator. I know you were interested in them. I know that they were in that letter. We have drafted answers, and it is being—again, it is being approved. I would have to get back to you on specific answers to those particular questions.

Chairman LEAHY. Excuse me, on my time. I will certainly give additional time. I have to emphasize that the "getting back to us" is very difficult here because the answers then go to the Department of Justice. They sit on them, and we never get the answers. And it really is not fair. It is not fair to you, Director Mueller, because I know in many instances you sent your answers over to them. But they sit on them. It is a dark hole over there. We never get the answers. Senator Grassley has asked some very legitimate questions over the past year, and he has not gotten answers. Senator Specter has. As Chairman, I will insist we do get the answers, whether it is a Republican Senator or a Democratic Senator that asked the question. They work hard, all the Senators, both parties, on this Committee. They deserve to have their answers.

Now, some of the questions that have been asked here today can be answered this morning. And when we do take our short break at some appropriate point, I would ask you to get on the phone and get us the answers.

Senator GRASSLEY. Well, thank you. I appreciate that support.

Mr. MUELLER. Could I just have 1 second?

Senator GRASSLEY. Sure. Go ahead.

[Pause.]

Mr. MUELLER. I think I have some limited information, but I would prefer to confirm it during the break.

Senator GRASSLEY. OK.

Mr. MUELLER. And be able to get back to you on that.

Senator GRASSLEY. And that is OK, and that is probably more directed to the second one I asked, exactly when did the FBI obtain those lab access records. But surely you can say, as long as you had them a long time before, shouldn't that have caused you to focus on Dr. Ivins instead of Dr. Hatfill?

Mr. MUELLER. As I think I have explained and as we have briefed, the key disclosure in the investigation came when we were able to identify and match the genetic markers from the anthrax mailings to the anthrax that was contained in a flask RMR1029 that was maintained by Dr. Ivins, and that came in the spring of 2005. And at that time it triggered a number of investigative steps and put investigative steps in a new light given the fact that we had identified the anthrax in the mailings with that particular flask maintained by Dr. Ivins. So it was at that juncture that I would say the investigation took on a new focus.

Senator GRASSLEY. OK. Let me go on then. You were quoted August 8th, Burlington Free Press, as saying you are "unapologetic" and that it is "erroneous to say that there were mistakes." Well, the FBI focused on an innocent man for those 4 years. FBI officials anonymously told the press that Dr. Hatfill was the anthrax killer. The Justice Department effectively got him fired from his job. Yet even after new scientific evidence pointed away from Hatfill and toward Ivins, the FBI waited years to publicly set the record straight. So three questions, and I will ask them all at the same time.

Should not the FBI apologize to Dr. Hatfill? Please explain how chasing an innocent man for 4 years was not a mistake, as you said it was not a mistake. And why did you wait until after settling Dr. Hatfill's lawsuit and after Dr. Ivins' suicide before clearing Dr. Hatfill's name?

Mr. MUELLER. I can speak generally. I do not believe that we inappropriately undertook any investigative steps in the course of the investigation, regardless of the individual. That means to say I think the steps that were taken in the course of the investigation, given the information that we had at a particular time, generated appropriate investigative steps in the course of the investigation.

The lawsuit that was brought by Dr. Hatfill appropriately, we believe, focused on leaks, and one assumes it is FBI, but one should not make that assumption, but leaks about the course of the investigation that did harm his reputation. I abhor those leaks. It was inappropriate. And the settlement is an acknowledgment that those leaks should not have happened and that they harmed Dr. Hatfill's reputation.

But in terms of the steps taken in the course of the investigation, given the evidence we had at a particular point in time, I think the steps taken were appropriate.

Senator GRASSLEY. Why did it take Dr. Ivins' suicide before Dr. Hatfill was cleared by the FBI?

Mr. MUELLER. Well, the fact that we had identified that flask as being—containing the parent of the anthrax used in the letters triggered a substantial additional investigation. We had to determine who else had access to that anthrax. We had to eliminate the persons who had access to that anthrax, and certain persons had been distributed portions or pieces—not pieces, but some of that anthrax for their own research. And, consequently, while it shifted the focus of the investigation, there was a tremendous amount of investigative work that had to be done to determine whether or not and who was responsible not just focused on Dr. Ivins, but anybody who may have had access to that anthrax over the period of time that that anthrax was in the suite and being maintained by Dr. Ivins.

There were a number of persons who had been employed by USAMRIID over a period of time, and every one of those persons had to be investigated and ruled out as the possible person responsible for the mailings.

Senator GRASSLEY. Was anyone punished for those leaks that took place about Dr. Hatfill?

Mr. MUELLER. There is a continuing investigation by the Department of Justice. In the meantime, there was one person counseled in our organization as a result of confirming something that had been put out by somebody else.

Senator GRASSLEY. Mr. Chairman, did I use up all the additional time that I was allotted?

Chairman LEAHY. I believe you have.

Senator GRASSLEY. OK. Go ahead, and I will have a second round.

Chairman LEAHY. Thank you, and we will probably take a break around 11 o'clock for a few minutes, which will give the Director also a chance to make some phone calls to be able to answer the things where he is going to get back to us.

On the list I have here, Senator Feingold, you are next.

Senator FEINGOLD. I thank you, Mr. Chairman, and welcome, Director Mueller. Thank you for being here. I think it is fair to say that you and I have had a good relationship in the time we have known each other. We have always had frank and honest discussions. I believe you are a straight shooter who has the best interests of the country at heart and who sincerely cares about and understands the importance of protecting civil liberties while fighting crime and terrorism aggressively.

Unfortunately, however, the FBI has made some major mistakes in recent years. I am thinking particularly about the problems with national security letters. And I am deeply concerned about these new Attorney General guidelines. We are talking here about a situation where the FBI must police itself, and I am not convinced that these guidelines include adequate safeguards to protect against overreaching. Remember, the whole reason that the Department issued guidelines in the first place was in reaction to revelations about very inappropriate investigations and other activities that took place in the 1960s, particularly with respect to the civil rights movement.

As Senator Leahy, the Chairman, already described today, the guidelines allow for what is called an "assessment," which includes some quite intrusive investigative techniques, such as physical surveillance, questioning of friends and neighbors, including based on a pretext or misrepresentation, and the recruiting of informants—all with no reason for suspicion whatsoever.

Basically, if I understand these draft guidelines correctly, so long as the FBI's purpose is detecting a possible national security threat or collecting foreign intelligence, you can pick any person at random off the street and say, "I want to investigate that person, see if there is something out there that would justify a preliminary or full investigation." Since no reason or suspicion is required, this raises the possibility of racial profiling.

Now, I know that you believe that racial profiling is wrong and it is unconstitutional. You have testified to that. And, yes, we have been told that the DOJ guidelines concerning racial profiling remain in effect. But, Director Mueller, these guidelines contain an exception for national security cases, and they are still just guidelines. They are not the law.

So let me ask you: First, do you agree that it would be ineffective and counterproductive for the FBI to engage in racial profiling—

Mr. MUELLER. Absolutely.

Senator FEINGOLD.—in national security and foreign intelligence investigations?

Mr. MUELLER. Absolutely.

Senator FEINGOLD. You and the Attorney General now know that there is a lot of concern about these draft Attorney General guidelines. When they are finally published, if the current approach is maintained, there is going to be, I think, a public outcry. Wouldn't it be better to take the time to let the groups that are concerned about these issues analyze the draft and make suggestions about the kinds of protections that are needed to avoid an outcry when the guidelines are published? Why can't you at least solicit their suggestions in a meaningful process that involves more than a single meeting where the participants are allowed to look at the draft, but are not allowed to keep a copy?

Mr. MUELLER. Well, first of all, these are the internal DOJ guidelines established by the Attorney General. And this is the first time in my experience that we have sought outside input, not just from Congress but also from the ACLU, privacy interests, in order to get suggestions.

Now, yes, we have maintained a process whereby we bring the guidelines, we allow whatever time is necessary to review the guidelines. They are a draft of the guidelines. We have elicited suggestions. We are incorporating the suggestions that have been made and have had an openness in the production of these guidelines that is far different than the sets of guidelines that have gone before.

One point I do want to make, and that is the change in the responsibility and the roles of the FBI over a period of time. The American public—Congress was relatively content to evaluate the FBI and the success the FBI had in investigating a terrorist attack after it occurred, whether it be the 1993 World Trade Center bombings, whether it be the Cole bombings, the East Africa bombings,

whether it be McVeigh. But in the wake of September 11th, you and the American public are asking the FBI to prevent terrorist attacks. And in order to do that, it is much different than focusing on a particular individual who may have committed a crime.

You are asking us—and I will go back to—I remember sitting here with Senator Specter, who is not here now, asking about the Phoenix memorandum. The Phoenix memorandum that came out before September 11th indicated that there were individuals from the Middle East who were attending flight schools in Phoenix, and the agent—who was a prescient agent—looked at that and said, "Hey, look, this is of concern. This is a threat." Not an individual, these are Middle Eastern individuals who apparently were attending radical groups who were going to flight school.

Now, in this day and age, the American public expects us to followup on that memorandum to determine whether any other individuals around the United States who may be undertaking the same activity, although these individuals have not committed a crime, these individuals—a crime has not been committed. And these guidelines that make a distinction between national security and criminal, in my mind, perpetuate the distinction in the Bureau between law enforcement and intelligence, where we, to undertake our responsibilities—

Senator FEINGOLD. I am running out of time, but as to the process, I have trouble understanding the reasoning for not allowing people to have a copy of this. If the guidelines are going to be made public anyway, why not let people see them and analyze them now? It would not only significantly increase public confidence in the guidelines, it would also improve them. What is the point of removing them from a room and not allowing people to really look at them?

Mr. MUELLER. There have been shifting drafts. They are in the middle of a process. And what we did is tried to include both Congress as well as the various groups in that process, giving—as I say, it is a draft. It is going to shift, and it is going to change. And our effort was to bring others outside who obviously have an interest in these—

Senator FEINGOLD. I can get you a "Draft Only" stamp, if that is what you need. You know, this is serious stuff, and it would help the process if we do this.

Let me ask you one other thing. You mentioned in your discussion with Senator Leahy that many of the details about how these new Attorney General guidelines will work in practice will ultimately be embodied in FBI policies. If the Attorney General does decide to go forward in the near term with these new guidelines, will you commit that the related FBI policies will be made available publicly, to the greatest extent possible, so that the American people can understand fully what rules govern FBI investigations?

Mr. MUELLER. Yes.

Senator FEINGOLD. Thank you. I will stop at that point.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

In the order I have from Senator Specter, Senator Kyl.

Senator KYL. Thank you, Mr. Chairman.

Let me just begin by saying that, in order that silence not be construed as consent, I just want to note for the record that I do not think that the tone of some of the questioning has been appropriate here. I specifically exclude, for example, the last questioner. Since I followed Senator Feingold, I do not want him to think that my comments are directed to him. We ask tough questions. That is appropriate. But I think we are all on the same side here.

I wanted to pick up on something the FBI Director just said, because I, too, remember the aftermath of 9/11. And there has been a big debate about whether we should have the FBI actually doing the kind of investigation that he spoke of. My own view is that it is still not a close question. I have had the debate with the Director. He says the FBI can and should be doing this. If we do not give the proper authority, I am not sure that the FBI should be doing it. I am assuming maybe we would give a broader authority to a group that is separate, as exists in Great Britain. That is a debate for another day.

We have said the FBI has the responsibility, and I think we have the responsibility, therefore, to assist in ensuring that you have the tools to get the job done.

I just wanted to quote one thing from your statement and then ask you to expand on it a little bit primarily because in answering some previous questions, I think you were prepared to go beyond what you were allowed to say. And so I want to give you that opportunity.

In your statement, you talk about how the rules, for the most part, dealing with crime investigations or terrorism threats can work together. But you go on to say, "However, criminal threats and national security threats no longer fall neatly into separate categories. The threat of today, and of the future, is a dangerous convergence of terrorists, hostile foreign governments, and criminal groups operating over the Internet and through interconnected, sophisticated networks. We may see organized crime laundering money for drug groups, drug groups selling weapons to terrorists, terrorists committing white-collar fraud to raise money for their operations, and, most threatening of all, hostile foreign governments arming terrorists with an arsenal of biological, chemical, and radiological weapons."

To demonstrate this interconnectedness and also the folly of trying to separate rules governing crime investigation from this new terrorist threat, you were in the process of providing some examples, and I wonder if you could, to make this real, to just be real clear about real-life situations that might evolve here, if you could give us a couple of examples of how you see these things unfolding and why it does not make sense to have a different set of rules, especially a set of rules that makes it more difficult to investigate terrorism than crimes.

Mr. MUELLER. Well, I guess a couple examples from the terrorism field would be in Colombia, for instance, the FARC that is involved in narcotics trafficking but is also a terrorist group. You have the same thing occurring in Afghanistan with the Taliban intersection with narcotics trafficking.

If you are looking at cyber as an example today, you have a number of fraud schemes that have migrated from the mails to the

Internet. You also have a number of those affiliated with terrorist groups and responsible for garnering funds for terrorist groups using a number of scams on the Internet that can be treated as either money laundering or fundraising by a terrorist group or money laundering on the Internet. One is criminal, one is national security.

The list of circumstances where you have terrorist groups or—not just terrorist groups but countries who commit espionage and seek to steal our secrets can be treated either as a criminal organization or as a terrorist organization or as operating at the behest of a foreign government who wants to steal our secrets. And what techniques we use to investigate that should not be dependent on the cubbyhole in which that particular activity is put. We need the techniques across the board regardless of what particular program we traditionally in the Bureau have operated it under.

Senator KYL. And if you could, one of Senator Feingold's questions I thought was a good question, and I would like you to have the opportunity to give a slightly more fulsome answer. Can you just pick up somebody on the street, whether it is a crime or investigating terrorism, what protections are there, what is the best way to describe the kind of assurances that this kind of thing simply would not happen so that the American people can be confident that the guidelines, along with the policies, along with complying with the law, prevent that kind of activity?

Mr. MUELLER. As opposed to the guidelines of the past with focus on a particular crime, the guidelines here focus on a particular purpose. There has to be an articulated purpose tied into a specified threat for the activity that is undertaken. It has to be written up. It will be assigned to an attorney. There will be a 30-day review of that. And there will be an increasing scale of review depending on the types of techniques that are going to be used. That has been traditional under the guidelines, whichever guidelines you have, and will be incorporated from the past guidelines to these guidelines.

We are absolutely sensitive that we want higher review. For instance, if an agent wants to undertake activity with regard to a religious institution or political institution or the like, there is a higher level of review and authorization that is required, as well as the 30-day review, to assure that the investigation is being pursued, if not being pursued is being closed.

Senator KYL. And, finally, are there some time constraints that, therefore, call for a presumption to move ahead subject to all of the kinds of reviews that you have discussed here?

Mr. MUELLER. Well, the assessments will generally be—in general, I say—a 30-day review. When you move up to the next level and preliminary investigations, they can be undertaken for 6 months. If they do not go to a full investigation, they need to be closed. So there is a level of supervision that in the past has been more or less on its own. Supervision authority, documentation procedures being followed—

Senator KYL. If I could just interrupt for a second, I think there is kind of a tendency, because we watch too many TV shows, to think you have got to have some kind of probable cause to believe

that the person is guilty before you can even begin investigating something. I wish you would address that point.

Mr. MUELLER. Every day, as most people know, we have a threat list of umpteen threats, generally anywhere from 11 to 20 pages. A number of those threats can be e-mail threats from all around the world saying that this particular terrorist activity is going to occur in the United States or elsewhere tomorrow. That is the type of threat that comes in that warrants an investigation, an assessment, if you will, to determine whether or not it is valid and what further investigation needs to be made.

Generally, we go to the IP address, and I do not care where it is, where it comes from—Pakistan or Malaysia or what have you—and we work to identify the person and to exclude that as a threat of moment. But that is the type of assessment.

What you also have—and I do not want to mislead people—you have assessments that would follow the recognition, as Agent Ken Williams did in Phoenix, of a circumstance that was bothersome to him, troublesome to him, and he believed needed a follow-up assessment. That would have been treated as an assessment as well.

Senator KYL. Thank you very much, Mr. Director.

Chairman LEAHY. Thank you very much.

We will go to Senator Durbin, and then we will take a 10-minute break.

Senator DURBIN. Director, thank you for being here, and I appreciate your service. It has been 7 very challenging years. I believe that it is 7 years that you have been in this position. We have worked closely, and I value the working relationship that we have had.

I would like to follow-up on this guideline question and try to zero in on what I think is at the heart of many of the questions that have been asked of you.

It is clear to me that in most instances, when it comes to an FBI investigation, there has to be some factual predicate which leads to that investigation. So my question to you is this: Is national origin or religion a sufficient factual predicate in investigations related to terrorism?

Mr. MUELLER. In and of itself, no.

Senator DURBIN. There has to be more?

Mr. MUELLER. There has to be more.

Senator DURBIN. I think that really gets to the heart of the question, and I hope that the guidelines will be shared with us and that they reflect what you have just answered.

I will also say that one of the more troubling aspects of this administration's policies since 9/11 has been the question of torture and investigative techniques. Attorney General Mukasey has testified before this Committee, and we had a long day or two of questions related to these techniques, what was permissible and what was not. I called you the other day to mention that I was going to bring this up.

In 2005, at a hearing before this Committee, I asked you about reports that FBI agents regarding—FBI agents regarding detainee abuses, they witnessed this. In these reports, which were publicly released under the Freedom of Information Act, FBI agents complained about "torture techniques" being used at Guantanamo. I

asked you in 2005 whether the Defense Department has changed their interrogation policies as a result of the FBI's concern, and you said, I quote, "I do believe they have."

I and other members of the Committee asked the Inspector General to investigate these FBI complaints. The Inspector General concluded, and I quote, "We found no evidence that the FBI's concerns influenced DOD interrogation policies."

So I would like to ask you, What was the basis for your statement to this Committee in 2005 that concerns of FBI agents did change the interrogation techniques at the DOD?

Mr. MUELLER. I am not certain that—I do not have it in front of me, but I am not certain the question said, "Did the concerns of FBI agents change the techniques?" What I do know is the techniques had changed over a period of time. There were different orders given through the hierarchy at Guantanamo. There were a set of procedures, as I understand it, that were instituted, maybe in 2002, 2003, and then were rescinded over a period of time. I do not think I meant to—if I did, I did not mean to say that I knew that that was as a result of the reports from the FBI, because I am not certain it was a result of the reports of the FBI. It may well have been of the reports of Abu Ghraib which interceded to make those changes.

All I know is that there were shifts in terms of the allowable procedures at Guantanamo over a period of time.

Senator DURBIN. If I asked you to step back and reflect on this period and this question and interrogation techniques, what could you say for the record has been the policy of the FBI under your directorship when it came to not only the use of these techniques, but also efforts to stop their misuse by other agencies of the Federal Government?

Mr. MUELLER. Well, with regard to the FBI participation in those techniques, I think, and the Attorney General report points out, that we maintain our own protocols that do not depart from utilizing techniques that include no coercion. With regard to—I think agents in the Bureau did exactly what was appropriate in complaining to their counterparts at Guantanamo. What I do not think we did a good job of is making certain that those reports came to the top so that additional requests—or to assure that these requests were being handled not just at the lower level in Guantanamo but higher here in Washington.

One of the concerns we have had and one of the issues one had to wrestle with is that there were shifting definitions of what was allowable over the period of time, and to a certain extent, there was legal authority supporting those. And so a definition of what constitutes "abused" shifted over a period of time, depending on a number of factors. And I think we could have done a better job of identifying at the top these particular abuses and making the points perhaps stronger to DOD.

But, on the whole, I think the FBI and its agents did a very good job in not participating in the techniques and alerting their counterparts that they did not agree with those techniques. I will tell you the other thing that I think we did appropriately is when we understood this was happening in the spring of 2004, we then went to any agent who had undertaken interrogations near Iraq or in

Guantanamo and had seen abuse, and we went through every one of those and then referred them to the appropriate authorities once we were aware that this was happening. I do wish that we had done more earlier in terms of pushing to the top the concerns that they had lower down.

Senator DURBIN. My understanding in reviewing the history of this administration is that the Office of Legal Counsel and other offices were sending out from time to time memoranda explaining what they considered to be the outer limits of interrogation techniques. Some of these were rescinded. Is that what you referred to earlier?

Mr. MUELLER. Yes. They were memoranda that went to other agencies.

Senator DURBIN. But in terms of your agency and the work of your agents, you have consistently not—your agents have not engaged in these techniques and have reported abuses when they observed them?

Mr. MUELLER. Yes—not in all cases, but I think—certainly over a period of time in all cases, when we queried every agent who had participated in questioning in Guantanamo or over in Iraq.

Senator DURBIN. And when General Counsel Valerie Caproni testified and I asked her about techniques such as painful stress positions, threatening detainees with dogs, forced nudity, mock execution, and waterboarding, she responded, "Yes, those are abusive under all circumstances." Do you agree with that?

Mr. MUELLER. Yes.

Senator DURBIN. I would like to ask you—we just have—well, I guess my time is up, but let me close by saying I am glad that you spent some time talking about the change in technology in the FBI. It is one thing you and I have worked on. I know it has been a painful, arduous journey. And it appears now that significant changes have been made for the record, and I am sure the Committee is well aware of it. On 9/11, the FBI was woefully unprepared from a technology viewpoint in terms of some very fundamental issues—e-mail, access to the web, ability to transmit photographs electronically. It appears now from your opening statement that significant progress has been made and more is underway.

Mr. MUELLER. Thank you, Senator.

Senator DURBIN. Thank you.

Chairman LEAHY. Thank you. And I should note that we keep talking about all the failures leading up to 9/11. The Director took office just barely at that time, and these were the failures prior to him being there.

I apologize to Senator Whitehouse. We are going to take the break now. When we come back, he will be recognized. Director Mueller will first be given a chance to respond to the unanswered questions. He can use the time during the break to make whatever call is needed to be able to answer them.

We will stand in recess subject to the call of the Chair. Thank you.

[Recess at 11:08 a.m. to 11:29 a.m.]

Chairman LEAHY. The Committee will be in order. I ask that the public please take their seats so that people's views are not obstructed.

Before I go to Senator Whitehouse, Director Mueller, you had something you wanted to say.

Mr. MUELLER. Yes. You asked two questions and asked me to try to track down answers to two questions, one yourself and one, I think, from Senator Grassley.

With regard to the two laboratories that you mentioned and were there any other laboratories that had the capability of weaponizing anthrax, I respectfully ask that we provide that in a closed session. Aspects of the response to that question may well be classified.

Chairman LEAHY. Well, do you have—and I understand from what you told me in a—you told me privately what the answer is. I will discuss with Senator Specter that we will make arrangements for the answer to be provided in a classified fashion.

Mr. MUELLER. I had one other—

Chairman LEAHY. Yes, please. Go ahead.

Mr. MUELLER. Senator, if I could, Senator Grassley asked a question with regard to when we received the records—after-hour records of the access to the laboratories at USAMRIID, and the answer is in 2002 we obtained the records of not just the time in labs of USAMRIID but any number of additional laboratories such that we had thousands upon thousands of records of access to various portions or hot suites in laboratories around this country and other—I am not certain, but maybe labs in other countries as well. And after that, it was a question of focusing and utilizing those records as a portion or a part of the continuing investigation.

Chairman LEAHY. Thank you, and I also will leave the record open for Senator Grassley to do any followup that he wishes.

Senator Whitehouse, you have been here right from the beginning of this hearing. I commend you, as I always do, for the amount of time you spend here. And I know you and I have had long discussions about these various subjects outside the hearing room, and I commend you for your diligence in the matter.

Senator WHITEHOUSE. Well, thank you, Chairman. I find these hearings highly informative, so I am delighted to be here and applaud, as always, your leadership of this Committee.

Director Mueller, this is probably the last time in this administration that you and I will face each other in Committee hearings. We have had some ups and downs in the course of the hearings that we have had, but through it all, I have never lost confidence in your personal professionalism, nor have I ever doubted your desire to see the right thing done, both by and for your agency. This being our last encounter of this kind in this Presidency, I want to take the occasion to remark on the incidents surrounding the Department of Justice review of the President's program for secret warrantless wiretapping of Americans.

Details of this incident have been disclosed to us in the Senate Intelligence Committee. Senator Schumer of New York, a member of this Committee, held a hearing that brought this story before the public. I suspect, Director, that if I am here 30 years, I may never again see such a hearing as that one. And the Washington Post has published even more detail in an excellent two-part series in the last 2 days—few days, I should say. It has been a few days now.

Director Mueller, I believe that the agencies of the Federal Government stand for something. I believe that the oath of office to

these senior positions confers duties and responsibilities. I believe that the greatest failing of the so-called unitary executive theory, still pursued by the extremists who have controlled White House decisionmaking, is that it expects all executive agencies to bow down before the will of the White House, even when duty, honor, and often statute confer particularly responsibilities on those agencies and on the men and women who run them.

This theory leads to a dangerous culture where yes-men and toadies become the constitutional norm. And they inevitably fail at a minimum to give the White House resistance and cautionary feedback consistent with their own duties to their agencies and to the public. This responsibility to the public and to the mission of the agency is nowhere more important than within the Department of Justice and within its components.

A combination of toadyism at the top and the deliberate disassembly of the firewall protecting the Department of Justice and its prosecutors from political interference rendered that great Department more vulnerable to political abuse and infiltration than ever in its recent history.

Attorney General Mukasey's refusal to look backwards, his determination to do no evil but also to see no evil renders us unable to determine to what extent the possibility of political influence actually became reality in investigations and prosecutions.

But against that squalid backdrop stands the example of you, James Comey, and Patrick Philbin. I believe the strength of your conviction brought along Attorney General Ashcroft and many others. It is hard to explain how serious and how long-lasting the damage to the Department of Justice would have been had you rolled over for Vice President Cheney and his operatives and ultimately the President at that grave time.

It is hard to imagine in America circumstances in which the Director of the FBI has to order agents standing guard over a stricken Attorney General not to leave him alone with the White House counsel and the President's Chief of Staff to make sure that Deputy Attorney General James Comey stayed with him.

But it is not hard to understand the feeling of pressure, isolation, and consequence that bore down on all of you through that episode. I will disagree with all of you on many things, but I wanted to take this opportunity today to say thank you. Against intense and hostile pressure from the highest offices in the land, you stood for the principle that all public offices have public duties and responsibilities and that honoring those duties and responsibilities, at least as God gives us each of us the light to see them, is a higher public virtue than mere obedience. That is an important lesson in democracy. I hope it is a lasting one, and I thank you for showing us it.

I will reserve my questions for the record. I will ask that—I think the discussion that the Director had on the subject of the control over these new investigative areas of national security and foreign intelligence unhinges the Department's investigative responsibilities from some of the traditional restrictions that have customarily and over time developed around criminal investigations. For starters, a nexus to a crime, the theories of predication and the rules around them that have been developed, and all of that, I think it would be helpful, in addition to sharing with us the

new guidelines when they become apparent, to allow some senior folks on your staff who are responsible for this new responsibility to come and brief those members of the Committee who are interested, and their staffs, on what the kind of affirmative protocol for providing guidance in those investigations.

I have not seen them yet, but I suspect that the guidelines are written rather in the negative and do not disclose the administrative structure that enforces and supervises them. I think the Chairman is a very experienced prosecutor. I spent time as an Attorney General and the United States Attorney. I have comfort that there is a structure that I am familiar with that restricts criminal investigation to the legitimate investigation of crimes that actually happen or are believed to have happened.

I am not convinced as to what the structure is that will limit investigations in the national security and foreign intelligence area to any reasonable benchmark or guideposts. I think you probably can provide it, but I think it would be helpful if we had that discussion, rather than just working off cold paper guidelines. And if you would agree to do that, I would appreciate it.

Mr. MUELLER. We have had preliminary discussions in our briefings with regard to what we plan to put into place to supplement the guidelines, but we would be happy, as we go through this process, to brief you on the structure, the administrative structure that will support the guidelines.

Senator WHITEHOUSE. You understand my question?

Mr. MUELLER. I do.

Senator WHITEHOUSE. Yes, OK. Thank you, Chairman. And thank you again, Director.

Chairman LEAHY. I thank you for that, and I would—I believe the article you were referring to was the excerpts from the book "Angler." And I want to note my agreement with what you said, and that I agree with what you said about the integrity of the Director in what had to be a very difficult, and I suspect lonely, circumstance. So I applaud you for your comments, I applaud you for your statement, and I concur.

Senator FEINSTEIN. Mr. Chairman, if I may, I would also like to concur with the comments. I think Senator Whitehouse said those with a full heart. I think they were well stated and, Mr. Director, well deserved.

Thank you very much.

Senator WHITEHOUSE. Thank you very much.

Chairman LEAHY. Thank you. And now we have Senator Cardin of Maryland, again, a very valued member of this Committee who brings his experience from his years in the other body.

Senator Cardin.

Senator CARDIN. Thank you, Mr. Chairman. I also want to concur in the comments made by my colleague from Rhode Island and thank the Director for the role that you have played. It does point out that it is not just the direct responsibility you have as the Director or the direct responsibility that we have as a Committee in enacting laws. But it is the role that you play in standing up for what is right and the role that we play in oversight that I think is critically important to our country.

I want to cover two points today, if I might: one will be the anthrax investigation; the other will be the 2008 elections.

I just want to concur with some of the comments that have been made by my colleagues of the importance to be as transparent as possible in the anthrax investigation. There is a comfort level that has not yet been reached, and I agree with Senator Specter that we should be looking for ways to make the availability of the Academy of Sciences a more transparent and understandable process to give more information that the public can understand about this anthrax investigation.

I represent Maryland. Fort Detrick, of course, is a critical facility for our national security. The community has been very understanding of what work is done at Fort Detrick, but they have a right to expect that those that work there are properly secure and are working in our national interest and that we are doing everything to make sure that is the case.

One part of this investigation I would like to cover with you today that I think points out the concerns that many of us have about the completeness of the investigation. It is my understanding that Mr. Ivins had security clearance until July 10th of this year. And if there was such mounting evidence against him, why was his security clearance maintained to such a late point? Did the FBI recommend that his clearance be changed and it was not followed up? Or was it just an oversight? Or did we not have credible information until after July of this year?

Mr. MUELLER. I would have to get back to you on the specific timeline, but the investigation continued and was not—there was no overt action taken until November, I believe, of 2007. At the time that the search warrant was requested and we had probable cause to believe that premises should be searched, we advised USAMRIID of our concerns. And my understanding is that at that point, while his security clearance may well have been maintained because there was no indictment, there were no public charges, nonetheless his access to the relevant spaces at USAMRIID was denied. And so he no longer had access to the compounds that he had access to prior to that day.

Senator CARDIN. And that was based upon the information obtained for the searches in November of 2007?

Mr. MUELLER. I believe that is the case.

Senator CARDIN. I would appreciate it if you would confirm that to the Committee, that, in fact, he did not have access after that date, because the information we received, it was a counselor challenging his mental status that ultimately led to the revocation of his security clearance.

Mr. MUELLER. That may well have been. That happened sometime later. And, again, the extent to which we have access to those records, I am not certain because they are privileged, and quite often in the course of a criminal investigation, if they are privileged records, medical records and the like, we do not have access to them. I would have to check as to when we found out about the—

Senator CARDIN. I appreciate that. I think it is important that access and clearance be very carefully monitored, particularly when there is criminal investigation that had reached the level that your

investigation had reached. I would appreciate your getting back to me on that.

Let me talk about the 2008 elections for one moment. This Committee has had oversight hearings as to the Department of Justice's actions to try to prevent a repeat of activities that occurred in the 2006 and 2004 elections, where there was voter fraud that took place in close proximity to the election, which makes it difficult for reaction to ensure that voters can participate without intimidation. We had a long letter sent out giving the wrong dates for elections, threatening people with parking tickets outstanding that they will be arrested, or new immigrant citizens, challenging their rights to vote.

What role will the FBI play prior to the November 4th elections to be as constructive as possible for the enforcement of our laws and be prepared—and how are you preparing for the 2008 election itself? Have there been meetings and discussions with the U.S. Attorneys? Is there a role that you are playing? Can you fill us in on this?

Mr. MUELLER. Whenever there is an election, we have specialist agents who are versed in this type of crime. Each one of our offices, every U.S. Attorney's Office, is instructed to take whatever allegations there are in, but then there is very close coordination with the Election Crimes Section of the Department of Justice. And so whatever allegations come into our offices are fed into the Election Crimes Section at the Department of Justice, and whatever additional investigation is necessary, there are steps taken, whether it be grand jury or steps taken by us, done in consultation with the Election Crimes Section.

Senator CARDIN. Well, I would just urge you to give this your personal attention. We are concerned—there are a lot of new participants in this election. There were exciting primaries for both the Democrats and Republicans. We have a lot of first-time voters. We are going to see that there is going to be a lot of activity on college campuses, and they are worried as to whether, in fact, the election system will be able to accommodate those voters.

We are concerned about misinformation being intentionally used by some advocates in an effort to influence voter turnout, which would be inappropriate and aimed at minority communities. And I think the more work you can do leading up to November 4th, the best it will be to prevent that type of activity from taking place, which is our goal; but if it occurs, to be in a position to make sure that we have the information necessary to hold those accountable for violating our laws.

I would just urge you to give that personal attention.

Mr. MUELLER. I will.

Senator CARDIN. Thank you.

Chairman LEAHY. Did you wish to respond on that at all?

Mr. MUELLER. No. I am fine. Thank you.

Chairman LEAHY. I might say also that a number of us share the concerns that Senator Cardin has stated. It is not a partisan concern. It is a practical concern.

I think of my own grandparents who taught me after they became citizens how wonderful that ability to vote is. One of my earliest memories as a child, probably 2 or 3 years old, is being carried

into the voting booth with my parents, they holding me while they checked their paper ballots in Montpelier, Vermont. It is very, very important. Very, very important part of life. I just want to make sure that people want—as we have seen in the past, when there have been instances when people have been denied the vote for political reasons, that that not happen, and I think the whole country is going to have to rely on the FBI to be extraordinarily vigilant in that.

I might mention, following on what Senator Whitehouse has said, a book that I read and found very enlightening, "The Dark Side" by Jane Mayer, she talks about a dinner party she attended. One of the lawyers at the party criticized Tom Wilner, another lawyer who had represented detainees, for defending terrorists down at Guantanamo, where the book toasted Mr. Wilner for doing what Americans should. Those of us who had the privilege, as you have and I have, of being prosecutors know the whole system breaks down completely if there are not defense attorneys. They are not enemies of the country but protectors of the system, just as the prosecutors are. So I commend you for that.

Now, a question I asked earlier, and the clock can start here, and then I am going to—I am in my second round here. I understand Senator Grassley has a second round.

These AG guidelines, if you open an assessment that allows an agent, among other techniques, to conduct an indefinite 24-hour surveillance on a U.S. person, the regulations do not require a supervisor to look at that. I keep going back to the misuse of the exigency letters. You said the supervision would be put in place through FBI policies. If there are going to be policies anyway, why not just include them in the regulations to begin with?

Mr. MUELLER. Because I do think the guidelines have always been a framework, and there are any number of situations and techniques that could be used in any particular situation. And what is important is to have the guidelines as a framework, and then working on that framework, flesh it out with particular requirements that may change over a period of time. In other words, if we establish a 30-day review period for our assessments, we may find that is too short a time or too long a time. And we should not have to go through, in my mind, a whole process of going back, requesting a change from the Department of Justice. We ought to be able to change those policies—with scrutiny from the Department of Justice, quite obviously, and with briefing to Congress, but to change those internal policies depending on what we find, what we learn. And inevitably there will be some set that we would have to come up to put into practice that which are the guidelines from the Attorney General.

Chairman LEAHY. But you understand my concern, and I go back to the exigency letter when there was not adequate supervision.

Mr. MUELLER. Yes.

Chairman LEAHY. It is something both you and I agree on, and I just want to make sure there is supervision, because in a digital age so much of this stuff just lasts there forever, and we know what can happen. I used as another example, the Homeland Security, Senator Kennedy is denied access numerous times to an airplane because somehow he is on a terrorist list, or the year-old

child who had to get a passport to prove they are not a 30-year-old suspected terrorist. It was so inflexible that the parents say, "Look, it is a year-old child." "Sorry. It is the same name as a 30-year-old terrorist on our list"—or 35 or whatever it was. People who are suddenly turned down for jobs or a security clearance or college loans or anything else are never told why because somewhere they got put on a list. And you end up with almost an Orwellian concept.

Our concern is not that we do not go out and make threat assessments, but that we do it in such a way that there is some supervision and some way for the record to be cleared if somebody does not—if the threat assessment turns out to be simply a case where a disgruntled friend or neighbor says, "Heck, I will drop a dime on this person, even if it is not legitimate," because in today's age, it is not a dusty file put off in a filing cabinet somewhere. It is in all kinds of data banks.

Mr. MUELLER. I do share your concern in that regard, Mr. Chairman. One thing I should add that I should have pointed out before in your hypothetical that you gave me, a person is driving down the street with—I think you said with a license plate that articulated something, that is under the guidelines as well as our procedures a circumstance where we could not open an assessment because the person was express First Amendment rights. And, consequently, that is an area that is carved out from that area where agents can undertake assessments.

Chairman LEAHY. Well, let's say there has been a threat assessment open, and let's go through all the various steps. The supervisor has looked at it. It is not just an FBI agent who is exercising a personal predilection or something. Somebody has looked at it and has said, "Yes, this is a legitimate threat assessment. Let's follow it up." And all the appropriate steps are taken. The supervision is there, and they find, yes, there really was nothing there. It was a case of mistaken identity or whatever and that is it. The case is closed. But all that information that is gathered, what happens to it? Is it kept there forever?

Mr. MUELLER. It is there subject to the rules of the archives. It will be there for a substantial period of time, just as on the criminal side of the house where you have an allegation that somebody violated the criminal laws—and, again, it could be a disgruntled employee, it could be a disgruntled spouse, it could be a disgruntled friend, who triggers the process. We do an assessment, we do an evaluation, and we determine that that was baseless, we retain those records according to those rules that are laid down by the archives.

Chairman LEAHY. OK. But is there any firewall in there so the fact that this person's name, there has been an investigation is not out there blocking them from getting on airplanes, blocking them from getting turned down for a promotion or a job, blocking them from getting a loan on their home and so forth?

Mr. MUELLER. Well, unless there is some substantial substance to believe that the person is a terrorist, they do not—or they should not be or their name should not be with identifying data on the terrorist watchlist. We try to protect our records. We are very concerned about information that we may obtain relating to an allega-

tion that turns out to be baseless be out there. But we have a records retention policy that we file in all of our programs.

There are occasions where we are asked to do background investigations on persons who may want to be judges or join an administration. We collect a fair amount of information with regard to those individuals. They have committed no crime, but the information we have obtained is pursuant to an authorized purpose, and we maintain that, both the good and the bad, without our acquisition of that adversely impacting that person in public.

Chairman LEAHY. But, for example, going back to what—and I keep thinking of the exigent letters and what happened there. You called the editors of the Washington Post and the New York Times to apologize for illegally obtaining telephone records for several of their reporters back in 2004—not you personally obtaining them, but they were obtained by the FBI. And according to a briefing that we got from your staff, the FBI had no legal authority to obtain these records. The agents had falsely claimed that it was an emergency request in the records, and the FBI had simply ignored well-known requirements that they get approval from the Justice Department before seeking these records from journalists.

The Department of Justice Inspector General said that the national security—the FBI used its national security authority in more than 700 letters where there is no basis in law.

Mr. MUELLER. Well—

Chairman LEAHY. Now, you have apologized—and I commend you for doing this—to the Washington Post and the New York Times for that. What about these other 700 people? Do they get apologies? Do they get a note or anything?

Mr. MUELLER. No, in the case of other investigations or information we obtain, it is maintained in our files for the period dictated by the archives and then ultimately destroyed, and no use is made of it in the meantime.

With regard to those 700, we have pulled any—we have tried to pull—because we did not have the authority to collect, we have pulled that information from databases and sequestered it. And it has been eliminated from our files.

With regard to the request that was made—actually, as I understand it—and the Inspector General is looking at this. As I understand it, an agent queried somebody in headquarters as to whether or not he could obtain records from an international entity relating to an ongoing investigation that did relate—and the records did relate to the media. That was picked up by another agent as a request, and what happened is we did not go through the approval procedures. They were bypassed, the approval procedures at the Department of Justice, when the request for those records was made. And once we found out from the Inspector General that the records had been obtained, we have sequestered them and sealed them.

Chairman LEAHY. Thank you.

Mr. MUELLER. No investigative use was made of those records.

Chairman LEAHY. Thank you.

Senator Grassley.

Senator GRASSLEY. I want to thank you because you got back very quickly, as you promised you would, if you could give us infor-

mation about the lab access records, and you do that and I thank you. I would like to have one little followup on that, and then I will go on to something else.

If the FBI had the lab access records in 2002, why did it take so long to analyze them and learn that he had been alone in the lab late at night around the time of the mailing?

Mr. MUELLER. I think the answer to that question, Senator, is that we obtained in 2002 thousands upon thousands of lab records from any number of laboratories who were in the purview of those laboratories that had individuals or had access to the Ames anthrax. And, consequently, we had a very large set of records, and it is only when they were used when we focused on an individual. And there has to be something that warranted us going to a particular record to analyze it beyond just the fact of analyzing hundreds—probably hundreds of thousands of pages of scientists, 99.9 percent of which were validly in the suites after hours. And so I think it was a question of focusing the investigation.

Now, I say that without having talked to the agents but having had secondhand understanding. So I would like to confirm that, that that was the case.

Senator GRASSLEY. Well, if there is anything contrary, then you can submit that in writing. I have just one more question in regard to Dr. Ivins. Then I will move on.

According to information released by the FBI, the material in the anthrax attack envelopes contained silicon. I understand that scientists at Sandia National Labs conducted a series of blind tests on samples of the material taken from the flask in Dr. Ivins' lab at Fort Detrick. Unlike materials in the attack envelope, the material in the flask did not contain silicon. Can you confirm that testing found no silicon in the flask from Dr. Ivins lab in Fort Detrick? And if there was no silicon in the flask material, then can you explain how silicon ended up in the attack envelopes?

Mr. MUELLER. You are a little bit out of my expertise at this juncture. I do know that there was an issue of silicon or silica at the outset, and it was determined that the silica was not on the exterior of the spore but was part of the growth process.

Now, in terms of how that related to the anthrax in the flask maintained by Dr. Ivins, I would have to get back to you on that.

Senator GRASSLEY. OK, and I will be glad to have you do that. Thank you very much.

In regard to exigent—

Mr. MUELLER. I will say, Senator, there are probably a number of scientists out there who are looking askance at my answer. I think it is pretty much on target, but I have to confess that I am a little bit out of my depth in terms of diving deeply into the science.

Senator GRASSLEY. I accept your confession and wait for your answer.

This Committee requested e-mails related to the exigent letter controversy more than a year and a half ago. I recently received a letter saying that you would not provide the documents because of the ongoing Inspector General's investigation. However, the FBI previously indicated it would provide the documents and then actually provided a few of them last October, even though the Inspector

General was investigating then as well. So your position on this has not been consistent. I do not believe that we should have to wait for months or years for the executive branch to conduct its own internal inquiries before we get answers to oversight requests.

Two questions together. Why should we have to wait so long to get these documents? And then, second, in responding to congressional document requests like these, are you limited more than you would like to be by the Justice Department policies that prevent you from responding to Congress even though a more complete response would be in the interest of the FBI?

Mr. MUELLER. Excuse me just one second if I could.

[Pause.]

Mr. MUELLER. Again, I am not certain as to why there is the inconsistency. We have tried to be as open as we can with regard to documents such as that. We are constrained periodically by the Department of Justice for reasons that are explained to us and which we tried to explain to you as well. But I would have to get back to you on this particular circumstance as to why—

Senator GRASSLEY. Can you concentrate on the second question, then, in regard—let me repeat it. In responding to congressional document requests like these, are you limited more than you would like to be by the Justice Department policies that prevent you from responding to Congress even though a more complete response would be in the interest of the FBI?

Mr. MUELLER. There are occasions—

Senator GRASSLEY. It can be less of a problem for you, let me add.

Mr. MUELLER. I will tell you without specific reference to a particular case, we do not see eye to eye—there are occasions where we do not see eye to eye with the Department of Justice. But I am a component of the Department of Justice.

Senator GRASSLEY. OK. Recently, the—

Mr. MUELLER. Relatively rare, I must say, but there are occasions where we part company.

Senator GRASSLEY. OK. Recently, the Attorney General proposed new guidelines for investigative activities by the FBI. I am concerned with the portion of the guidelines related to cooperation among Federal law enforcement agencies. Specifically, the section in question outlines how criminal matters outside the FBI jurisdiction are to be treated. It goes on to state—and I have got to paraphrase because I do not have a copy—that any criminal matter outside the FBI's jurisdiction that arises should be transferred to other law enforcement agencies with expertise. However, it adds that if it would jeopardize an investigation or a source, the FBI can simply write up a memo and forward it to the Deputy Attorney General and move on. The guidelines are silent as to what the Deputy Attorney General does with this information. I am concerned that this new provision could lead to gaps in information sharing and ultimately let criminal wrongdoings go unpursued because of turf battles. So four questions that kind of go together. I would like to state them all.

Under the new guidelines, what would the Deputy Attorney General do with any information forwarded from an FBI field office that the office believed would jeopardize an FBI investigation?

Two, would the other coordinate law enforcement agencies ever get that information?

Three, would the FBI pursue the case?

And, four, is the decision made by the field office to refer the matter to the Deputy Attorney General ever reviewed? And if so, could a field office decision to not share the information be overturned?

Mr. MUELLER. The answer to the first question, I believe the Deputy would look at it and determine whether or not the rationale given for not alerting the other agency was valid. I think the Deputy would also make a determination as to whether or not there was a time period during which they should not be notified, but after that time period or after that investigative activity, the other agency should be alerted.

As to the third portion of the question, certainly the FBI should be pursued, and if it came from field to headquarters to the Deputy Attorney General's office, then headquarters would certainly be involved in that process.

And, last, certainly the view of a field office would be and could be second-guessed by either headquarters or the Deputy Attorney General and the field office determination overturned, either at headquarters or with the DAG.

Senator GRASSLEY. OK. Thank you, Mr. Chairman. Thank you, Mr. Director.

Chairman LEAHY. Well, thank you, Senator Grassley. We will hold the record open for the appropriate time, also, Director, on some of these questions, if you find after looking at the transcript that there is additional material you want, of course, the transcript to be open for that, I would encourage you to do that. Many, as you have noticed, on both sides of the aisle have raised questions about whether the Attorney General's proposed new guidelines for FBI activities would give the FBI sweeping new powers with minimal checks to prevent the kind of things we saw in the national security letters.

I think we could have been more productive today if the Attorney General had agreed with the request that Senator Specter and I made to provide copies of the proposed guidelines. But like the limited briefings that have been given to staff, the exchange today was a good start. I think it could have been better had we had that. That is not any criticism of you. That is a decision made by the Attorney General.

I was pleased, though, with your promising this Committee that the FBI is going to be vigilant in investigating whether fraud or lawbreaking contributed to the ongoing financial crisis. It is the worst we have experienced since the Great Depression. It has exposed the American taxpayers to possibly trillions of dollars in losses. And, of course, we have seen the devastation of homeowners and investments and lives across the country. Drive through any community in America and look at the number of "For Sale/Foreclosure" signs—unprecedented, certainly in my lifetime. It is the kind of thing my parents told me about that they observed during the Great Depression.

The Wall Street mess has a lot of causes, but it illuminates a number of the problems we have seen in these past few years. I

think they include incompetence in some of the appointments to regulatory agencies the White House has made. These are people who are supposed to be the public's on-the-scene watchdogs. We have squandered faith in market mechanisms by winking at increasing signs of excess and corner-cutting by rich and powerful corporations. I believe there has been indifference to the widening gap between the very super-rich and ordinary Americans, the lack of affordable housing. These are fundamentals of responsible economic and fiscal policy. It has been ignored in this administration, and whoever the next President is, they must try to straighten that out.

On a personal level, I thank the Director for being here—I agree with what Senator Whitehouse and others have said—and I commend him for the amount of time you have spent in meetings and trying to answer my questions, including one that was obviously classified.

Go ahead.

Mr. MUELLER. I am sorry. Could I interrupt just to clarify an answer I had before?

Chairman LEAHY. Of course.

Mr. MUELLER. In mentioning the subpoenas for the media records overseas, I mentioned that the individuals did not go through the process at the Department of Justice. What I failed to mention, which was another aspect of it, was that an exigent letter was used, which is also inappropriate. And I did not want to omit that from the calculus and paint it as something other than it was.

Chairman LEAHY. Thank you. I appreciate that. Several of us here will continue to work with you as these guidelines come out and with the Attorney General, even though he seems reluctant to work with us. But I would also—on a question I asked you, we will work with you and your office to provide in a classified fashion the response to Senator Specter and myself that will be available under the normal fashion that we handle—he and I handle a great deal of classified material here, and we will follow the normal procedures on that.

With that, Director, I thank you for coming.

Mr. MUELLER. Thank you, sir.

[Whereupon, at 12:13 p.m., the Committee was adjourned.]

QUESTIONS AND ANSWERS

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

April 27, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on September 17, 2008. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." The data in these responses is current as of December 15, 2008. More recent information can be found in the Director's testimony before the Committee of March 25, 2009, as well as the President's Fiscal Year 2010 budget. However, we hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

M. Faith Burton

M. Faith Burton
Acting Assistant Attorney General

Enclosure

cc: The Honorable Arlen Specter
Ranking Minority Member

Responses of the Federal Bureau of Investigation Based Upon the September 17, 2008 Hearing Before the Senate Committee on the Judiciary Regarding Oversight of the FBI

Questions Posed by Senator Schumer

Schumer 1. The *Washington Post* recently reported on the earlier controversy surrounding the reauthorization of the Administration's warrantless wiretapping program, also known as the Terrorist Surveillance Program. The article asserted that Scott Muller, the general counsel at the CIA, agreed with the Justice Department's analysis in March 2004 that some aspects of the program were not supported by law.

a. Did the FBI General Counsel have the same opportunity to do a legal analysis, or did another FBI lawyer do so?

Response:

The FBI's General Counsel reviewed the operative Office of Legal Counsel (OLC) opinions regarding the National Security Agency program that existed in March 2004.

b. If so, did she reach the same conclusion?

Response:

FBI General Counsel Caproni does not recall the position taken by Scott Muller. She agreed with the legal position being taken by the Department of Justice (DOJ) Assistant Attorney General of the OLC in March 2004.

c. Was the FBI general counsel ever read into the program or given access to the underlying legal analysis, given that the FBI had a role in implementing the program?

Response:

The FBI's General Counsel was read into the program. In March 2004, the General Counsel was given access to the underlying legal analysis.

Schumer 2. Former Attorney General Alberto Gonzales, through his counsel, recently submitted to the DOJ Inspector General a memorandum concerning his handling of certain classified notes that he created at the President's direction. Mr. Gonzales's memo was in response to the Inspector General's recent report that Mr. Gonzales violated security procedures and mishandled classified information.

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a. Has the FBI conducted, or does it plan to conduct, any investigation of possible violations of law by Mr. Gonzales?

Response:

DOJ's National Security Division has determined not to prosecute the former Attorney General for the handling of his classified notes, and the matter has not been referred to the FBI for action.

b. Has any pressure been exercised on the FBI not to investigate or pursue these events further?

Response:

No pressure has been exerted on the FBI to take any particular action in this matter.

Schumer 3. A Michigan newspaper recently reported that local Republican party officials in Macomb County, Michigan planned to challenge voters at the polls based on foreclosure lists. Though the officials in question have denied the allegation, the specter of voter suppression has been raised and I am concerned that other officials may try to use this tactic to intimidate or harass voters.

a. Is the FBI conducting any investigation into the allegations in Michigan?

Response:

Longstanding DOJ policy generally precludes the FBI from commenting on the existence or status of ongoing investigations. In addition to protecting the privacy interests of those affected, the policy serves to avoid disclosures that could provide subjects with information that might result in the destruction of evidence, witness tampering, or other activity that would impede an FBI investigation.

b. Is the FBI prepared to investigate any further allegations of voter suppression based on foreclosure lists?

Response:

The FBI stands ready to investigate credible allegations of misconduct that fall under current Federal statutes criminalizing various forms of voter intimidation and related crimes.

Schumer 4. A regulation promulgated by the Federal Election Commission states that campaign finance rules apply to any money solicited through a communication

stating that the money will be used to support or oppose a candidate for elected office (11 C.F.R. 100.57). However, Craig Donsanto, the director of the Election Crimes Branch in the DOJ's Public Integrity Section, recently made comments suggesting that the DOJ does not pursue criminal campaign finance investigations against contributors to independent groups known as Section 527 groups. It has been reported that Mr. Donsanto, during a September 12 conference sponsored by the Practicing Law Institute, stated that he would not approve of a case against a donor who gave a seven-figure contribution to a Section 527 group, even if the contribution was solicited in order to help or harm the prospects of a particular presidential candidate. If this is so, then DOJ's enforcement stance seems to contradict the position of the FEC.

a. Does the FBI conduct investigations of contributors to Section 527 groups?

b. If not, why not?

Response to subparts a and b:

As a general matter, the FBI investigates possible Federal crimes, including violations of the Federal Election Campaign Act (FECA) that are committed knowingly and willfully. Whether a particular matter warrants investigation by the FBI depends on the application of the relevant criminal statutes to the facts presented. The FBI and DOJ place a high priority on investigating and prosecuting Federal crimes that affect voting rights and the integrity of the Federal election process. Credible allegations or evidence of such crimes will be investigated and, where appropriate, prosecuted to the full extent of Federal law.

c. If so, what is your understanding of DOJ's prosecution strategy? As a matter of policy or practice, has the Election Crimes Branch declined to prosecute cases against contributors to Section 527 groups, even after the FBI has investigated such cases?

Response:

As stated above, DOJ's investigative and prosecutorial strategy in this area depends on whether the facts presented in a particular matter suggest the elements necessary to prove that a FECA crime was committed.

The FBI is not aware of a policy or practice of declining to prosecute cases against contributors to Section 527 groups.

Schumer 5. Prior to May 2007, DOJ's prosecution guidelines for election crimes stated that "most, if not all, investigation of an alleged election crime must await the end of the election" in order to avoid chilling legitimate voting and affecting the

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election outcome. In May 2007, however, DOJ introduced new guidelines that do not include the same clear statement. Instead, the new guidelines tell prosecutors in vague terms that they "should carefully evaluate" whether an investigative step could potentially affect the election.

a. As a result of the new guidelines instituted since the last election, will FBI agents be changing the techniques, practices, or timing in any investigations of alleged election crimes before Election Day?

Response:

The FBI does not believe DOJ established new guidelines regarding the timing of election crime investigations. Consequently, the FBI will not be changing its handling of election crime allegations made prior to an election.

b. If FBI agents will not be changing their techniques, practices or timing in any investigations of election crimes before Election Day, why do you think the guidelines were revised? Would you support a return to the previous wording for this section of the guidelines?

Response:

As stated above, the FBI does not believe any revisions have been made to DOJ's Noninterference Policy regarding pre-election investigations. Moreover, the FBI believes the updated version of DOJ's election crime manual clearly reflects the continuation of this important policy:

> [I]t is the general policy of the Department not to conduct overt investigations, including interviews of individual voters, until after the outcome of the election allegedly affected by the fraud has been certified.

(DOJ publication entitled Federal Prosecution of Election Offenses, 7th edition (May 2007, revised August 2007), page 10.)

c. If the FBI will be changing its techniques, practices, or timing in any investigations of alleged election crimes, can you describe how the FBI will change its approach? Do you expect overt or aggressive investigation of any allegation in the days before an election?

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Response:

The FBI will not be changing its handling of election crime allegations made prior to an election.

d. Do you think there is a danger that allowing greater investigation before an election could discourage voting or influence the election's outcome?

Response:

Please see the response to Schumer Question 5b, above.

Schumer 6. Following the Inspector General's 2007 report on National Security Letters, you ended the FBI's practice of sending exigent letters to obtain telephone records and also stated that FBI instituted a new procedure to track National Security Letters. Since you ended the use of exigent letters last year, how many National Security Letters has the FBI sent in total?

Response:

The response to this inquiry is classified and, therefore, will be provided separately.

Schumer 7. I am very concerned about the FBI's recent admission that agents used exigent letters improperly to obtain the telephone records of reporters from *The New York Times* and *The Washington Post*. This episode illustrates the critical need for the Free Flow of Information Act of 2007, which Senator Specter and I have championed in order to create a journalist's privilege. The Act allows a neutral decision-maker – a federal judge – to decide whether the government's need for confidential source information outweighs the public's interest in the free flow of information. As you know, the FBI and the DOJ both oppose this bill.

a. Have you disciplined the agents responsible for this improper use of exigent letters to obtain reporters' telephone records?

Response:

The use of exigent letters is currently under review by DOJ's Office of the Inspector General (OIG). When that report is received and reviewed, the FBI will determine whether employees should be disciplined for using exigent letters.

b. In response to this incident, have you instituted any new training or accountability measures to ensure that journalist's records are not sought or handled improperly by the FBI?

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Response:

As you know, we briefed the Senate Judiciary Committee staff at length on what happened in this particular instance. The case agent who was working the investigation in which the reporters' telephone records were relevant was well aware of the Department's policy mandating Attorney General permission to subpoena reporters' records. We believe that our agents -- particularly those who investigate leak cases, which are most likely to generate requests for reporters' telephone records -- are well aware of the Department's policy in this regard.

Nevertheless, this incident led us to believe that we should remind all employees of the Department's policy, and that reminder was provided at or around the time the FBI notified the Washington Post and The New York Times of the incident. In addition, changes have been made to ensure this situation does not recur. The use of exigent letters is no longer permitted, and the FBI has placed heavy emphasis on training agents, analysts, and other employees involved in national security investigations concerning the use of NSLs. Requests for emergency disclosure of telephone toll records are now governed by clear policy that requires appropriate documentation and supervisory review.

c. Without the Free Flow of Information Act, what assurance can you give me that the FBI will not overstep its authority in the future?

Response:

We do not believe the Free Flow of Information Act would have prevented this incident. As indicated above, the agent who was working on the investigation in which the records were sought was aware of the need to obtain Attorney General permission to seek the records. Due to a failure of communication, however, the agent who was working in the Communications Analysis Unit misunderstood the request he received from the case agent and apparently was unaware that process requirements had to be met before seeking the records from the telephone company. We believe the education steps we took in response to this incident will be effective in preventing a recurrence.

Schumer 8. Mortgage fraud is clearly a factor contributing to the financial crises we are experiencing. The *Los Angeles Times* reported on August 25, 2008 that one of the FBI's senior officials foresaw an epidemic in mortgage fraud as early as 2004. The *Times* also reported that some FBI investigators asked for additional resources to investigate mortgage fraud, but did not get them. Is this true?

Response:

On 10/7/04, the former Assistant Director (AD) of the FBI's Criminal Investigative Division, Chris Swecker, testified before the House Financial Services Subcommittee regarding Housing and Community Opportunity. At that time, AD Swecker outlined the market impacts of mortgage fraud, describing the FBI's proactive approach to mortgage fraud, mortgage fraud trends, our law enforcement partnerships with respect to the mortgage fraud crime problem, and our liaison relationships with mortgage fraud-related entities in private industry. AD Swecker made clear the FBI's support for new approaches to the mortgage fraud problem, including a mechanism to require the mortgage industry to report fraudulent activity and the creation of "safe harbor" provisions to protect the mortgage industry under such a mandatory reporting requirement. AD Swecker expressly noted the FBI's commitment to addressing the serious mortgage fraud crime problem through continued work with the Chairman of the House Financial Services Subcommittee and its members. The FBI's commitment has been demonstrated by the increase in the FBI's mortgage fraud case load as the problem has grown: On 7/12/03, the FBI was working 263 mortgage fraud investigations, with this number growing to 545 investigations by 8/31/04, a 107% increase in that year. This increase has continued, with 721 pending cases in 2005; 881 pending cases in 2006; 1,204 pending cases in 2007; and 1,524 pending cases as of 7/31/08.

From 2004 to the present, the FBI has taken numerous steps to address mortgage fraud, including the following.

Meeting with Mortgage Industry Leaders. The FBI met with the Senior Vice President of Fannie Mae in July 2004, approximately three months before AD Swecker's Congressional testimony. The purpose of the meeting was to establish a continuing relationship between the FBI and Fannie Mae and to explain the FBI's mission relative to mortgage fraud, including the FBI's plans to address mortgage fraud, its development of public/private and law enforcement relationships, and its identification of fraudulent methods.

Operation Quick Flip. In 2005, the FBI joined the Department of Housing and Urban Development, the Internal Revenue Service, the U.S. Postal Inspection Service, and others in DOJ to coordinate a massive national mortgage fraud initiative commonly referred to as Operation Quick Flip (OQF). OQF dealt a significant blow to numerous mortgage fraud perpetrators, leading to 81 arrests, 156 indictments, 89 convictions, and the sentencing of 60 subjects. The fraud committed by these subjects resulted in a combined loss to the industry of $606,830,604.

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FBI Mortgage Fraud Warning Notice. In 2006, the FBI and the Mortgage Bankers Association (MBA) entered into a Memorandum of Agreement regarding a Mortgage Fraud Warning Notice produced by the FBI and the MBA. This notice was designed to warn would-be mortgage fraud perpetrators of the serious criminal consequences associated with the commission of mortgage fraud-related crimes. The FBI and the MBA agreed to make the notice available to mortgage lenders to permit institutions to voluntarily post the notice on their websites as a proactive means of educating consumers and mortgage lending professionals regarding the penalties and consequences of mortgage fraud.

Operation Malicious Mortgage. In the spring of 2008, the FBI and others in DOJ sponsored another nationwide mortgage fraud response initiative called Operation Malicious Mortgage, which included participants from both Federal agencies and local mortgage fraud task forces. This initiative resulted in over 400 charges, 287 arrests, 173 convictions, and 81 sentences.

The FBI's efforts to combat mortgage fraud continue. For the past several years, the FBI has participated in the DOJ-sponsored Bank Fraud Working Group and mortgage fraud working groups, which serve as force multiplying platforms that allow more efficient responses to mortgage fraud. For example, as of September 2008 the Sub-Prime Mortgage Industry Fraud Initiative included 42 mortgage fraud task forces or working groups investigating 1,569 mortgage fraud origination cases and 26 sub-prime market corporate fraud cases.

Schumer 9. Several issues related to the financial crisis, like predatory lending or underwriting fraud, seem to have become a focus of investigation only after they were widely recognized as problems.

a. Looking back, do you think that the FBI should have been more aggressive in investigating these practices?

Response:

As indicated in the response to Schumer Question 8, above, the FBI has responded aggressively to the mortgage fraud crime problem at all stages of the epidemic, though the rapid rise in property values from 2003 through 2007 led to the under-reporting of the mortgage fraud crime problem. While the FBI has devoted significant resources to the investigation of mortgage fraud, the lending industry's relaxed standards and failure to report fraud during the "housing boom" camouflaged the mortgage fraud taking place. The systematic under-reporting of mortgage fraud, particularly during a period in which the consequences of issuing risky loans were substantially muted by the rapid rise in real estate prices,

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contributed significantly to the magnitude of the mortgage fraud crime problem we face today. In light of the economic dynamics contributing to the crisis, the FBI believes the fact that we have targeted 180 criminal enterprises related to mortgage industry fraud and arrested approximately 1,000 suspects since 2004, focusing on those lenders and buyers involved in multiple frauds or cases in which the profits went to drug crews, to gangs, or to organized crime, reflects a significant degree of success.

b. Do you think that the Securities and Exchange Commission should have been more active in referring cases to the criminal authorities?

Response:

The FBI has initiated more than 525 corporate fraud investigations, of which 26 are related to sub-prime mortgage industry fraud. The majority of these investigations were initiated pursuant to referrals from the U.S. Securities and Exchange Commission (SEC). The FBI's Headquarters and Field Office agents continually share intelligence and information with their SEC counterparts regarding pending civil mortgage fraud matters, and the SEC has assured the FBI it will immediately notify FBI or DOJ representatives of any possible criminal activities identified in pending civil matters.

Schumer 10. The FBI had about 1,000 agents working on banking fraud during the savings and loan crisis of the 1980s.

a. How many FBI agents are currently investigating mortgage fraud or predatory lending cases?

Response:

As of 8/31/08, approximately 180 FBI agents were assigned to investigate approximately 1,569 mortgage origination or lending fraud cases.

b. Do you think this is adequate to investigate mortgage fraud, or does the FBI require more resources from Congress in order to address the current crisis?

Response:

The FBI will continue to work with the Congress, OMB, and others in DOJ to identify the funding needed to address the Administration's priorities.

c. More specifically, what is the FBI doing to focus on possible wrongdoing within the lending industry?

Response:

The FBI's mortgage fraud investigations address all aspects and stages of mortgage fraud schemes, including both frauds committed against lenders and financial institutions and frauds committed by, or with the implicit consent of, lenders and financial institutions. This includes both efforts to arrest individuals engaged in mortgage fraud schemes and efforts to disrupt and dismantle lending industry organizations engaged in mortgage and lending fraud crimes.

Questions Posed by Senator Grassley

Grassley 1. In May the Washington Post published an article highlighting problems with cooperation between the FBI and the ATF. As you know, Congress moved ATF from the Treasury Department to the Justice Department in the Homeland Security Act of 2002. I worked with Senator Kohl to help facilitate this transfer believing the move would help better coordinate criminal investigations with both agencies. I remain concerned about the level of cooperation between FBI and ATF as I've seen it over the years where the FBI acts like Pac-Man and encroaches on other agencies investigative jurisdiction. I understand that shortly before the Attorney General testified on July 9, you and ATF Acting-Director Sullivan signed a new Memorandum of Understanding (MOU) regarding explosives investigations. I wrote to the Attorney General on August 29, requesting a copy. My staff has been briefed on the MOU and had a chance to review it. I understand they raised some questions with representatives from your office that they promised to get answers to. Will you commit to getting me those responses in a timely manner?

Response:

DOJ requested the opportunity to provide consolidated responses on behalf of all involved DOJ components. The FBI has provided its input to DOJ for the preparation of that consolidated response.

Grassley 2. The Los Angeles Times reported back in August that allegedly, the FBI was aware of potential criminal violations in the mortgage and housing industries, but failed to go after the problems that have led to billions in losses across the banking, finance, and housing industries. I'm not concerned with putting the blame on any one agency for the problems with the housing market, but the article states that FBI criminal investigators were alerted to this problem and requested extra resources, but were denied that help. I understand that resources are tight and that meeting the new mission of countering terrorist threats are a significant—and appropriate—use of FBI resources. However, we in Congress never heard these same concerns.

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a. Did you know that FBI field offices were raising concerns regarding problems in the mortgage industry back in 2004? When did you learn of these concerns? What did you do when you heard these concerns?

b. Did FBI field offices ever send a request for additional resources to investigate criminal fraud in the mortgage lending, finance, and home construction industries to the FBI Headquarters? If so, did the FBI grant this request? If not, why not.

c. Did the FBI ever share the concerns with other government agencies at the state or federal level?

Response to subparts a through c:

Please see our response to Schumer Question 8, above.

d. Did the FBI ever send a request for additional funding for agents and resources to investigate mortgage fraud to Congress? If not, why not.

Response:

The FBI will continue to work with the Congress, OMB, and others in DOJ to identify the funding needed to address the Administration's priorities.

e. Is there any effort work cooperatively with other agencies to pursue this type of fraud?

Response:

As indicated in the responses to Schumer Questions 8 and 9b, above, the FBI has worked with numerous other agencies and task forces to investigate mortgage fraud.

Grassley 3. In May of this year, I testified along with FBI whistleblowers Michael German and Bassem Youssef before the House Judiciary Committee. We learned from Bassem Youssef that a key division of the FBI's Counterterrorism Division was operating at only 62% of full staffing levels. Agents and analysts are reportedly unwilling to work there because it is so poorly run.

a. What do you think causes these shortfalls?

b. What have you done to address these shortages?

Response to subparts a and b:

A review of demographic information pertaining to the FBI's agent workforce indicates that the FBI's staffing challenges are exacerbated by pre-9/11/01 hiring freezes, which have resulted in a current shortage of Special Agents (SAs) with 8 to 13 years of experience. Historically, this group has provided the FBI with a large percentage of its Supervisory Special Agent (SSA) candidates.

The FBI has developed several mechanisms designed to reduce these staffing shortfalls. Primary among these is the Headquarters Staffing Initiative (HSI), which is used to staff critical FBI Headquarters (FBIHQ) positions with experienced SAs while providing positive alternatives for participants in the Executive Development and Selection Program eager to continue their career development. To date, approximately 655 positions have been filled at FBIHQ through the HSI, with approximately 60% of the candidates requesting permanent rather than temporary assignments. In addition, a growing number of SSAs who initially selected the temporary duty (TDY) option are converting to permanent assignments.

The FBI continually reevaluates its staffing goals and the assumptions that frame them. One such assumption, recently challenged, is that all functions that have historically been performed by SSAs must continue at the supervisor level. The FBI is undertaking a thorough re-evaluation to determine which FBIHQ SA positions must be filled by supervisory personnel and which might be filled by nonsupervisory SAs. Our ability to fill certain positions with nonsupervisory SAs in the applicable career path will enable us to resolve or reduce some of our most critical staffing shortages. Pursuant to this re-evaluation, over 40 SAs have volunteered and have been selected for nonsupervisory positions in the Counterintelligence Division, Counterterrorism Division, and Directorate of Intelligence since June 2008. The ability to fill previous supervisory positions with nonsupervisory SAs will offer several benefits: it will provide a significant career development opportunity for nonsupervisory SAs, reduce FBIHQ supervisory staffing needs to attainable and sustainable levels, and nearly eliminate short-term TDYs, which are a less effective means of staffing FBIHQ and disruptive to field operations.

Grassley 4. Just days after that hearing, Bassem Youssef was confronted with anonymous allegations that he had violated FBI travel regulations. He had to spend time gathering documents to prove that he had not. The timing of these unfounded allegations disturbs me, as it appears it was in retaliation for his testimony. In response to a letter from me and the House Judiciary Committee Chairman, you referred the matter to the Office of Inspector General. However, that is not what we asked for. What we asked for was to see any internal FBI documents related to Youssef's testimony, so that we can find out for ourselves if anyone at the FBI was

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retaliating against a witness for Congressional testimony. The letter we received . . . simply ignored our document request entirely. Can you please tell me when we will receive the documents?

Response:

As Senator Grassley was advised in an 8/12/08 letter from Inspection Division AD Kevin Perkins, the question of whether Youssef suffered retaliation as a consequence of his Congressional testimony has been referred to DOJ's OPR. It would be inappropriate for the FBI to comment while this matter remains pending.

Grassley 5. Recently, concerns have been raised about the quality and lack of information entered by state and local law enforcement agencies into the National Crime Information Center (NCIC) which is overseen by the FBI. NCIC is the clearinghouse for all fugitive warrants and is utilized by every law enforcement agencies to verify if an individual has outstanding arrest warrants. Articles and stories . . . have highlighted how failures to enter warrants have allowed criminals to roam free continuing to commit crimes and evade capture. It is my understanding that the FBI has established a task force to review the problems with NCIC and why states are not entering warrant information accurately into the system. This task force is headed by former Delaware State Police Major, Michael Mc Donald. Congress is considering legislation that would create a new grant program to states that would fund staff to enter these warrants. I have concerns that we haven't had a chance to hear recommendations from the FBI task force before we create a new program to pay states to do this.

a. Has this task force had an opportunity to issue any recommendations on how to ensure that information is entered into NCIC properly?

b. If so, can you provide the Committee those recommendations? If not, when can we expect them?

Response to subparts a and b:

The Warrant Task Force has not issued formal recommendations to date. Because it appears to the task force that the non-entry of warrants is a "process" problem at the local level that will benefit from funding and education, the task force has worked to gather information from Federal, state, and local repositories (or warrant systems) to assess the degree to which these records are entered into the national system. This analysis was begun as a pilot in three states, but further data collection efforts were frustrated by the absence of local repositories in many states, which rely entirely on the national system, and by the task force's recognition that on occasion the entry of a warrant in a national system could jeopardize an ongoing investigation. The task force has requested the development of a

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self assessment tool designed to identify the number of warrants by agency, date of warrant, and date of National Crime Information Center (NCIC) record entry. It is hoped that this score sheet, which will be provided to the states semiannually, will promote local awareness of the need for the timely entry of warrants in NCIC.

Grassley 6. What is the date (month and year) that the FBI determined that the anthrax came from a specified flask in Ivins's lab ("RMR 1029")?

Response:

By early 2005, there were strong indications from the ongoing genetic analysis of the mailed spores that the parent material (RMR-1029) for the spores came from the United States Army Medical Research Institute of Infectious Diseases (USAMRIID). However, the genetic testing continued for two more years by scientists both within the FBI and in outside organizations in an effort to confirm these earlier indications. Ultimately, by the fall of 2007, the FBI was able to conclude to a reasonable degree of scientific certainty that RMR-1029 was the parent material of the mailed spores. RMR-1029 was created in 1997 by Dr. Bruce Ivins, who was its sole creator and custodian.

Grassley 7. When (month and year) did the FBI determine that Dr. Hatfill never had access to the anthrax used in the killings?

Response:

In the spring of 2006, access records for relevant hot suites at USAMRIID were analyzed and it was determined that Dr. Hatfill had not had access to the genetically positive material.

Grassley 8. How did the FBI determine that Dr. Hatfill did not have access to the anthrax used in the killings? Was that because the FBI determined that Dr. Hatfill no longer worked at USAMRIID when the powder was made?

Response:

Please see the response to Grassley Question 7, above.

Grassley 9. Was Dr. Hatfill or his counsel informed that Dr. Hatfill had been cleared of any involvement in the anthrax killings before the Department of Justice offered a settlement to him? Was he informed before signing the settlement agreement with him? If not, please explain why not.

Response:

DOJ agreed to the Hatfill settlement on 6/17/08. In an 8/8/08 letter from Jeffrey Taylor, U.S. Attorney for the District of Columbia, Dr. Hatfill's attorney was notified that Dr. Hatfill was believed not to be involved in the 2001 anthrax mailings.

Grassley 10. Was Judge Walton (the judge overseeing the Privacy Act litigation) ever informed that Dr. Hatfill had been eliminated as a suspect in the anthrax killings? If so, when. If not, please explain why not.

Response:

No. The notification was sent to Dr. Hatfill's attorney by way of an 8/8/08 letter from Jeffrey Taylor, U.S. Attorney for the District of Columbia.

Grassley 11. Please provide the dates and results of any and all polygraph exam(s) of Dr. Ivins, including the text of any questions to which his answers would have been deceptive if he were responsible for the anthrax attacks.

Response:

Longstanding DOJ policy generally precludes the FBI from commenting on ongoing investigations. Consequently, with the exception of those documents pertaining to the anthrax investigation that have been unsealed by the courts and released to the public with DOJ's approval, the FBI cannot provide further information while this matter is pending.

Grassley 12. Of the more than 100 people who had access to RMR 1029, how many were provided custody of samples sent outside Ft. Detrick? Of those, how many samples were provided to foreign laboratories?

Response:

RMR-1029 was provided to two domestic facilities outside of Ft. Detrick. No foreign laboratories received RMR-1029.

Grassley 13. a. If those with access to samples of RMR 1029 in places other than Ft. Detrick had used the sample to produce additional quantities of anthrax, would that anthrax appear genetically indistinguishable from RMR 1029?

Response:

Yes. The FBI's examinations of seven evidence samples said to be derived from RMR-1029 produced positive results for the detection of the

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four genetic mutations first isolated from material in the 2001 letters. Some of these samples came from places other than Ft. Detrick.

b. Would that anthrax have an identical elemental signature?

Response:

Not necessarily. A bacterial culture's elemental signature depends on the ingredients and methods used to grow and produce it, so the elemental signatures of two samples may differ even when the same genetic seed stock was used to produce them. If genetic seed stock identical to RMR-1029 were used to produce multiple samples following different growth and productions methods, they could conceivably produce spore preparations with different elemental profiles despite the identical genetic background of the starter cultures.

Grassley 14. How can the FBI be sure that none of the samples sent to other labs were used to create additional quantities of anthrax that would appear indistinguishable from RMR 1029?

Response:

Investigators identified the facilities that received RMR-1029 from Ft. Detrick, and were ultimately able to conclude that researchers at those facilities were not involved in the mailings.

Grassley 15. Please describe the methodology and results of any oxygen isotope measurements taken to determine the source of water used to grow the spores used in the anthrax attacks.

Response:

Oxygen isotope measurement is an unreliable method for geolocation for this type of evidence. This method did not provide any useful information.

Grassley 16. During questioning at the hearing, you indicated that you did not know whether samples of RMR-1029 had been tested to determine whether the level of silicon matched the level of silicon in the anthrax used in the attack. According to Dr. Joseph Michael of the Sandia National Laboratory, he learned in mid-August of this year that he had tested several blind samples of RMR-1029 for the FBI on several occasions and that the samples did not contain the [same] elevated levels of silicon as the anthrax used in the attack.

a. Is Dr. Michael's description accurate?

b. If so, then why did the FBI disclose to the public that RMR-1029 *genetically* matched the attack material without also disclosing that it did not *elementally* match the attack material?

c. What is the explanation for the elevated level of silicon in the attack material?

Response to subparts a through c:

The FBI's laboratory used Inductively Coupled Plasma-Optical Emission Spectroscopy (ICP-OES) to quantify the silicon in several samples of powder. While the ICP-OES indicated that the concentration of silicon in the letter mailed to Senator Leahy was consistent with amounts that would occur naturally, the limited quantity of recovered material from the other mailings either precluded a reliable measure of silicon content or precluded analysis using ICP-OES altogether. The results of the Sandia National Laboratory's use of electron microscopy on a number of samples were consistent with naturally occurring silicon.

d. Has the FBI been able to reproduce anthrax from RMR-1029 that matches the attack material in all its characteristics, including particle size, density, concentration, genetic make-up, and elemental signature? If not, why not?

Response:

The FBI did not use RMR-1029 to attempt to reproduce the characteristics of the spore powders used in the attack material. The FBI used a non-evidentiary form of *Bacillus anthracis*, type "Ames," to study the effects of different growth and production methods on the chemical and physical characteristics of spore preparations. The FBI did, though, re-grow RMR-1029 and its derivatives in the course of the investigation and demonstrated that subcultures of RMR-1029 contained the same genetic background as the attack material. With the exception of RMR-1029 and its derivatives, no other evidence resulted in the same genetic profile as the spore powders in the attack letters.

e. Is it true that a CIA contract facility also possessed a sample of RMR-1029 shortly before the anthrax mailings?

f. If so, when did that facility obtain a sample of RMR-1029 and for how long was it stored there?

g. Please describe the nature and extent of any work that facility did with anthrax and silicon-based additives?

Response to subparts e through g:

It is the FBI's understanding that one private facility received RMR-1029. Because the work done by that laboratory was conducted on behalf of other government agencies, the FBI is unable to address the work performed there.

h. How can the FBI be sure that the attack material was not created from the RMR-1029 at that facility?
Response:

This determination is based on both investigative and scientific information. As an investigative matter, because of the limited amount of time RMR-1029 was located at this private facility before the mailings, the FBI was able to investigate the limited number of individuals who had access to RMR-1029 and determine that they did not have any involvement in this attack. From a scientific perspective, the *B. anthracis* spores in RMR-1029 had a different chemical composition than the spores in the attack material. In addition, the physical and chemical properties of the New York letter's spore powders differed slightly from the spore powders recovered from the Washington, D.C., mailings. This suggests two separate spore preparations were produced.

Grassley 17. During questioning at the hearing, you indicated that the FBI first gathered entry and exit logs of access to the Ft. Detrick lab containing RMR-1029 sometime in 2002. If examined and analyzed at the time, these logs would have revealed Dr. Ivins' suspicious late-night activity in the lab around the time of the attacks. Why did the FBI fail to analyze the logs until years later?

Response:

The analysis of the investigative material evolved over time. The Amerithrax Task Force conducted numerous searches and thousands of interviews during the course of the investigation, and scientific advances during this period resulted in a testing process that, by early 2005, helped the investigators narrow their focus and identify additional evidence.

Although it was known in early 2005 that Dr. Ivins was in the hot suites at night, this behavior could not be identified as "unusual" until a thorough investigation determined his access patterns over time, the projects and experiments he was working on, and whether other researchers were present with him in the hot suites.

Grassley 18. When did the FBI first learn that Dr. Ivins was prescribed medications for various symptoms of mental illness? If this is circumstantial evidence of his guilt, then why did this information not lead the FBI to focus attention on him,

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rather than Dr. Hatfill, much sooner in the investigation? Of the 100 individuals who had access to RMR 1029, were any others found to suffer from mental illness, be under the care of a mental health professional, or prescribed anti-depressant/anti-psychotic medications? If so, how many?

Response:

As a consequence of Federal laws and regulations regarding health information privacy, the FBI did not obtain the full picture of Dr. Ivins' mental health. Based upon the information we did receive, though, including behavior witnessed by FBI agents, the FBI searched Dr. Ivins' home. The search resulted in the recovery of, among other things, a bullet-proof vest and ammunition, both of which were consistent with the concerns that formed the basis for the search. In addition, a review of Dr. Ivins' emails indicated significant mental health issues; for example, in the months before the attacks an email by Dr. Ivins said he had "incredible paranoid, delusional thoughts at times."

As with Dr. Ivins, the mental status of other individuals who may have had access to RMR-1029 is similarly protected by Federal laws and regulations regarding health information privacy.

Grassley 19. What role did the FBI play in conducting and updating the background examination of Dr. Ivins in order for him to have clearance and work with deadly pathogens at Ft. Detrick?

Response:

It is the FBI's understanding that the Office of Personnel Management (OPM) is the agency responsible for conducting background/security clearance investigations for Department of Defense (DoD) personnel.

Under Executive Order 10450, a National Agency Check (NAC) is required as part of the pre-employment vetting and background investigation process conducted with respect to all U.S. Government employees. The FBI's role in the NAC is limited to a search of the FBI's Central Records System, which contains the FBI's administrative, personnel, and investigative files. At OPM's request in June 2004, the FBI conducted a search of its Central Records System and identified no derogatory information.

As provided in more detail in the responses to Senator Cardin's questions. below, the FBI's Bioterrorism Risk Assessment Group (BRAG) conducts Security Risk Assessments (SRAs) on individuals who require access to select agents and toxins. The SRA, which is conducted through database searches and is not a full background investigation, complies with the

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requirements of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002 (hereinafter the Bioterrorism Act). That Act provides for denial of access based on 11 identified "prohibitors." Neither the SRA conducted in October of 2003, nor the one conducted in September of 2007, revealed prohibitors as defined in the Act, and the FBI consequently identified no basis for restricting Ivins' access. It was not until Ivins was adjudicated as "mentally defective" in July 2008 that the FBI was able to begin restriction procedures.

Grassley 20. After the FBI identified Dr. Ivins as the sole suspect, why was he not detained? Did the U.S. Attorney's Office object to seeking an arrest or material witness warrant? If not, did anyone at FBI order a slower approach to arresting Ivins?

Response:

Each FBI case is monitored to assess the potential risk to public safety as the FBI works to ensure the investigation is thorough and complete. The FBI appropriately communicated to DoD officials that Dr. Ivins was a suspect in these cases.

Grassley 21. In order to fully understand the circumstances surrounding his release and suicide, please describe in detail all communications between the mental health facility to which Dr. Ivins was committed shortly before his death and the FBI related to Dr. Ivins.

Response:

The FBI contacted various Sheppard-Pratt Hospital personnel concerning Dr. Ivins' mental state in the days before his death. We are unable to comment further because, as noted above, longstanding DOJ policy generally precludes the FBI from commenting on ongoing investigations.

Grassley 22. Had an indictment of Dr. Ivins been drafted before his death? If so, what additional information did it contain beyond the affidavits already released to the public? If not, then when, if ever, had a decision been made to seek an indictment from the grand jury?

Response:

DOJ was moving to bring charges against Ivins. The FBI will not comment further on internal Department deliberations.

Grassley 23. According to family members, FBI agents publicly confronted and accused Dr. Ivins of the attacks, showed pictures of the victims to his daughter, and offered the $2.5 million reward to his son in the months leading up to his suicide.

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These aggressive, overt surveillance techniques appear similar to those used on Dr. Hatfill with the apparent purpose of intimidation rather than legitimate investigation. Please describe whether and to what degree there is any truth to these claims.

Response:

Dr. Ivins' adult children were interviewed pursuant to the FBI's 11/1/07 search of his residence. The investigators interviewing his daughter showed her photographs of the victims, taken prior to the anthrax attacks, explaining that they were investigating the deaths of these victims and needed to obtain closure for the victims' families. At no time did they tell Dr. Ivins' daughter that he had killed these victims.

Likewise, during the interview of Dr. Ivins' son, he was shown a reward poster that outlined the crime. The interviewer explained to Dr. Ivins' son that the investigation of the anthrax attacks was still active and that there were questions the investigators needed to ask. When Dr. Ivins' son asked to speak to an attorney, the investigators honored that request and the interview ceased. Dr. Ivins' son was not offered financial or other benefits for his cooperation.

Grassley 24. In August 2006, FBI Special Agent Elizabeth Morris filed a complaint with the Office of Professional Responsibility (OPR). The complaint alleged that another Agent, in the presence of Morris and an Assistant District Attorney, stated that he routinely used subpoenas in a manner in which both Morris and the ADA deemed inappropriate. Morris has alleged that rather than investigating her complaint, the FBI conducted a retaliatory investigation of her. In March 2007, the FBI terminated Ms. Morris for an unrelated alleged infraction, based in large part on OPR's reading of Morris's own sworn statement. OPR alleges that Morris "knowingly included false/misleading information" in affidavits, and that her sworn statement contains admissions of this conduct.

a. Please provide specific examples from Morris's sworn statement which led OPR to believe that she made statements which she knew were inaccurate at the time she made them in the sworn affidavits.

Response:

By letter to Morris dated 3/27/07, the FBI's Office of Professional Responsibility (OPR) articulated the specific bases for her termination, including examples that led OPR to believe Morris had knowingly made sworn statements she knew to be erroneous. Consistent with internal FBI procedures, SA Morris has availed herself of multiple appellate opportunities, including an oral presentation to the Assistant Director of the FBI's OPR and a written appeal to the FBI Human Resources

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Division's Disciplinary Review Board (DRB), both with the assistance of her attorney. At SA Morris' request, the DRB ordered an additional investigation and requested interviews of two Assistant District Attorneys from New York. After the additional investigation was completed, the DRB found that the findings of misconduct and decision to dismiss were reasonable based on the facts of the investigation, and issued its letter sustaining SA Morris' dismissal.

b. It is my understanding that the FBI did not interview the Assistant District Attorney during its investigation of Morris. Why not?

Response:

The FBI interviewed two people from the District Attorney's Office, and received a letter from that Office, as well.

c. Did the FBI ever investigate Ms. Morris's original allegation regarding her fellow Agent's inappropriate use of subpoenas? If so, what was the finding and what disciplinary action did the FBI take?

Response:

The FBI investigated the allegations made by SA Morris and is currently responding to an inquiry from DOJ's OIG related to these allegations. The original FBI investigation did not support a finding of misconduct and, consequently, no disciplinary action was taken based on the results of that investigation. If the information the FBI obtains as a result of the OIG inquiry supports a finding of misconduct, appropriate disciplinary action will be taken.

Grassley 25. In May of this year, I testified along with FBI whistleblowers Michael German and Bassem Youssef before the House Judiciary Committee. We learned from Bassem Youssef that a key division of the FBI's Counterterrorism Division was operating at only 62% of full staffing levels. Agents and analysts are reportedly unwilling to work there because it is so poorly run.

a. What do you think causes these shortfalls?

Response:

Please see the response to Grassley Question 3a, above.

b. What have you done to address these shortages?

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Response:

Please see the response to Grassley Question 3b, above.

Grassley 26. Just days after that hearing, Bassem Youssef was confronted with anonymous allegations that he had violated FBI travel regulations. He had to spend time gathering documents to prove that he had not. The timing of these unfounded allegations disturbs me, as it appears it was in retaliation for his testimony. In response to a letter from me and the House Judiciary Committee Chairman, you referred the matter to the Office of Inspector General. However, that is not what we asked for. What we asked for was to see any internal FBI documents related to Youssef's testimony, so that we can find out for ourselves if anyone at the FBI was retaliating against a witness for Congressional testimony. The letter we received in simply ignored our document request entirely. Can you please tell me when we will receive the documents?

Response:

Please see the response to Grassley Question 4, above.

Grassley 27. I have received a letter from Bassem Youssef's attorney that appears to indicate that the FBI's abuse of National Security Letters may be broader than we originally thought. Some of the e-mails that the FBI has been withholding for a year-and-a-half are attached to this letter. These emails also appear to indicate that the FBI's Office of General Counsel approved a procedure of issuing national security letters in connection with generic "umbrella files" rather than a specific, authorized investigation. When I asked about these umbrella files in written questions following our last FBI oversight hearing, the FBI refused to answer, citing the ongoing joint FBI/OIG inquiry. However, the fact that there is an ongoing internal investigation is no bar to answering questions from Congress.

a. Has the FBI, in fact, used such "umbrella files" to authorize NSLs or conduct generic investigative activities?

b. Did you know of the use of generic "umbrella files" by the FBI? If so, when did you learn this and what steps have you taken to ensure that the requests are only issued in connection with legitimate, authorized investigations?

Response to subparts a and b:

Because this matter is currently under investigation by the OIG, it would not be appropriate for the FBI to comment.

Questions Posed by Senator Cardin

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Director Mueller, you will understand that as the Amerithrax investigation continues, all of us have questions about the adequacy of the safety and security procedures in place at military and non-military biocontainment labs. That holds especially true for me. Maryland is home to the military lab where Dr. Ivins worked along with several other non-military biocontainment labs.

I understand that it is the Attorney General's responsibility to conduct security risk assessments for "all individuals with access to select agents or toxins" – or those agents and toxins that the CDC and Animal and Plant Health Inspection Service have determined pose a severe threat to public health and safety.

Cardin 1. Does the Criminal Justice Information Services Division of the FBI have this responsibility?

Response:

Yes. In April 2003 the FBI began conducting SRAs on those needing access to select agents and toxins as a result of the regulations mandated by the Bioterrorism Act. SRAs are conducted through database searches, similar to National Instant Criminal Background Check searches. SRAs are not full background investigations such as those conducted for security clearances.

Cardin 2. It is my understanding that that review consists, at least in part, of a voluntarily completed form asking for background information and two sets of finger prints. And assessments are reviewed every five years? Is that correct?

Response:

Yes. In order to perform a bioterrorism SRA, a completed FBI Form FD-961 and two fingerprint cards must be submitted to the FBI either by the person requesting access to the select agents or toxins or by local law enforcement authorities at the applicant's request. Within a five-year period, the applicant must submit a new FD-961 for re-assessment.

Cardin 3. What happens at the Bureau once those forms and fingerprints are submitted? What is the extent of the review? Are there additional questions or procedures for individuals working in labs with the most dangerous substances?

Response:

Once the FBI receives the information referenced above, it conducts the SRA by searching the following databases.

- Integrated Automated Fingerprint Identification System (IAFIS)

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- NCIC
- Interstate Identification Index
- DoD dishonorable discharge records
- Veterans Affairs "mental defective" records
- FBI indices in the Automated Case Support system
- Foreign Terrorist Tracking Task Force records (including the Terrorist Screening Database, Violent Gang and Terrorist Organization File, and Department of State TIPOFF file)
- Immigration Alien Query of Immigration and Customs Enforcement databases (for foreign-born applicants only)

The information gleaned from these database searches is analyzed to determine if the person is restricted by relevant laws or regulations from accessing select biological agents and/or toxins.

The FBI notifies the sponsoring agency (either the Centers for Disease Control and Prevention (CDC) or the United States Department of Agriculture's Animal and Plant Health Inspection Service (APHIS)) of the results of the SRA. The sponsoring agency then uses this information to determine whether to deny or approve an individual's access and notifies the individual by letter of this determination.

Cardin 4. From what I can tell, the regulatory process relies on voluntary reporting by laboratories handling select agents and toxins. It is up to the agency, lab or individual to register with the CDC or APHIS. It is up to them to report any changes, new personnel, etc. Does the FBI do any proactive work to monitor biocontainment labs or personnel? What about for labs and scientists active before these regulations went into effect in 2005?

Response:

The Bioterrorism Act establishes the requirements for registration, the system for identifying qualifying agents and toxins, and the circumstances under which access to these agents and toxins is restricted, requiring registration when specified agents or toxins are possessed, used, or transferred. Bioterrorism SRAs are required for each person who needs access to select agents or toxins, for any individual who owns or controls a qualifying entity (including any government agency, university, corporation, company, partnership, association, firm, sole proprietorship, or other legal entity, including an individual acting on his or her own), and for the entity's Responsible Official and Alternate Responsible Official, as those terms are defined in the regulations implementing the Act. The FBI's activities are conducted in compliance with the relevant statutory and regulatory requirements.

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Cardin 5. Once completed, are there any triggers that might initiate an FBI review of an approved scientist before the five year term is complete?

Response:

When the initial bioterrorism form (FD-961) is submitted to the FBI with fingerprint cards, these fingerprint cards are processed through IAFIS and "flagged" to identify the person as having a bioterrorism SRA record. If a law enforcement official later requests a name check on that person, or if the person is later arrested (pursuant to which a fingerprint card would be submitted to the FBI), the BRAG will be notified and will monitor that individual.

Cardin 6. In the wake of the FBI's allegations against Dr. Ivins, the Army issued revised biosurety regulations under which U.S. Army personnel who act in an aggressive or threatening manner towards other people would be denied access to toxic or lethal biological agents. Other potentially disqualifying personality traits include: "arrogance, inflexibility, suspiciousness, hostility,... and extreme moods or mood swings." While I am not offering any judgment as to whether these are the right policy adjustments, can you tell us whether the FBI has made, or plans to make, any similar adjustments to its policies? Has there been any internal review of the adequacy of the security risk assessment process?

Response:

The Bioterrorism Act governs the circumstances in which access to select agents and toxins may be granted or denied. The FBI conducts its SRAs in compliance with this Act, which identifies the "prohibitors" that may form the basis for denying access. Consequently, the FBI cannot make "adjustments" to its policies, which implement the Bioterrorism Act, unless the Act itself is revised.

If an individual meets the criteria of a prohibitor, the FBI's BRAG notifies the individual's sponsor, which is either the CDC or the U.S. Department of Agriculture's (USDA's) APHIS. The sponsor then determines whether the individual should be denied access to select agents in coordination with the sponsoring lab and/or the investigators (if an investigation is ongoing) with the benefit of the information provided by BRAG. Because the Bioterrorism Act does not include a prohibitor providing for a denial of access based on aggressive behavior or personality traits, it is the FBI's understanding that these sponsors could not restrict access on the basis of such traits alone.

The FBI is continually evaluating the effectiveness of its internal processes. In the past couple of years we have made considerable changes to our internal BRA processes, including adjustments to ensure that our

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Weapons of Mass Destruction Division has a more integral role in the BRA process. We have also coordinated extensively with the CDC, APHIS, and Department of Homeland Security (DHS) to improve information sharing regarding individuals on whom derogatory information is discovered during the SRA process by further automating the exchange of data, and we have discussed with DHS whether greater depth in vetting foreign-born individuals is appropriate within the confines of the "sole purpose" of the SRA as provided for in the Act.

Cardin 7. The Government Accountability Office reported to the Energy & Commerce Committee that no one in Government could give a complete accounting of how many Biosafety Level 3 and 4 labs exist in the United States. Given that the FBI performs security reviews of all personnel, at least at non-military labs, I would assume that the agency has a comprehensive list of the non-military BSL-3 & 4 labs. Does the agency maintain such a list? How hard would it be to compile one? Can you provide this list to the Committee in either an unclassified or classified manner?

Response:

The FBI conducts security reviews of individuals seeking to work with select biological agents and toxins. These reviews are "material" focused. which differs from the focus of biosafety levels (BSLs), which is on facilities. The FBI is not involved in the rating of BSL facilities. The FBI has a list of the facilities registered in the select agent and toxin program, some of which are BSL-2, 3, and 4 labs. Through agreement with the CDC and USDA, when the FBI conducts a security review we are informed of the facility's location, the name of the responsible official, and the select agents and toxins housed at that facility, and we are authorized to use this information for investigative purposes only. The CDC and USDA may be able to provide additional information on the select agent and toxin program.

Cardin 8. It is my understanding that Dr. Ivins' security clearance was not revoked until July 10th of this year. If there was mounting evidence against him, why was his security clearance maintained to such a late point?

Response:

DoD may be best able to describe the security clearance policies and procedures for its employees. It is important to understand that, when a criminal investigation is ongoing, it is critical to maintain confidentiality both to protect the privacy of individuals and to prevent obstruction of justice. When DOJ prosecutors and FBI agents developed evidence demonstrating probable cause to believe Ivins was involved in the anthrax mailings, they informed USAMRIID and, shortly thereafter, executed search warrants at Ivins' home and laboratory. It is the FBI's

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understanding that when USAMRIID learned this information they immediately restricted Ivins' access to areas containing biological agents and toxins.

Cardin 9. Did the FBI or DOD recommend that his clearance be suspended or revoked? Was this recommendation followed up? Please provide dates as to when his security clearance was revoked, and details and dates as to when and if it was ever suspended, restricted, or limited.

Response:

Please see the response to Cardin Question 8, above.

Cardin 10. Based on recent news articles it appears as though Dr. Ivins was banned from labs which housed the most dangerous select agents and toxins in November of 2007 after the FBI executed a warrant to search his home, but it was not until March 17th, 2008, after spilling a strain of anthrax on himself that he was barred from all laboratory work and transitioned to administrative work. Is that correct?

Response:

The FBI was not informed of the 3/17/08 spill. The FBI defers to DoD regarding their internal personnel actions.

Cardin 11. Was the FBI informed of the Army's decision to revoke Dr. Ivins' access to labs on each of these occasions? If so, when was the FBI informed, and what was the substance of the information given by DOD to the FBI? If the FBI was not informed, should they have been, in your view? Should these decisions by the Army have triggered an FBI review of Dr. Ivin's security clearance?

Response:

While the FBI was not informed by USAMRIID that Dr. Ivins' access had been restricted, we became aware of restrictions on his access to the hot suites and, subsequently, to lab activities generally through our investigative efforts. We were officially advised of these restrictions during a discussion with Ivins' Commander in July 2008, when Ivins was restricted from entering Fort Detrick. Any review of Ivins' security clearance would have been accomplished by the granting authority, which the FBI understands to be OPM.

Cardin 12. Is it the DOD or the FBI that handles the investigative work for granting security clearances for scientists at USAMRIID and other military biocontainment labs? Which agency is responsible for reviewing security clearances for these scientists and making a decision either to suspend, restrict, or limit a security clearance once granted?

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Response:

The FBI does not handle the investigations on which DoD clearances are based. We therefore defer to DoD for a response to this inquiry.

Cardin 13. Did any . . . of these Army decisions to restrict Dr. Ivin's lab access or prior incidents impact the standing of his security clearance?

Response:

The FBI defers to DoD for response to this inquiry.

Cardin 14. News reports indicate that by early September of 2007 the FBI determined that the lethal anthrax originated in flasks maintained by Dr. Ivins at Ft. Detrick. Did this determination impact the standing of his security clearance, or cause any type of suspension or review of his clearance by the FBI?

Response:

The FBI does not grant, deny, or review the security clearances of DoD employees. Consequently, the FBI defers to DoD regarding the circumstances in which a DoD employee's clearance is reviewed or suspended.

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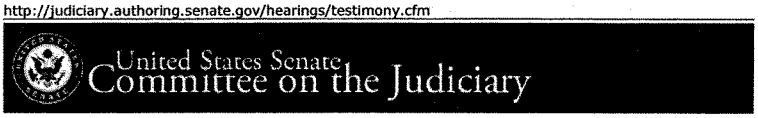

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Statement of

The Honorable Russ Feingold

United States Senator
Wisconsin
September 17, 2008

Senate Judiciary Committee
Hearing on "Oversight of the Federal Bureau of Investigation"
Wednesday, September 17, 2008

Statement of U.S. Senator Russell D. Feingold

This is a particularly important time for this hearing. Last month, the Department of Justice shared with this committee new draft Attorney General guidelines to govern the activities of FBI agents in criminal, national security and foreign intelligence investigations. Such Attorney General guidelines were promulgated for the first time in the mid-1970s to rein in the abuses that came to light through the Church Committee's work, and they already have been revised several times since September 11, 2001. They are a critical component of the system of oversight and checks on FBI authority.

Initially we were told that the Attorney General planned to sign these new draft guidelines into effect just a week after committee staff had been permitted to look at them. However, after the chairman and ranking member of this committee requested a delay to allow more thorough review by members of Congress and the public, and after Senator Kennedy, Senator Durbin, Senator Whitehouse and I made a similar request and raised substantive concerns about the draft guidelines, the Attorney General agreed to delay signature until after today's hearing. I understand that the Justice Department just a few days ago met for the first time with advocacy and community groups and briefly showed them the new draft guidelines. I appreciate those steps, but the Department also has said that it plans to go forward with its original implementation date of October 1, which does not allow much time for consideration of significant changes. The Department still has not made the draft guidelines public, nor has it even allowed committee members or relevant experts to retain copies of the guidelines to review. This is hardly a recipe for meaningful consultation.

Nonetheless, I want to reiterate some of the most significant concerns I have with the draft, as laid out in the letter sent to the Attorney General by myself and my three colleagues on August 20:

While our access to the draft Attorney General Guidelines has been limited, we want to note some of our initial concerns and questions, which highlight the need for additional time and consultation:

• The guidelines permit the FBI to use a variety of intrusive investigative techniques to conduct "assessments" of possible criminal activity, national security threats or foreign intelligence collection – without any initial factual predication. We are concerned about the extent to which such authority might, for example, permit the FBI to conduct long-term physical surveillance of an innocent American citizen; interview such an individual's neighbors and professional colleagues, including based on a "pretext" or misrepresentation; recruit human sources to provide information on that individual; or conduct commercial database searches on that individual – all without any basis for suspicion. Moreover, the mechanisms that the FBI intends to use for approval and oversight of these new investigative tools have not been shared with Congress and yet are critical to understanding how these tools could be employed. We are particularly concerned that the draft guidelines might permit an innocent American to be subjected to such intrusive surveillance based in part on race, ethnicity, national origin, religion, or on protected First Amendment activities.

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• The guidelines permit the collection of foreign intelligence information inside the United States, through both "assessments" and predicated "full investigations," with little explicit protection for information gathered about United States persons. The definition of "foreign intelligence" is broad, and covers any information relating to the activities of a foreign government, organization or person. We are concerned about the extent to which the FBI may be permitted to gather or use information about Americans under the rubric of foreign intelligence gathering when there is no suspicion of a crime, threat to national security, or any other wrongdoing.

• The draft guidelines include broad information-sharing provisions with few constraints. While there is no doubt that our intelligence agencies must share important threat information with one another, we have serious questions about the scope of information sharing as it relates to U.S. persons who are under no suspicion of wrongdoing.

In addition to these substantial concerns and questions about the current draft, I see no reason to rush forward with these very significant changes to the guidelines now. Changes to the criminal and national security guidelines have already been made by this administration in the aftermath of September 11, 2001. Given the breadth of these new revisions, the Department and the FBI should consider carefully the input of members of Congress, experts in national security and privacy issues, and affected communities before making any final decisions.

It also would be sensible to allow the next administration – which will take office in a mere four months – to weigh in before making these sweeping changes to the guidelines. It makes little sense to try to implement such a sweeping revision, with the expenditure of resources in training that such implementation will involve, at this time. The next Attorney General should have the opportunity to consider these issues and put into place guidelines to govern the Department, rather than either having to defer to the outgoing Attorney General, or explicitly undo what has been done in the last months of this administration.

I hope the Department and the Bureau will take these reasonable steps.

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United States Senate
Committee on the Judiciary

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Statement of

The Honorable Charles Grassley

United States Senator
Iowa
September 17, 2008

Prepared Statement of Senator Chuck Grassley of Iowa
U.S. Senate Committee on the Judiciary
FBI Oversight Hearing
Wednesday, September 17, 2008

Chairman Leahy, thank you for calling this hearing today. This hearing comes at a critical time with many pressing oversight issues pending regarding the FBI. I thank Director Mueller for coming up here today to discuss these important matters. I also want to thank Director Mueller for taking the time to meet with me last week to discuss some of the matters I'll be bringing up today. It is important that we take the time to discuss these concerns and bring them out in a public forum. That said, I look forward to discussing the following topics with Director Mueller.

Anthrax Investigation

In the anthrax investigation, we now know that the FBI has been focusing on a new suspect for the last several years, Dr. Bruce Ivins. Although it is unclear whether anyone will ever be punished for leaking confidential case information about Dr. Stephen Hatfill to the news media, Dr. Hatfill received a multi-million dollar settlement from the government. The FBI finally cleared Dr. Hatfill of any involvement in the killings, but it did so with no apologies and only after the FBI's new suspect committed suicide.

The FBI has released a limited amount of the evidence against Dr. Ivins, and is in the process of closing the anthrax case. However, dozens and dozens of serious questions remain unanswered. Since there will likely never be a trial, the reliability of the evidence against Dr. Ivins will never be tested as it traditionally would be in a court of law. If Dr. Ivins had been indicted and tried, his attorneys would have had access to virtually everything gathered by the FBI in the last seven years. They would have been able to search for evidence that contradicted the FBI's claims or supported alternate theories about who the killer or killers might have been. Now, that cannot happen.

Given all the time and money sunk into this investigation, I believe that the American people deserve more than just a press conference and a few briefings. If this case has truly been solved, then there has to be some alternative process capable of ensuring, in the way that a trial could have, that the FBI got it right. There needs to be a substantive, in-depth, and independent inquiry of the sort that only Congress can conduct at this point. I challenge Director Mueller to embrace this sort of scrutiny and open the FBI's files on this matter for inspection by the representatives of the American people. I challenge the leadership of the Senate and of this Committee to put the time, resources, and energy necessary into conducting a thorough review in which the public can have confidence.

Staffing Shortfalls / Bassem Youssef Retaliation

FBI whistleblower Bassem Youssef testified before the House Judiciary Committee in May that a key component of the FBI's counter-terrorism division operated at only 63 percent of capacity because it was so poorly run that FBI agents simply did not want to work there. If not for the courage of Youssef to come forward and report it to Congress while still employed at the FBI, we would never have known this critical

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information. The fear of retaliation would have kept most others silent. That sort of fear is well founded. Just days after the hearing, Youssef's supervisor informed him of anonymous allegations that he violated FBI travel regulations. Given the timing of these allegations, they appear to be motivated by a desire to retaliate for Youssef's Congressional testimony. I am anxious to hear from Director Mueller how he plans to deal with this continued culture of retaliation at the FBI as well as the serious staffing shortages that apparently plague the counter-terrorism division.

The FBI continues to stonewall this Committee on requests for documents. For example, in March 2007 we requested internal FBI emails on their issuance of "exigent letters." These letters were criticized by the Justice Department's Inspector General as an inappropriate way to obtain phone records without any legal process and said the letters contained false statements promising that a subpoena would be forthcoming, when there was no intent to issue a subpoena. Here we are a year-and-a-half later. The FBI only produced 15 heavily redacted pages last October and now says it won't produce anymore until the joint FBI/Inspector General investigation is complete.

ATF/FBI Cooperation

I am continuing to follow-up on concerns that were raised in May regarding the level of cooperation between agents from the FBI and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). In 2002, I worked closely with Senator Kohl to secure the transfer of ATF from the Treasury Department to the Department of Justice in the Homeland Security Act of 2002. It was our belief that bringing these investigative agencies under one roof would help to strengthen their ties and foster better cooperation on firearms and explosives investigations. However, allegations were published that this transfer has not had that impact and I've written to the Attorney General seeking a copy of the new Memorandum of Understanding between FBI and ATF regarding explosives investigations. I have some concerns with the timing of that document and whether it supersedes or supplements past MOU's between the two agencies.

National Security Investigative Guidelines

We've heard recently that the Attorney General has proposed new investigative guidelines for national security investigations. Members and staff have had an opportunity to review these guidelines and I have a concern regarding a provision in the guidelines related to criminal matters uncovered by the FBI that are outside of their jurisdiction. I would like to ask the Director how he views this provision, how he believes it will work in practice, and if he believes it will hurt or hinder sharing of information between the FBI and other federal law enforcement agencies.

Time permitting; I'd also like to discuss some concerns I have with the investigative of mortgage fraud and fugitive warrants being entered into the National Crime Information Center which is overseen by the FBI. All these issues, and more, need to be addressed by this Committee.

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United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

August 7, 2008

Via Electronic Transmission

The Honorable Michael B. Mukasey
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530

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

Dear Attorney General Mukasey and Director Mueller:

Thank you for ensuring that Congressional staff received an advanced briefing yesterday of the information released to the public in the Amerithrax investigation. The three affidavits provided represent an important, but small first step toward providing Congress and the public a full accounting of the evidence gathered by the FBI.

At yesterday's briefing, Justice Department and FBI officials invited follow-up questions after there had been time to read the affidavits. Indeed, there are many important questions to be answered about the FBI's seven-year investigation, the basis for its conclusion that Dr. Bruce Ivins conducted the attacks alone, and the events leading to his suicide. To begin this inquiry, please provide complete and detailed answers to the following questions:

1) What is the date (month and year) that the FBI determined that the anthrax came from a specified flask in Ivins's lab ("RMR 1029")?

2) When (month and year) did the FBI determine that Dr. Hatfill never had access to the anthrax used in the killings?

3) How did the FBI determine that Dr. Hatfill did not have access to the anthrax used in the killings? Was that because the FBI determined that Dr. Hatfill no longer worked at USAMRIID when the powder was made?

4) Was Dr. Hatfill or his counsel informed that Dr. Hatfill had been cleared of any involvement in the anthrax killings before the Department of Justice offered a settlement to him? Was he informed before signing the settlement agreement with him? If not, please explain why not.

5) Was Judge Walton (the judge overseeing the Privacy Act litigation) ever informed that Dr. Hatfill had been eliminated as a suspect in the anthrax killings? If so, when. If not, please explain why not.

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6) Was Dr. Ivins ever polygraphed in the course of the investigation? If so, please provide the dates and results of the exam(s). If not, please explain why not.

7) Of the more than 100 people who had access to RMR 1029, how many were provided custody of samples sent outside Ft. Detrick? Of those, how many samples were provided to foreign laboratories?

8) If those with access to samples of RMR 1029 in places other than Ft. Detrick had used the sample to produce additional quantities of anthrax, would that anthrax appear distinguishable from RMR 1029?

9) How can the FBI be sure that none of the samples sent to other labs were used to create additional quantities of anthrax that would appear distinguishable from RMR 1029?

10) Please describe the methodology and results of any oxygen isotope measurements taken to determine the source of water used to grow the spores used in the anthrax attacks.

11) Was there video equipment which would record the activities of Dr. Ivins at Ft. Detrick on the late nights he was there on the dates surrounding the mailings? If so, please describe what examination of the video revealed.

12) When did the FBI first learn of Dr. Ivins' late-night activity in the lab around the time of the attacks? If this is powerful circumstantial evidence of his guilt, then why did this information not lead the FBI to focus attention on him, rather than Dr. Hatfill, much sooner in the investigation?

13) When did the FBI first learn that Dr. Ivins was prescribed medications for various symptoms of mental illness? If this is circumstantial evidence of his guilt, then why did this information not lead the FBI to focus attention on him, rather than Dr. Hatfill, much sooner in the investigation? Of the 100 individuals who had access to RMR 1029, were any others found to suffer from mental illness, be under the care of a mental health professional, or prescribed anti-depressant/anti-psychotic medications? If so, how many?

14) What role did the FBI play in conducting and updating the background examination of Dr. Ivins in order for him to have clearance and work with deadly pathogens at Ft. Detrick?

15) After the FBI identified Dr. Ivins as the sole suspect, why was he not detained? Did the U.S. Attorney's Office object to seeking an arrest or material witness warrant? If not, did anyone at FBI order a slower approach to arresting Ivins?

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16) Had an indictment of Dr. Ivins been drafted before his death? If so, what additional information did it contain beyond the affidavits already released to the public? If not, then when, if ever, had a decision been made to seek an indictment from the grand jury?

17) According to family members, FBI agents publicly confronted and accused Dr. Ivins of the attacks, showed pictures of the victims to his daughter, and offered the $2.5 million reward to his son in the months leading up to his suicide. These aggressive, overt surveillance techniques appear similar to those used on Dr. Hatfill with the apparent purpose of intimidation rather than legitimate investigation. Please describe whether and to what degree there is any truth to these claims.

18) What additional documents will be released, if any, and when will they be released?

Please provide your responses in electronic format to Brian_Downey@finance-rep.senate.gov no later than August 21, 2008. Please have your staff contact Jason Foster at (202) 224-4515 with any questions related to this request.

Sincerely,

Charles E. Grassley
Ranking Member

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KOHN, KOHN & COLAPINTO, LLP

URGENT MATTER – DISCLOSURE OF VIOLATIONS OF LAW

September 10, 2008

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

Re: FBI Violation of NSL Law

Dear Senator Grassley:

I am writing in further regard to your request for information concerning information related to the FBI's compliance with the law in its administration and use of National Security Letters. By letter dated March 16, 2007 you requested Mr. Youssef, the current Unit Chief for the Communications Analysis Unit ("CAU") of the Federal Bureau of Investigation's ("FBI") Counterterrorism Division to provide your office with information related to the FBI's compliance with rules governing National Security Letters ("NSLs"). As counsel for Mr. Youssef, please accept this letter as his response to your requests.

For your information, my office was granted access to hundreds of exhibits currently being utilized by the FBI and the U.S. Department of Justice ("DOJ") Office of Inspector General ("OIG") as part of their joint review of the FBI's use of NSLs. I was also permitted to participate in eight days of testimony given by Mr. Youssef to investigators from the OIG. In late August 2008, my office was granted access, for the first time, to various emails that the FBI has refused to turn over to your office. Upon review of these emails, it is clear that the FBI knowingly violated the law in its handling of NSL letters and conspired to violate the civil liberties of countless American citizens. These emails should have been provided to you in 2007. Attached to this letter are the texts of some of these highly relevant emails.

Based on the content of these emails, and the information I learned during my participation in the questioning of Mr. Youssef, I am setting forth a summary of the relevant concerns raised by these emails.

5335 WISCONSIN AVE, NW, WASHINGTON, DC 20015
202-342-6980 WWW.KKC.COM 202-342-6984 (FAX)

Attachment 1: email dated March 11, 2005 :

This document is an email dated March 11, 2005 from FBI Assistant General Counsel Patrice Kopistansky and addressed to upper level attorneys within the FBI's Office of General Counsel ("OGC"), including the Deputy General Counsel Julie Thomas and the head of the National Security Law Branch, Mr. Marion ("Spike") Bowman. The email was internal to OGC, and Mr. Youssef was not on the email chain and was never provided a copy of this document.

The email discusses internal discussions within OGC concerning the FBI's improper use of "exigent circumstance letters." These are letters provided to the telephone carriers that are used to conduct searches of people's phone and email records. Under the law, in order to conduct a search of these records the FBI was required to initiate either a preliminary or full investigation on a subject, and then serve a NSL on the phone company. Instead of following the law, the Communications Analysis Unit ("CAU") of the FBI (along with other entities), had, for years, authorized searches and obtained phone/email documentation without ever initiating a preliminary investigation and without serving an NSL. In fact, in order to obtain an NSL, the FBI was required to have an ongoing investigation (or preliminary investigation). Thus, in those searches conducted in instances for which there was no preliminary investigation, it was impossible for the FBI to obtain an NSL. Consequently, in thousands of cases, the FBI obtained the phone/email records by serving a letter on the phone companies, known as an "exigent circumstances letter," which promised that an NSL or subpoena would be provided in the future. In these cases, there was no approved preliminary or ongoing investigation.

The problem was that these NSLs (or subpoenas) were never served, mostly because the searches were conducted in cases for which no investigation or preliminary investigation was ever authorized. As explained in this email, the FBI's Office of General Counsel discussed these problems in January 2005. The March 11th email was sent to various FBI attorneys as a follow-up to these discussions

As stated above, Mr. Youssef was not privy to the January 2005 OGC discussions and was not a recipient of this email.

The March 11th email summarizes the problem and confirms that OGC knew of the violations no later then January 2005: "CAU gets emergency requests to get telephone numbers, gets the information, and then has to do an NSL to justify getting the information. As it is now, it sends us a lead to either the field or ITOS I or II to do the NSLs, but this [i.e. obtaining the NSL] *rarely happens*." (emphasis added). The email recognizes that the real issue behind obtaining the NSL related to determining what preliminary investigation the NSL could be tied to, as under the law a preliminary investigation must exist in order for an NSL to be issued. No preliminary investigation (or full scale investigation), no NSL.

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OGC also understood that the CAU could not open up cases ("CAU can't open cases because they are not operational. We would probably need to get ITOS I and II to open such cases"). In other words, CAU could never open up a preliminary investigation necessary to justify an NSL and would not even have any access to the underlying information concerning the alleged terrorist threat. Consequently, OGC understood that the FBI was obtaining information without having served the proper NSL request. They also understood that in order to justify these prior requests, or to continue to obtain information from the phone companies, they needed to determine "what file we issue the NSLs pursuant to." OGC knew that there had to be, at a minimum, a preliminary investigation file for which the NSL could be tied.

According to the email, in January 2005, the OGC attorneys "proposed" a "solution" to the NSL problem in which the FBI would open "very broad PIs [preliminary investigations] that could be ongoing and would encompass future threats."

Once these broad preliminary investigations were opened, OGC would have the authority to use its own discretion to classify any search request into one of the very broad PI categories, and could thus approve the NSL. There would be no need to even consult with the requesting operational unit about the actual factual justification, provided that the general information about the search was available.

According to the email, these umbrella PIs would cover all of the so-called "emergency" requests for which the FBI was currently using the "exigent letter" to obtain the information. This assessment clearly is accurate. The broad scope of these proposed preliminary investigations, and the ability to classify almost any search request, is evident from a review of the preliminary investigation proposed in the OGC email:

> *CAU and I came up with a list of six (sic) PIs that we could open that would encompass most, if not all of the emergency requests that came in. They were:*
>
> *Threats against Transportation Facilities (e.g. airplanes, trans)*
>
> *Threats against Infrastructure (e.g. bridges, roads, water treatment plants)*
>
> *Threat against Public Facilities (e.g. mass?, sports stadiums)*
>
> *Threats against individuals (e.g. plans to assassinate public figures)*
>
> *Threats against Special events (e.g. World Bank event, Superbowl, G-8 Summit)*

In other emails, these "very broad" and "future threat" based PIs would be referred to in a variety of ways, including "Umbrella PIs," "generic PIs" and/or PI's initiated from a "control file."

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In the March 11th email, Kopistansky indicates that she and persons from CAU (presumably the Assistant Section Chief over CAU) came up with six PIs that could be used to justify NSLs. Other emails make clear that the proposal to create these generic PIs was initiated by OGC, not CAU. Also, Mr. Youssef was not copied on the emails concerning the generic PIs until sometime after CAU agreed to work with OGC on this matter. The documents indicate that the Assistant Section Chief of CAU (Mr. Youssef's immediate supervisor) was the point of contact between OGC and CAU at the time these units agreed to start working on the scope of the generic PIs.

Attachment 2: email dated January 26, 2005:

This attachment is a January 26, 2005 email from Kopistansky to the Assistant Section Chief over the CAU (Glenn Rogers). This email contains information that was subsequently referenced in Attachment 1. It confirms that OGC developed the idea of the generic/control file/umbrella PIs, and sought CAU's assistance in coming up with the categories of threats for which these generic PIs could be based. This email was also copied to the upper management chain of command within OGC, including the Deputy General Counsel.

The email also confirms that the FBI/OGC viewed compliance with the law as potentially "cumbersome" and attempted to sell the idea of using "control files or a more generic PI" as the basis for an NSL based on the simplicity of the concept. Although OGC recognized that the "standard for a PI" based on an actual threat was "very low," OGC was putting together a policy for which an NSL could be based on a generic PI for which there was no actual terrorist threat and no real investigation, preliminary or otherwise.

Mr. Youssef was not on this email and, despite being the Chief of the CAU Unit, was not aware of these discussions at this time.

Attachment 3: email dated March 7, 2005:

This email was written by Kopistansky and sent to Mr. Youssef and Assistant Section Chief (Youssef's immediate supervisor), Mr. Glen Rogers. It contained a postscript directed to one of the supervisors in CAU. This postscript is highly significant as it demonstrates OGC's knowledge, as early as March 2005, that:

1. OGC was in the process of formulating the "possible PIs to which we can tie emergency requests to." This is a reference to the generic/umbrella PI concept.

2. OGC understood that the CAU "backlog" on NSLs continued to exist, and was "*getting worse.*" In other words, OGC knew that the unit was still sending out exigent letters in order to obtain data without an NSL. OGC knew that the law was not being complied with, and knew that the problem was growing.

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3. OGC then informs CAU that they "*can't help*" fix the problem until they obtain "*generic PIs opened to which we can tie these NSLs*." In other words, whatever request for assistance this supervisor made, it was rejected on the basis that CAU needed to work with OGC and come up with the generic PI solution. OGC knew of the problem, knew it was getting worse, and refused to help fix the problem, relying instead on its intent to create a generic PI to solve the issues.

Attachment 4: email chain dated April 5, 2005 [8:58AM; 9:04AM; 9:09AM; 11:57AM; 12:01AM; 12:09AM; 12:12PM]:

This is an internal email chain between attorneys in OGC, including the Deputy General Counsel and the head of the National Security Branch.

The first email on the chain (8:59AM) is from Kopistansky. In this document she recognizes that the "operational units" needed to open up investigations before the information was searched and obtained by the FBI, so that the FBI could be "*getting this information legally*." The email recognizes the precise problem with the exigent letters (i.e. searches being conducted without preliminary investigations, and therefore without the legal predicate to obtain an NSL) and also understood that CAU was asking that OGC use its influence "force the operational units to open these PIs."

The second email in the chain (9:04) indicates that a solution to this problem may be reached if there was a meeting with the Deputy Assistant Director for the FBI, Mr. John Lewis (the DAD with ultimate authority over CAU).

The third email in the chain (9:09AM) reinforces the fact that the operational units needed to "know that they need to open up these PIs." It also confirms the fact that the operational units were "not good about" establishing the required preliminary investigations, and that Mr. Youssef had reached out to OGC to obtain help in forcing the operational units to comply with the law. According to the email: "*So Bassem [Youssef] wanted to know if there was something we could do to force their [the operational units, i.e. ITOS] hand as far as opening up the necessary PIs.*"

The fourth email in this chain (11:57AM) is the deal-breaker. Deputy General Counsel Julie Thomas ignores the request for assistance made by Youssef and sidesteps the idea that a meeting be conducted with the Deputy Assistant Director for Counterterrorism. Instead, Thomas states that she has been "signing a tremendous amount of these under our new procedure." In other words, Thomas has been signing out NSLs under umbrella/generic/control files, and thinks that the solution to the NSL problem is at hand.

The fifth email in the chain (12:01 PM) indicates that Thomas was referring to another NSL-related program. In this regard, Kopistansky states that she did not understand the "new procedure" referenced in the prior email, and Kopistansky did not think that the generic PI policy had been implemented in the NSL program that they were discussing.

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The sixth email in the chain (12:09 PM) further demonstrates that another unit in the FBI was using generic/umbrella/control files to justify NSLs, as Thomas states that she was "thinking of another unit." She also recalled working with others in OGC to use this generic process to "help out" with a "delay in NSL processing." Thomas then states that the entire issue raised by CAU/Youssef and Kopistansky needed to be placed on the "back burner." Because Thomas believed that the solution to the issues raised by Youssef was at hand (i.e. the new procedure which was being used for other NSLs), there simply was no rush to fix this problem, she was able to regulate the matter to the "back burner."

The last email (12:12PM), confirms that the problem will be dealt with "later". In this email Kopistansky confirms that two attorneys in the OGC assigned to help CAU actually "can't do anything" until the generic PI policy is created.

Significantly, in an earlier email, Kopistansky specifically acknowledged that the generic/control file policy she was proposing, which would provide a paper-justification for NSLs, was based on another program already in effect within the FBI. Email dated January 26, 2005 (**Attachment 2**). In other words, although the generic/control file process for justifying PIs and NSLs was never finally approved within CAU as the solution for the exigent circumstances letter problem, it was approved and implemented for another program. The use of generic/control PIs to justify NSLs is a clear violation of law.

Attachment 5 email dated April 12, 2005:

This is an April 12, 2005 email, sent by Patrice Kopistansky to Deputy General Counsel Julie Thomas as a follow-up to the April 5th email chain. This email provides additional guidance and confirmation as to the meaning of the April 5th chain. The email confirms the following:

1. OGC was fully aware of the "problem with CAU and their backlog of NSLs." This is the problem caused by the use of "exigent letters" and the failure of the operational units to provide the promised NSLs.

2. Mr. Youssef (i.e. CAU) wanted help from OGC in fixing this problem ("CAU would like us to put something out to pressure ITOS I"). ITOS stands for the International Terrorism and Operations Section of the FBI.

3. OGC was stuck on the generic PI solution, i.e. creating Preliminary Investigations out of control files or umbrella files which could simply be used to justify the NSLs. Because OGC was committed to creating a system based on generic PIs to resolve the problem, they continued to postpone and ignore the repeated requests from Mr. Youssef to help fix the problem. OGC could have fixed the problem immediately by simply telling the operational units that they had to comply with the law, and by instructing CAU to stop issuing the exigent letters. But OGC did not. They remained

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committed to permitting the operational units to obtain information without real PIs being initiated. Instead, they were working on creating a system that would create phony PIs, which could simply paper-over the legal requirement that the searches be tied to a real terrorist PI, and thus permit the issuance of NSLs.

4. The email continues to recognize that the current process of conducting searches without NSLs and without any confirmed PIs was not legal. This confirmation is contained in the email's reference that "generic PIs" should be adopted so the FBI could "more efficiently" and "not to mention legally" "continue to obtain emergency telephone information."

5. Two follow-up emails are attached to this document. The first, sent at 5:02 PM indicates that the Deputy General Counsel approved the generic PI solution proposed by Kopistansky. The second, sent at 5:03 PM indicates that Kopistansky would start to draft the Electronic Communication or "EC" to implement the generic/umbrella/control file PI proposal.

6. Thus, by April, 2005, after having full knowledge that the current searches were not being conducted "legally" and that CAU was trying to get help from OGC to have the operational units comply with the law, OGC internally approved the plan to establish generic PIs in order to permit the FBI to continue large numbers of illegal searches. OGC's commitment to the illegal generic PI procedure resulted in a delay in OGC engaging in any constructive corrective action on these matters.

Attachment 6: email dated May 27, 2005

The Deputy General Counsel of OGC formally approved the umbrella PI proposal on April 12, 2005. At some point in time Mr. Youssef was made aware of OGC's proposal to create the generic/umbrella PIs and issue NSLs out of control files. Mr. Youssef took no position on this proposed solution, as he could not override his chain of command and/or could not challenge OGC's implicit position that such PIs were somehow legal.

Regardless, in an email to Mr. Youssef dated May 27, 2005, Assistant General Counsel Kopistansky understood that it would be the responsibility of ITOS I and II to create the generic PIs: "Bassem, we have discussed this issue with ITOS I and II since they are the ones who would be creating the umbrella files that you would be using as the basis for your emergency NSLs."

The text of the May 27th email is troubling, as it demonstrates how the umbrella PI concept was open to abuse. An example given by OGC of facts which could justify using the umbrella PI to justify a search included the following: "For instance, if we see someone taking a picture of a bridge, and the person fits the stereotype of a domestic terrorist (e.g. young, male, Caucasian, maybe a crewcut – you get the point)" that person could be the subject of a generic PI NSL "*even though at that point there is no suggestion that the target is affiliated with a foreign power*."

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Attachment 7: emails dated September 22 and 23, 2005

OGC continued to push the generic/control file PI solution through mid-September 2005, when it helped to set up a meeting between CAU, ITOS I and II managers and OGC. OGC believed that this meeting was designed to facilitate the approval of the generic/umbrella PIs. Kopistansky clearly identified the problem at hand: "But the issue had been that we did not have PIs to attach them [NSL]." The FBI's assistant general counsel's solution was "*so we thought we'd create some.*" Email dated September 23rd. In other words, the OGC office concedes that the purpose of the generic PIs was simply to "create" an investigation for which to justify the NSL.

However, Mr. Youssef testified (and the emails support) that he asked for this meeting in order to obtain a commitment from ITOS I and II that they would stop asking the CAU supervisors for emergency searches in non-emergency situations. The ITOS requests had placed pressure on CAU supervisors to use the exigent letter process, and Youssef wanted help from ITOS managers to support CAU in its effort to stop this practice.

Youssef's intent for asking for the meeting/what he said at the meeting is confirmed in Attachment 8, an email from Kopinstansky to Youssef about that meeting: " . . . at the meeting on September 26, 2005, it seemed that your main concern was getting ITOS I to issue NSLs under existing files. . . ."

Attachment 8: email dated October 21, 2005

Throughout the emails, OGC repeatedly confirms that Mr. Youssef wanted help in getting the operational units to comply with the law and provide the required NSLs. This is reflected in an October 21, 2005 email from Kopistansky to Youssef, in which she acknowledged Mr. Youssef's position: ". . . you [Youssef] thought you needed the weight of OGC to come down on ITOS I to assure that they'd issue these NSLs . . . ."

In the October 21st email, Kopistansky stated that she was "under the impression that" CAU "did a lot of emergency situations" and thus there was a need for ITOS to "create some umbrella files under which we could issue NSLs." Kopistansky's impression was absolutely correct concerning the actions of CAU *prior* to Youssef becoming Chief. Consistent with policy and practice, CAU routinely used exigent letters to conduct searches for a number of years before Mr. Youssef was named Chief of the Unit.

However, once Mr. Youssef required that such letters be issued only in real emergencies, it was obvious that real "emergency requests were few and far between." This is reflected in the statistics concerning the issuance of exigent letters out of CAU after Youssef instructed his unit to approve such letters only if there was a real emergency.

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Also in the October 21st email, Kopistansky states that on the basis of issues raised by Youssef in the September 26th meeting, Kopistansky stopped supporting the generic/umbrella PI solution. Instead she supported Mr. Youssef's position that the current problem could be solved if pressure was put on ITOS to stop asking for emergency searches in non-emergency matters, and to ensure that they in fact provided NSLs to CAU, based on the existence of a real investigation or preliminary investigation. Kopistansky described the meeting and her change of position as follows:

> "I [Kopistansky] was under the impression that . . . you needed ITOS I and II to create some umbrella files under which we could issue NSLs. Therefore, we had decided that we'd suggest the creation of umbrella files . . . . However, at the meeting on September 26, it seemed that your [Youssef's] main concern was getting ITOS I to issue NSLs under existing files. . . ."

Kopistansky informed Youssef that Spike Bowman, the head of the National Security Law Branch, had contacted "higher ups" about Youssef's concerns, and that she expected (hoped) that CAU was now "receiving the information" needed to "meet the standard for NSLs, namely relevance to an authorized investigation."

Although Kopistansky appeared to change her position on the use of the generic PIs to resolve the problems caused by the exigent letters within CAU, her email did not reflect a shift in position related to the use of such instruments to fix the backlog that she knew existed in CAU or a shift in OGC's general position of the use of umbrella/generic PIs in other programs which also used NSLs to gather data. The issue of the backlog was not addressed in this email.

Attachment 9: email dated March 19, 2007

As set forth in the October 21st email, Mr. Youssef's intent was to have the ITOS units simply comply with the law, and provide NSLs in all but true emergency situations. According to a March 19, 2007 email from Youssef to the FBI General Counsel (and others in OGC), Youssef informed OGC that he took action in 2005 to ensure CAU compliance with the NSL rules. He informed OGC of his communications with the FBI Inspection Division about the problems which had existed concerning the exigent circumstance letters and the corrective actions Youssef had undertaken to fix the problem in 2005: "The inspection team was advised of the spring 2005 audit [i.e. Youssef's attempt to identify all the searches that were conducted without NSLs] wherein CAU obtained a list of outstanding NSLs from [redacted by FBI]. The inspection asked what CAU is doing at the present time to remedy this situation and CAU advised that under normal circumstances (non exigent) an NSL must be provided by the requesting entity prior to obtaining any telephone records . . . ."

In other words, by the spring of 2005 Youssef had instructed his staff to comply with the law, use the exigent circumstances letter only in true emergencies and he had further commenced an internal audit to locate all instances in which a search was

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conducted without an NSL. This provided CAU with a list that it would work off of in an attempt to have the operational units provide the necessary NSLs.

Significantly, unlike OGC, Mr. Youssef did not see the need for generic/control file-based PIs in order to ensure that his Unit followed the law. In April 2005, Mr. Youssef obtained an email from Kopinstansky setting forth a definition of "emergency" and instructed his unit only to issue the exigent letters in real emergency situations. Despite the fact that the legal guidance from Kopinstansky was wrong, Youssef's insistence that CAU stop issuing exigent letters except in rare true emergencies, which he orally communicated more then once to his entire unit, resulted in a radical decrease in the use of exigent letters.

A review of the number of exigent letters sent from his unit confirms this fact, and confirms that by the end of 2005 exigent letters had all but stopped, and those that were issued were clearly supposed to be tied to a real emergency. *See* **Attachment 10, Exigent Letter Use Chart.**

Attachment 11: ECs dated January 6, 2003 and November 18, 2003 and a proposed EC dated May 19, 2006

Attachment 11 consists of an EC sent out Bureau-wide dated January 6, 2003, another EC dated November 18, 2003 and a proposed EC drafted under Mr. Youssef's supervision dated May 19, 2006. These three documents set forth the policies concerning the use of exigent letters in place at the time Mr. Youssef became Chief of CAU, and the effort that Mr. Youssef undertook to correct these policies.

The January 6th EC established FBI policy that recognized that the FBI would be using information collection tactics that would result in "generating an enormous amount of data in short order." Much of this data "may not actually be related to the terrorism activity under investigation." In other words, the FBI knew that it would collect information that in fact would not be tied to any actual terrorist threat.

The EC also establishes the fact that the CAU would obtain telephone records *before* it obtained an NSL or a subpoena, and would obtain the "appropriate legal authority" only after the search was done. Although the EC did not set forth the types of investigations or preliminary investigations for which such searches could be conducted, it clearly authorized CAU's practice of using so-called "exigent circumstances" letters.

Later in 2003, CAU's practice of using exigent circumstance letters was formally included in a new EC, which was uploaded Bureau-wide and transmitted to the relevant counterterrorism programs. The November 18th EC stated that CAU "typically" would "request transactional records in response to specific field office requests for support." The EC continued and explained that the "Exigent Circumstances Letter" was the process used to obtain the data: "Under the authority of the Exigent Circumstances Letter signed by the appropriate CAU Supervisory Special Agent [withheld by FBI] will provide transactional records . . . ."

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As part of Mr. Youssef's efforts to stop the improper use of Exigent Circumstances Letters and ensure that searches were only conducted if there was an NSL (or if there was a legally justifiable emergency), Mr. Youssef asked his staff to conduct a review of the underlying policies that had previously permitted (and required) CAU to use Exigent Circumstances Letters.

This review was completed and Youssef and his staff drafted a new EC that would correct the improper guidance provided in the January and November, 2003 ECs. Mr. Youssef's work on this process was completed in May, 2006, and he communicated the proposed changes in FBI policy in an email to OGC dated May 19, 2006.

The proposed revised EC, if approved, would have ensured CAU compliance with the law. It explicitly defined exigent circumstances in a manner consistent with the law, and required that exigent circumstance searches only occur if the facts proved that the search was justified under the law: "In crisis situations where there is a specific threat to the United States . . . and loss of life and property are imminent, CAU will issue an exigent circumstances letter . . . under 18 USC 2707 [the law which sets forth the definition of exigent]. . . . "

This revised policy was sent to OGC before the Office of Inspector General commenced its on-site review of the NSL process. However, OGC did not immediately act on this recommendation, and the improper policy set forth in the 2003 ECs remained in the system (and binding on CAU) for another year.

Attachments 12 and 13: email concerning the "clean up" of the NSL backlog:

OGC's use of the "umbrella" concept did filter its way into the ITOS and CAU as a method for cleaning up the backlog of NSLs. In 2006, as a result of Mr. Youssef's audit of exigent letter requests, the CAU was able to identify past searches for which NSLs were never issued. Under Mr. Youssef's direction, a "spread sheet" of "outstanding NSL requests" was created in October, 2005. **Attachment 12, email dated October 27, 2005 (11:13AM)**. Mr. Youssef directed his staff to contact the operational unit supervisors who had "sent the lead to us" in order to "clear our outstanding NSL requests." *Id.*

The CAU attempted to get these NSLs from the operational units, but had limited success. The inability of CAU to obtain the NSLs from the operational units is not surprising, as NSLs could only be approved if a preliminary or other ongoing investigation existed. If no preliminary investigation was ever opened, absent the FBI instituting the "umbrella/control file" solution proposed by OGC, it would be impossible to justify the NSL.

Consequently, the supervisors within ITOS and CAU discussed this problem and came up with an "umbrella" "solution." According to an email from a CAU supervisor

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(Mr. Randy Allen) to OGC (Kopistansky), dated November 14, 2006, the solution involved justifying a "blanket" NSL for past searches "acting under the umbrella that terrorists are in the U.S. and are imminently planning operations." **Attachment 13, email dated November 14, 2006, from Allen to Kopistansky**. In other words, the ITOS and CAU supervisors utilized the "umbrella" concept originally proposed by OGC in order to create a justification for an NSL that would cover the prior undocumented searches. This solution was discussed with the Section Chief for ITOS, Mr. Hiembach and with the CAU Unit Chief (Youssef). However, it was the Assistant Director for the Counterterrorism Division (Billy) and the Deputy Assistant Director for Counterterrorism (Cummings) who actually "signed off" on these blanket NSLs.

OGC was concerned that Mr. Youssef testified about these blanket NSLs during his initial interview with the Inspector General. This concern triggered an email from Kopistansky to the FBI General Counsel Valerie Caproni informing her that Joseph Billy, the Assistant Director for the Counterterrorism Division, had signed a blanket NSL. **Attachment 13, email dated November 7, 2006, Kopistansky to Caproni** ("I presume Bassem told OIG about it so I thought you ought to know about it"). After receiving this information from Kopistansky, the General Counsel contacted Billy. In an email also dated November 7, 2006 Billy claimed that he had "no recollection" of having signed the blanket NSL. *Id.* OGC also attempted to distance itself from this blanket NSL, despite the fact that OGC had strongly advocated and approved using "umbrella" investigations to justify resolving NSL problems.

CONCLUSION

The FBI and OIG only provided counsel for Mr. Youssef access to these emails in late August 2008. For whatever reasons, the FBI had failed to "clear" these documents for review for well over a year, despite the fact that almost nothing in the documents was properly classified and most of the emails stated, on their face, that they did not contain classified materials.

A review of the emails released to counsel for Mr. Youssef in August, 2008 confirms the following facts:

1. OGC knew that CAU was obtaining information without proper NSLs no later then January 2005.

2. OGC failed to order CAU or the operational units to comply with the law, and failed to even instruct these units and sections as to what was lawful. Instead, OGC devised an "umbrella" file proposal that would have permitted the FBI to hide its past improper searches and continue to conduct improper searches by using umbrella/generic/control files to justify searches.

3. Between January, 2005 – September, 2005, despite knowing that searches were being conducted in violation of law (and without the required NSLs), the FBI OGC

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never instructed the operational units to comply with the law, and took no steps to discover the extent of the violations for which they became aware.

4. Had the OGC "umbrella" proposal been acted on, the FBI would have institutionalized a process, which permitted the wholesale violation of law and massive intrusions into the privacy and constitutional rights of countless citizens. Despite the fact that the FBI did not use the umbrella/control file process to resolve the issues identified by Mr. Youssef, the record demonstrates that this concept was used on at least two other matters within the FBI.

5. A "tremendous amount" of NSLs were improperly authorized using the umbrella/control file process. The FBI's use of such umbrella/control files to open preliminary investigations is illegal. Using those improperly docketed investigations to obtain an NSL constitutes a further violation of the law.

6. Based on the information obtained during the joint FBI-OIG investigation into the misuse of NSL letters, and the scope of the prior and current OIG reviews, it appears that the illegal use of umbrella/control files referenced in the emails dated January 26, 2005 (4:54PM) (Attachment 2) and April 5, 2005 (11:57 AM) (attachment 4) remains covered-up within the FBI.

7. The FBI also used the "umbrella" concept as a predicate to issue NSLs to clear the backlog on past searches improperly conducted using the "exigent letter."

In closing, I would like to express my deepest concern over the FBI's actual and potential use of umbrella/control/generic/blanket files to authorize either a preliminary investigation or the issuance of an NSL. FBI OGC worked for nearly a year to expand the use of this concept within the FBI. A review of Attachments 1, 2 and 6 demonstrate how dangerous these proposals are to our Democracy. A review of Attachments 2 and 4 demonstrate that these types of improper searches were actually approved and conducted by the FBI in NSL-related search program(s) which were not the subject of the current FBI-OIG investigation. A review of Attachment 5 demonstrates that the FBI's OGC also gave approval for use of these umbrella-type files to cover up past improper practices and permit the continuation of illegal searches in the NSL program which is the subject of the current joint FBI-OIG investigation.

The FBI's proposal could justify opening a preliminary investigation on any American citizen. The example provided by the OGC, in which they explain how any Caucasian American with a crew cut who took a picture of a bridge could be the subject of a preliminary investigation (even though there was absolutely no evidence that this photographer was "affiliated with a foreign power"), and have his phone and email records searched, is shocking to the conscience. But under the FBI proposal, not only bridges would be covered, persons taking pictures of airplanes, trains, roads, sporting events, public figures, the Super Bowl, among countless other public events, could all be made the subject of the ongoing "preliminary investigation." Worse still, no FBI agent involved in an actual terrorism investigation would ever have to approve the search. The

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Office of General Counsel would have the authority to sign-off on the NSL based on requests for which no real factual predicate was ever set forth.

Even if the search turned up no evidence of misconduct, the information obtained in the search would be stored in an FBI file, and the target of the search would be identified in FBI records as the subject of a "preliminary" terrorist investigation." These records could easily be misused and misinterpreted to the detriment of the target for years after the information was collected.

The FBI plan (which apparently was actually carried out in other NSL programs run by the FBI) could be used to target journalists in order to identify sources, political opponents in order to collect embarrassing information, and just about anyone who drives on a road or over a bridge, uses a train, flies on a plan, attends a sporting event, attends a public event, associates with a public figure, or engages in virtually any other activities encompassing the innocent and constitutionally protected conduct of every American.

Thank you in advance for your attention to these matters and your concern that fundamental rights enshrined in our Constitution are protected.

Respectfully submitted,

Stephen M. Kohn
Attorney for Mr. Youssef

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Attachment 1

EX 12

From: PATRICE KOPISTANSKY

Sent: March 11, 2005 3:42 PM

To: MARION BOWMAN; JULIE THOMAS

CC: LIZANNE KELLEY; LAURA BLUMENFELD; LAURA RON (?), SHAWN THOMPSON, WILMON HEALY LEE, JR.

Subject: CAU Backlog of NSLs

About two months ago we discussed the fact that CAU gets emergency requests to get telephone information on phone numbers, gets the information, and then has to do an NSL to justify getting the information. As it is now, it sends a lead to either the field or ITOS I or II to do the NSLs, but this rarely happens. So we agreed to provide Will and Laura and Shawn, who would respond immediately to the ECs from CAU and get NSLs out ASAP.
The issue arose as to what file we issue the NSLs pursuant to. As you may remember, we agreed that we would look at a proposed solution whereby we open very broad PIs that could be ongoing and would encompass future threats. CAU and I came up with a list of six PIs that we could open that would encompass most, if not all, of the emergency requests that came in.

They were:

Threats against Transportation Facilities (e.g. airplanes, trains)

Threats against Infrastructure (e.g. bridges, roads, water treatment plants)

Threats against Public Facilities (e.g. mass ?, sports stadiums)

Threats against individuals (e.g. plans to assassinate public figures)

Threats against Special events (e.g. World Bank event, Superbowl, G-8 Summit)

Obviously, there is overlap, but I don't think that matters.

Assuming it is okay to open PIs that would be phrased in some way that the PI would encompass [deleted] ... [track language or NSIG] or words to that effect, how would you suggest we go about this? Apparently, CAU can't open cases because they are not operational. We would probably need to get ITOS I and II to open such cases. But we need some leverage to get them to do it, maybe in the form of OGC guidance that instructs that this is the way we've determined we can handle the emergency requests that CAU has been getting.

Any thoughts?

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Attachment 2

fyi
-----Original Message-----
From: KOPISTANSKY, PATRICE I. (OGC) (FBI)
Sent: Wednesday, January 26, 2005 4:54 PM
To: ROGERS, GLENN T. (CTD) (FBI)
Cc: BOWMAN, MARION E. (OGC) (FBI); THOMAS, JULIE F. (OGC) (FBI); THOMPSON, SHAWN M. (CTD) (FBI); BLUMENFELD, LAURA ROSS (OGC) (FBI); LEE, WILMON HEALEY JR (OGC) (FBI)
Subject: Creating necessary files/investigations to which NSL can be tied

Glenn, we've toyed around with a number of ideas as to how to make this work, i.e., how to establish files or investigations by which we can obtain an NSL.

The easiest solution from a legal point of view is to open a PI everytime you get a request. It is more than likely that you would have enough information to meet the standard for a PI, which is very low ("information or an allegation indicating the existence of a circumstance. . ." and circumstance is defined, in relevant part, to include "a crime involved in or related to a threat to the national security [that] has or may have occurred, is or may be occurring, or will or may occur."

However, assuming that such an approach would be cumbersome, option two is to set up either control files or a more generic PI for each type of threat that you receive. In other words, if we could group threats by target (infrastructure, airports, nuclear facilities, etc.) and/or by weapons (bombs, missiles, etc.), then we could establish a control file much like . . and tie the NSL to the particular control file that the threat fits into. Or we could open up a set of PIs that are more encompassing than just one particular threat. A PI could be opened for an investigation of, for instance, "all threats to airports that may be occurring or will or may occur." (tracking the language for opening a PI).

In order to decide how best to set up a system in advance (to avoid having to open a PI each time), we need some sort of listing from you as to the broad categories of threats that you receive. If you can come up with such a listing, either by target or type of weapon, or whatever criteria you deem best covers the threats that you get, then we will work with that listing and determine how to put it into effect so as to be able to tie an NSL to it.

If you have any thoughts on this approach, please let me know. If you are okay with it, then please send me a listing of the categories of files/investigations that you would suggest cover the threats you receive.

thanks. pik

53619.053

Attachment 3

Exhibit 8

From: KOPISTANKSY, PATRICE, I.
Sent: March 7, 2005 11:18 AM
To: YOUSSEF, BASSEM; ROGERS, GLEN
Cc: Laura Blumenfeld, Laura Ross, Shawn Thompson

...

PS – Rob, OGC still hasn't heard back from you about the possible PIs to which we can tie emergency requests to. So I assume your backlog is still backlogged and getting worse. We can't help until we get some information about getting generic PIs opened to which we can tie these NSLs. Thanks.

53619.054

Attachment 4

From: PATRICE KOPISTANSKY
Sent: April 5, 2005 8:59 AM
To: MARION BOWMAN; JULIE THOMAS; LIZANNE KELLEY
Cc: LAURA BLUMENFELD; ROSS; SHAWN THOMPSON; WILMON HEALY LEE, JR.
Subject: CAU backlog of NSLs

I sent this email a while ago to deal with the situation of CAU issuing NSLs in emergency situations. I don't believe I've heard any feedback. And the issue is, assuming that it is a good idea, how do we implement it and force the operational units to open these PIs – have OGC guidance possibly, to tell the ops units that they have to do this in order to be getting this information legally?

From: Marion Bowman
Sent: April 5, 2005 9:04 AM
To: PATRICE KOPISTANSKY; JULIE THOMAS; LIZANNE KELLEY; LAURA BLUMENFELD; SHAWN THOMPSON; WILMON HEALY LEE, JR.
Subject: CAU backlog of NSLs

The best thing to do is set up a meeting with John Lewis – CAU falls under him. I believe I talked with him about this when it first arose.

From: PATRICE KOPISTANSKY
Sent: April 5, 2005 9:09 AM
To: MARION BOWMAN
Cc: LAURA BLUMENFELD; SHAWN THOMPSON; WILMON HEALEY LEE, JR., JULIE THOMAS, LIZANNE KELLEY
Subject: CAU backlog of NSLs

I have had a meeting with the head of CAU, Bassem Youssef, and he is comfortable with this arrangement. I'll contact him to make sure Lewis is on board, but the issue is legally, whether this is okay, and whether we can use our influence to help get it done, i.e. let the ops people know that they need to open up these PIs. To date, when asked to do NSLs, the ops folks, have not been good about it. So Bassem wanted to know if there was something we could do to force their hand as far as opening up the necessary PIs.

53619.055

From: JULIE THOMAS
Sent: Tuesday April 5, 2005 11:57 AM
To: MARION BOWMAN
Cc: PATRICE KOPISTANSKY
Subject: CAU backlog of NSLs

Patrice and Spike,

Schedule such a meeting after inspection if you still see a problem; however, I have been signing a tremendous amount of these under our new procedure.

From: PATRICE KOPISTANSKY
Sent: Tuesday, April 5, 2005 12:01 PM
To: JULIE THOMAS
Cc: MARION BOWMAN
Subject: Re: CAU backlog of NSLs

I don't quite understand what new procedure you mean. I didn't think we'd implemented one, inasmuch as CAU, to my knowledge, still doesn't have working PIs under which to put these emergency requests for info so that Laura and Shawn can approve them here.

From: JULIE THOMAS
Sent: Tuesday April 5, 2005 12:09 PM
To: PATRICE KOPISTANSKY
Sent: Re: CAU backlog of NSLs

Patrice, maybe I'm thinking of another unit, but I clearly remember teaching Laura B and a paralegal at HQ to help out with this delay in NSL processing. But bottom line, I have to place this on the back burner for this week.

Julie

From: PATRICE KOPISTANSKY
Sent: Tuesday April 5, 2005 12:12 PM
To: JULIE THOMAS
Subject: Re: CAU Backlog of NSLs

No problem. We can deal with this later. But – FYI – you are thinking of the same project. Except Laura and Will can't do anything until CAU and OGC come up with a system for having PIs on the books to which we can tie emergency requests for information via NSLs. Until we do so, Laura and Will will not be getting NSLs to draft/approve.

53619.056

Attachment 5

From: PATRICE KOPISTANSKY
Sent: Tuesday April 12, 2005 4:43 PM
To: JULIE THOMAS
Cc: LIZANNE KELLEY
Subject: FWD CAU backlog of NSLs

Lizanne suggested I re-send this to you, so yell at her, please, if you think I'm badgering you. Just so you know, we still have this problem with CAU and their backlog of NSLs, which cannot be relieved until generic PIs are opened. CAU would like us to put something out to pressure ITOS I to open these up. If you give me the go ahead, I will draft a very short EC explaining the solution and saying that it is legally necessary that we open these suggested generic PIs so that we can more efficiently (not to mention legally) continue to obtain emergency telephone information. (CAU has found in the past that its request of ITOS I to issue NSLs has gone unaddressed, so that is why they think that if there is any legal underpinning that can be found, it would force ITOS I to open those cases). I also have been told by other attorneys here that some field offices are having the same problem with respect to getting information in emergency situations, and to the extent we come out with guidance that legitimizes broad generic PIs to cover emergency situations, but also sets some bounds so this would not be abused, this apparently could be of use throughout the FBI.

From: JULIE THOMAS
Sent: Tuesday April 12, 2005 5:02 PM
To: : PATRICE KOPISTANSKY
Subject: RE: CAU backlog of NSLs

I will sign the EC.
Julie

From: PATRICE KOPISTANSKY
Sent: Tuesday April 12, 2005 5:03 PM
To: JULIE THOMAS
Subject: Re: CAU backlog of NSLs

Okay, then I'll draft it.

(Attached to this email string are all the emails from ex. 12. Except email from PIK to BOWMAN Tue. 4/5/05 @9:09 AM.)

53619.057

Attachment 6

From: KOPISTANSKY, PATRICE I. (OGC) (FBI)
Sent: Friday, May 27, 2005 11:48 AM
To: YOUSSEF, BASSEM (CTD) (FBI)
Cc: VANNUYS, THOMAS J. (CTD) (FBI)
Subject: Creation of umbrella files to cover emergency NSLs

Bassem, we have discussed this issue with ITOS I and II since they are the ones who would be creating the umbrella files that you would be using as the basis for your emergency NSLs. A question has arisen in terms of how you are able to fit threats into categories, particiularly distinguishing between foreign and domestic threats, based on the limited information you have. For instance, if we see someone taking a picture of a bridge, and the person fits the stereotype of a domestic terrorist (e.g. young, male, Caucasian, maybe a crewcut - you get the point) and you have some piece of information that requires telephone info, would you fit that NSL into the ITOS I./II created umbrella investigation of threats to infrastructure on behalf of a foreign power even though at that point thre is no suggestion that the target is affiliated with a foreign power and in fact the outward stereotypical signs are that the threat to national security is domestic . Or are there ever situations, now, where the information you have is so limited that you can't begin to guess whether the threat is foreign or a domestic. I assume, since all your information gathering is through NSLs, and not criminal mechanism, that even in those cases, you are using NSLs and tying them to some national security investigation?

thanks. pik

53619.058

Attachment 7

----Original Message----
From: KOPISTANSKY, PATRICE I. (OGC) (FBI)
Sent: Thursday, September 22, 2005 2:12 PM
To: YOUSSEF, BASSEM (CTD) (FBI); MCKUNKIN, JAMES W. (CTD) (FBI); VANNUYS, THOMAS J. (CTD) (FBI)
Cc: SIEGEL STEVEN N (OGC) (FBI); KELLEY, LIZANNE D. (OGC) (FBI)
Subject: NSL Project

We would like to set up a meeting on Monday, September 26 at 12:15 p.m. at LX-1 to discuss the issue of assisting CAU in its efforts to obtain NSLs to validate the gathering of information obtained in emergency situations. OGC has suggested the opening of umbrella- type preliminary investigations which would cover most, if not all, of the emergency situations brought to CAU for the purpose of obtaining telephone information. To do so, we need the assistance of ITOS I and ITOS II.

Bassim, I would need the representation of CAU obviously so if you could not make it, maybe you could have someone else from CAU attend.

If this time doesn't work, can you please suggest alternative dates?

Thanks. Patrice Kopistansky OGC/NSLB

Ex 22

From: PATRICE KOPISTANSKY
Sent: September 23, 2005 8:43 AM
To: LAURA BLUMENFELD; SHAWN THOMPSON

We are having a meeting out here at LX 1 on the long – delayed project for CAU about creating umbrella PIs so that emergency requests for information that CAU receives and obtains by emergency letters can be followed up with NSLs with a quick turnaround time. But the issue had been that we did not have PIs to attach them to, so we thought we'd create some...

You are welcome to attend the meeting, although you don't have to...

53619.059

Attachment 8

From: KOPISTANSKY, PATRICE I. (OGC) (FBI)
Sent: Friday, October 21, 2005 10:38 AM
To: YOUSSEF, BASSEM (CTD) (FBI)
Cc: KELLEY, LIZANNE D. (OGC) (FBI)
Subject: NSLs

Bassem - I am actually sitting down to write the EC that you need to set forth the proper procedures that are needed in responding to the NSL requests that you get and in actually getting the NSLs issued. I had sent you prior drafts of the EC as I envisioned it but that was at a time when I think the request to us was phrased quite differently than how it turned out at the meeting we had on September 26. At the time I originally drafted the memo, I was under the impression that you did a lot of emergency situations so that you needed ITOS I and II to create some umbrella files under which we could issue NSLs. Therefore, we had decided that we'd suggest the creation of umbrella files for WMD, infrastructure, public structures, etc.

However, at the meeting on September 26, it seemed that your main concern was getting ITOS I to issue NSLs under existing files. You said that the emergency requests were few and far between, and that you were intending to request more information at the time that CAU was asked to provide information. If you got sufficient information, you did not believe that it would be difficult to find an investigation to which to relate the request. Thus, there no longer seemed to be a need to create umbrella files, as we had previously discussed.

In the interim, I believe that Spike Bowman has spoken to higher ups about this matter. I am hoping it has gotten better and that you are receiving the information you need to be able to meet the standard for NSLs, namely relevance to an authorized investigation.

At this point, in order to make sure this EC from OGC serves your purpose, I'd like to hear from you as to exactly what you'd like us to be instructing. This EC is probably more operational than legal, as we agreed earlier, because you thought you needed the weight of OGC to come down on ITOS I to assure that they'd issue these NSLs (or open PIS, as was the previous idea). So operationally, please tell me how you perceive this EC to assist you and what instructions you would like OGC to give to ITOS I and

53619.060

ITOS II (and maybe the field, as well) with respect to the assistance they can give you in this regard.

I don't know if we still need this EC to address emergency situations in which we do NOT have an investigation to which to tie the request to and thus need some sort of umbrella file. If you think we do, let me know.

53619.061

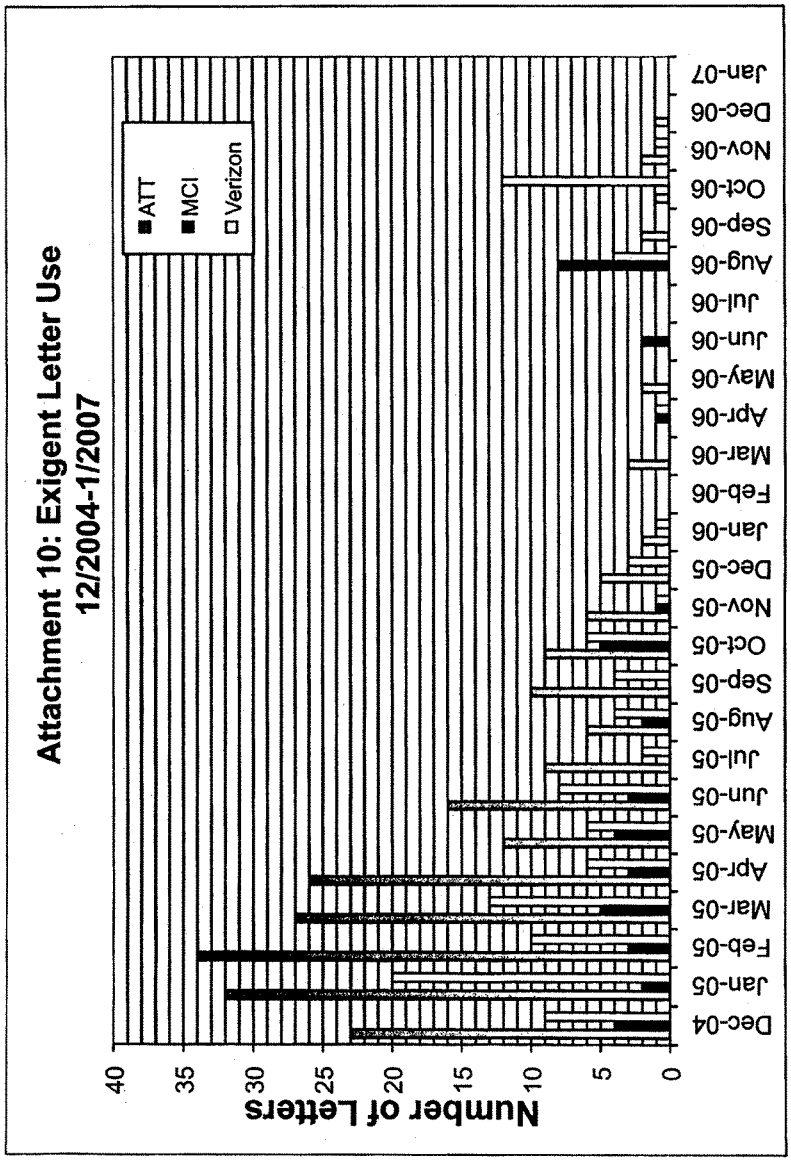
Attachment 9

Email
From Youssef
Date: March 19, 2007
To: Caproni, Wall, Kopitansky, Ortiz
Cc: Julie, Frahm, Hess
Subject: Request for information: Exigent Letters
* * *

The inspection team was advised of the spring 2005 audit wherein CAU obtained a list of the outstanding NSL's from (redacted). The inspection asked what CAU is doing at the present time to remedy this situation and CAU advised that exigent letter are not (now) being utilized by CAU and that everyone in CAU has been advised that under normal circumstances (non exigent) and NSL must be provided by the requesting entity prior to obtaining any telephone records form the (redacted) CAU has not advised the inspection team that CAU has been retaining copies of the exigent letters.

53619.082

Attachment 10



Attachment 11

Exhibit 7:

January 6th 2003 Document

From: Counterterrorism CAS/CAU/ Room 4944
Contact: Timothy F. Gossfeld, 3-4245

Approved by: Mefford Larry A
Harrington Thomas
Fedarcyk Michael R

Drafted by: Gossfeld Timothy

Case Id: (U) 66F-HQ-A1397797 (Pending)

Title: (U) Review of the mission of the Communications Analysis Unite and a description of the services this unit provides.

(S) **Derived From: G-3**
Declassify On: X1

Details: (U) For the information of field offices, Legats, and FBIHQ divisions, the following provided to clarify the mission of the Communications Analysis Unit (CAU) of the Couterterrorism Division's Communications Analysis Section (CAS), as well as to describe this unit's distinct role I the FBI's participation in the global war on terror.

(U) The CAU facilitates the prevention and prosecution of international and domestic terrorism activities through the relevant collation, incisive analysis, and timely dissemination of high quality intelligence identified through telephone calling activity.

(S) This mission is accomplished through liaison the CAU has established with specific elements of the United States Intelligence Community (USIC) who are in the a unique position to provide potentially actionable intelligence to the FBI. This intelligence is reviewed by the CAU's team of supervisory Special Agents, Intelligence Operations Specialists, and Technical Information Specialists experienced in the investigation of international and domestic terrorism cases. These personnel are equipped with analytic tools capable of further dissecting the intelligence so that logical leads may be deduced from the information and forwarded to appropriate entities.

Redacted Paragraph

(S) An important facet of the work underway in the CAU in the achievements of a defined capability within the FBI to provide for predictive exploitation of certain types of international terrorist calling activity. This capability will preeminently allow the FBI to identify and intercept previously unknown hostile elements on US soil. The Counterterrorism Division has determined this capability is imperative to the continuing efforts by the FBI to protect our nation against future terrorist attacks.

53619.064

(S) The operational support conducted by the CAU is accomplished through the use of a number of analytical tools, some of which are highly classified. Other tools are publicly or commercially available. The CAU strives to provide operational support at the lowest classification level possible - sometimes using multiple techniques to identify the same information at a lower classification level. It should be noted that some of the information available to the CAU is classified NOFORN which does not allow for dissemination for foreign intelligence agencies.

(S) The CAU also has the ability to conduct calling analysis on specific individual numbers of high interest to case agents. Analysis of these numbers utilizing specialized tools beyond the FBI Telephone Application can sometimes provide the case agent with previously unknown associates or terrorism activity regarding their subjects. (Redacted Section)

(S) Comprehensive calling analysis of hot numbers (those instruments and techniques being utilized by known terrorists) has the potential of generating an enormous amount of data in short order, much of which may not actually be related to the terrorism activity under investigation. For this reason, the most beneficial analysis seems to emerge with a summary of events predicating the request, as well as a description of the intended investigative inquiry, can accompany the request for calling analysis.

Redacted Version

(U) Through liaison developed by the unit, in exigent circumstances the CAU is able to obtain specialized toll records information for international and domestic numbers which are linked to subjects of pending terrorism investigations. Appropriate legal authority (Grand Jury subpoena or NSL) must follow these requests.

(U) All field offices have access to and should utilize the Telephone Application on the FBINET in their investigations. The Telephone Application is the FBI's central repository for telephone subscriber data and should be checked prior to setting leads for telephone related records.

(U) Lead for requesting calling analysis may be set to Counterterrorism with the identifier AT CAU, DC in Electronic Communications. Requests for calling analysis in a criminal terrorism investigation should emanate fro a classified sub file of that investigation since all of the USIC databases utilized by the CAU contains classified information. The reply EC prepared by the CAU will normally be classified at the SECRET level and will contain necessary caveats regarding the information contain therein. Special arrangements need to be made to pass information classified beyond the SECRET level.

53619.065

Exhibit 8:
Document to Counterterrorism from Counter terrorism
Approved by Rogers Glenn, Case ID (U)66F-HQ-AI397797-13

Communications Analysis Unit, Room 4944
Attn: Communications Analysis
All CAU personnel

Dated: 11/18/2003

* * *

...(withheld) Typically, CAU analytical personnel will request transactional records in response to specific filed office requests for support. Under the authority of an Exigent Circumstances Letter signed by the appropriate CAU Supervisory Special Agent (SSA), (withheld) will provide transactional records in the form of data saved on a Compact Disc.

53619.066

Document Dated May 19th 2006

From: Counterterrorism CAS/CAU/ Room 4315
Contact: Bassem Youssef

Approved by: Hulon, Caproni, Lewis, Smith, Wall, Youssef

Case Id: (U) 66F-HQ-A1397797 (Pending)

Title: COMMUNICATIONS ANALYSIS UNIT (CAU)
COUNTERTERRORISM PROGRAM MATTERS

Synopsis: (S) This communication articulates and establishes administrative policy and procedures regarding the service of National Security Letters (NSL's) by CAU personnel.

Derived From: G-3
Declassify On: X1

Enclosure: (S) Sample standard NSL and attachment.

Details: (S) This communication establishes policy and procedures regarding the service of headquarters and field generated NSL's by CAU personnel. This communications will also clarify the requirements for exigent situations where CAU personnel will issue Exigent Circumstances Letters to telecommunication carriers prior to serving an NLS. These procedures will be effective upon the data of this communication.

(S) In support of CAU's mission to provide timely and relevant analytical support to FBI field offices and headquarters operational unit. (Redacted)

(U) In order to ensure this valuable relationship with the telecommunication industry remains viable, CAU has established the NSL policy documented in this Electronic Communications (EC).

(U) The enclosed attachments are designed to assist FBI field offices and headquarters personnel with accessing CAU telecommunications assets.

Exigent Circumstances

(S/NF/OC) In crisis situations where there is a specific threat to the United States or its allies, both domestically or overseas, and loss of life and property are imminent , CAU will issue an exigent circumstances letter to . . . requesting transactional non content records that are subject to production under 18 USC 2709 pertaining to the target number (s) connected to the threat. CAU will then conduct the appropriate toll analysis and provide the results to the requesting office. The issuance of an NSL is expected forthwith from the field office or headquarters operational personnel. Upon receipt of the NSL, the original records will be sent to the requestor to serve as original evidence.

53619.067

(S/NF/OC) Additionally, CAU will issue an Exigent Circumstances letter for kidnapping or fugitive cases where there is grave danger to the victim or the public at large. CAU will then provide the necessary analysis to the requesting office. Again, the issuance of an NSL or subpoena is expected forthwith form the field office or headquarters operational personnel. Upon receipt of the NSL, the original records will be sent to the requestor to serve as original evidence.

Routine Counterterrorism and Counterintelligence Investigations

(S/NF/OC) All routine NSL's for Counterterrorism or Counterintelligence cases must be sent through the normal office procedures to the appropriate telecommunication carrier corporate office, including (redacted) CAU does not have the inherent resources to effectively manage voluminous NSL requests of a routine nature.

(S/NF/OC) However, there will be instances where CAU will work closely with an office on a specific case and recognize the need for instantaneous toll data. During these rare occurrences, CAU will recommend that the field office or headquarters entity write an NSL to one or all of the carriers for toll days.

Major Case Report

(S/NF/OC) During a fast moving major case CAU offers valuable tactical intelligence to case agents and headquarters operational personnel by obtaining efficient and accurate calling data through the partner carriers. An NSL must be issued, by either field office or headquarters personnel, prior to receiving toll records in all non exigent circumstances during major investigations. When the NSL is received by CAU, all efforts will be made to expedite the request to minimize the delay in obtaining the records or analyzing the results.

(S/NF/OC) All call records provided by CAU must be considered original evidence. CAU personnel will generate an EC which documents NSL service and transmits the original evidence to the field responsible for uploading the toll records into the Automated Case Support/Telephone Application database.

(S/NF/OC) The mission of CAU is to facilitate the prevention and prosecution of international and domestic terrorism activities through the relevant collation, incisive analysis, and timely dissemination of high quality intelligence identified through liaison the CAU has established with specific elements of the United States Intelligence Community (USIC) and telecommunication industry representatives who are in a unique position to provide potentially actionable intelligence to the FBI.

Lead (s)
Set Lead 1: (Info)
All receiving offices
(U) Please read and clear.

53619.088

Attachment 12

From: BASSEM YOUSSEF
Sent: October 27, 2005 11:13AM
To: Martin Robleto
Subject: Thanks Gary

Hello team leader,

Please review the attached spreadsheet and lets clear our outstanding NSL requests. I'd like each of you to send 'remind me' emails to those who set the lead to us to query our telecom assets.

Once that's done, please send me a status email listing all the outstanding NSLs for your team and whether you sent them an EC or an Email.
This is a priority matter.
Thanks.

53619.089

Attachment 13

Email
From: Allen, Randall
Sent: 11/14/06
To: Kopistansky, Patrice I
Cc: Youssef
Subject : RE; OIG audit re usage of NSLs – re CAU situation

* * *

Patrice,

We had completed a large group of telephone numbers related to (withheld) instead of having NSLs created for all the numbers individually. We combined them into one NSL for each carrier, (withheld) and (withheld) and presented them to Mr. Billy. It was an effort to consolidate what otherwise would have been a disparate, critically time consuming and redundant effort. I created the NSL letters and attached the relevant numbers thereto. The NSL was forwarded to the respective carriers who had provided us timely data that was needed during the "heat of the battle" as the case was breaking. This cut down the operational input, data return and analytical return of information to ITOS and the filed by weeks or longer if we had tried to do each of the numbers with an individual NSL. We subsequently did likewise during (withheld) which involved hundreds of telephone numbers again related to a large case. Once each Operation begins to slow, usually after the first two weeks to a month we revert to the individual NSL(s). To gain an important perspective of the genesis for this solution one has to appreciate that ITOS and our intelligence partners are acting under the umbrella that terrorist are in the U.S. and are imminently planning operations. The NSL(s) discussed were proposed to SC Hiembach, UC Youseff and signed off by Mr. Billy and Mr. Cummings.

SSA Randy Allen
CAU LX-1 1S-425

53619.070

Attachment 14

Email
From: Kopistansky, Patrice, I
Sent: 11/7/06
To: Caproni, Valerie E. (OGC) (FBI)
Subject: FW: OIG audit re: usage of NSLs – re CAU situation

* * *

Per the email below from Youssef, with regard to the backlog, they had Joe Billy sign a blanket NSL. I don't know if anyone in NSLB reviewed this. I know that I did not, nor did I know2 about it until this email below. I had just had assurances that the backlog no longer existed.

I presume Bassem told OIG about it so I thought you ought to know about it. Pik

Email
From: Caproni, Valerie E
Sent: 11/7/06
To: Billy, Joseph (CTD) (FBI)
Subject: FW: OIG audit re usage of NSLs – re CAU situation

* * *

Joe,

Do you have any recollection of signing a "blanket" NSL? What does that mean? Did anyone in OGC OK that as a way to resolve this issue?

VC

....

Email
From: Billy, Joseph
Sent: 11/7/06
To: Caproni, Valerie E
Subject: Re: OIG audit re usage of NSLs – re CAU situation

* * *

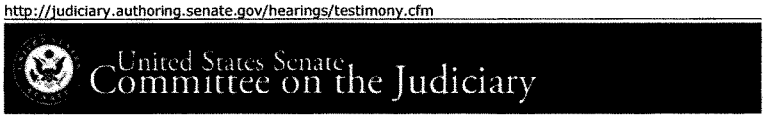
Valerie – I have no recollection of signing anything blanket. NSLs are individual as far as I always knew.

Joe

....

53619.071

http://judiciary.authoring.senate.gov/hearings/testimony.cfm



< Return To Hearing

Statement of

The Honorable Patrick Leahy

United States Senator
Vermont
September 17, 2008

STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION
SEPTEMBER 17, 2008

We gather this morning on Constitution Day, the 221st anniversary of our nation's founding charter. It is fitting that we continue our oversight of the Department of Justice. Today we examine the effectiveness of the Federal Bureau of Investigation in carrying out its critical role and responsibilities in keeping us secure while upholding the rule of law. We welcome back the FBI Director and thank the hard-working men and women of the FBI for upholding their motto: Fidelity, Bravery, and Integrity.

I thank Director Mueller for joining me in Vermont last month where together we visited the Joint Terrorism Task Force and the Internet Crimes Against Children Task Force based in Burlington. We talked with members of the Federal, state, and local law enforcement organizations who work cooperatively on these task forces. They are working everyday to keep us safe from terrorists and to keep our children safe from those who would do them harm and we appreciate it.

In commemorating the 100th anniversary of the FBI earlier this year, Director Mueller said:
"It is not enough to stop the terrorist – we must stop him while maintaining his civil liberties. It is not enough to catch the criminal – we must catch him while respecting his civil rights. It is not enough to prevent foreign countries from stealing our secrets – we must prevent that from happening while still upholding the rule of law. The rule of law, civil liberties, and civil rights – these are not our burdens. They are what make us better. And they are what have made us better for the past 100 years."

I agree. That is why we are here, to conduct the oversight needed to be sure that the FBI carries out its responsibilities while maintaining the freedoms and values that make us Americans.

We learned last month that the Attorney General was planning to revise the guidelines for the FBI's investigative activities. Allowing the FBI authority to use a vast array of intrusive investigative techniques with little or no predicate facts or evidence raises concerns and may potentially lead to the kinds of abuses we have seen with national security letters and with other vast grants of authority with minimal checks in the past.

Senator Specter and I requested a delay in the approval and implementation of the Attorney General's new guidelines. The Department of Justice only agreed to a limited delay and pointed to today's oversight hearing as a key opportunity to explore questions or concerns. However, the Attorney General has refused to provide us with copies of the proposed guidelines. Senator Specter and I sent another letter to Attorney General Mukasey last week, requesting that the Committee be provided copies of the proposed guidelines in advance of today's hearing in order to allow for a meaningful exchange with Director Mueller on this issue. The Department again said no, indicating that they could not share guidelines that have not been finalized. The Attorney General's response is straight out of Joseph Heller's novel Catch-22. The Attorney General is saying he cannot give us copies of the proposed guidelines until they are finalized, but once they are finalized they are no longer proposed and subject to change.

VerDate Nov 24 2008 11:11 Dec 09, 2009 Jkt 053619 PO 00000 Frm 00116 Fmt 6633 Sfmt 6633 S:\GPO\HEARINGS\53619.TXT SJUD1 PsN: CMORC

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Also impairing our ability to make progress today is this administration's refusal to cooperate in oversight. As of yesterday morning, we still had not received the answers to our questions from our last oversight hearing with the FBI Director last March—those questions have been pending more than six months.

Even as we try to get a handle on the Administration's latest expansion in the FBI's investigative authority, we are reminded of the problems that followed other recent expansions of the FBI's investigative powers. Last month, Director Mueller apologized for the misuse of "exigent letters," in violation of the law, to obtain phone records from reporters. I hope that the Director will be able to assure us, and the Inspector General will confirm, that appropriate steps have been taken to prevent a repeat of that abuse.

I am glad finally to be hearing of progress in getting through the backlog in the FBI's name checks for citizenship. I hope the FBI will do its part to ensure that applications for citizenships are processed in time for new citizens to participate in this year's election.

We also have to work together to ensure that adequate resources are being dedicated to investigating public corruption and corporate fraud – types of crime that the FBI is uniquely suited to investigate and that must be comprehensively prosecuted to restore the public's faith in our government and our economy.

I am also concerned that the FBI's Cold Case Initiative has apparently not yet led to a single prosecution for Civil Rights Era crimes and look forward to the Director's explanation of that effort.

In the area of violent crime, despite modest progress last year following several years of increases in crime, crime rates have remained essentially stagnant in this decade after years of consistent and substantial declines in crime in the 1990s. I hope the Director will join me, Senator Biden and others in supporting state and local law enforcement and collaborative efforts directly involving our communities to combat violent crime.

I applaud Director Mueller's efforts to recommit the FBI to its best traditions through his personal example and leadership. I appreciate the Director's openness to oversight and accountability. That distinguishes him and his agency from much of the Department of Justice and this administration.

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CLOSING STATEMENT OF SENATOR PATRICK LEAHY,
CHAIRMAN, SENATE JUDICIARY COMMITTEE
HEARING ON OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION
SEPTEMBER 17, 2008

Many of us on both sides of the aisle have raised questions and concerns about whether the Attorney General's proposed new guidelines for the FBI's investigative activities would give the FBI sweeping new authority with minimal checks to prevent the kinds of abuses we have seen in such areas as national security letters.

This hearing could have been more productive in addressing those concerns if the Department of Justice had agreed with my request and Senator Specter's request to provide copies of the proposed guidelines. Like the limited briefings that have been given to staff, the exchange today was a good start, but not as meaningful as we would have wanted and it should have been.

I was pleased that this hearing began with Director Mueller promising this Committee that the FBI will be vigilant in investigating whether fraud or lawbreaking contributed to the ongoing financial crisis, the worst we have experienced since the Great Depression and one that has exposed the American taxpayers to trillions in losses and the devastation of homeowners and investments and lives across the country.

The Wall Street mess has many causes but it illuminates several problems we have seen before over the last eight years. They include incompetence in White House appointments to regulatory agencies that are supposed to be the public's on-the-scene watchdogs; squandering faith in market mechanisms by winking at increasing signs of excess and corner-cutting by rich and powerful corporations; and indifference to the widening gap between the super-rich and ordinary Americans, and to the lack of affordable housing. The Bush Administration has ignored those and other fundamentals of responsible economic and fiscal policy, and we need leadership that can make a fresh start to turn a bad situation around before it gets even

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worse.

I thank Director Mueller for appearing today before the Committee and for his openness to oversight and accountability. I look forward to working with an Administration where the Director's approach and responsiveness is not the exception, but the rule.

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Department of Justice

STATEMENT OF

ROBERT S. MUELLER, III
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY

CONCERNING

"OVERSIGHT OF THE FEDERAL BUREAU OF INVESTIGATION"

PRESENTED

SEPTEMBER 17, 2008

I. Introduction

Good morning Chairman Leahy, Senator Specter, and Members of the Committee. I am pleased to be here today.

As you know, the Federal Bureau of Investigation (FBI or Bureau) marked its 100th anniversary this past July. We were honored to have several of you join us for our celebration at the National Building Museum. We looked back over our century of service to America — from the earliest days, when 34 investigators focused on the few federal crimes that existed, to today, when over 30,000 employees are combating crime and terrorism across the country and around the world.

The crimes we confront have changed dramatically through the decades, from violent gangsters to Nazi saboteurs, from foreign spies to organized crime rings, and from computer hackers to terrorists. And the FBI has changed along with them, always evolving to meet the threats of the moment. Each historic period has prepared us for the challenges of the future. And while it is a time of tremendous change in the Bureau, our values will not change. The rule of law, civil liberties, and civil rights–we do not perceive these as our burdens but among our core missions, as they have been for the past 100 years. And while I assure you that we are preserving the finest traditions of the FBI, it is the future that I would like to talk about today.

When I have come before this committee over the past several years, I have discussed the FBI's transformation from an organization whose primary mission was law enforcement into a national security organization that is focused on preventing crime and terrorism, not just investigating the perpetrators after the fact. And I have recounted our many improvements and accomplishments in each of our priority areas.

But marking milestones is about more than looking backward; it is also about looking forward. And so today I want to focus on what the FBI is doing — and will continue to do — in order to ensure that we can serve the American public for the next hundred years. In the interest

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of time, I will focus on four specific areas: intelligence, investigative techniques, technology, and human capital.

* * *

II. Intelligence

First, intelligence. Intelligence is crucial to every investigation and operation the Bureau undertakes. The FBI has always excelled at gathering intelligence, even if we did not always call it that, and using it to build cases that led to courtroom convictions. After the attacks of September 11, 2001, we realized that we also had to strengthen our intelligence analysis and dissemination.

I have discussed our efforts in great detail in the past, from ramping up hiring and training of intelligence analysts to establishing the Directorate of Intelligence and the National Security Branch at Headquarters. But intelligence gathering does not happen at Headquarters, it happens out in the communities we serve.

And so each field office established a Field Intelligence Group (FIG), made up of agents, analysts, linguists, and surveillance specialists. These are the operational arms of our intelligence program. Their mantra is "Know Your Domain," and they are focused on identifying and assessing every threat in their regions.

Their work is not limited to counterterrorism threats. For instance, a field office near a research university or defense contracting firm might also focus on potential espionage or proliferation threats. An office along the Southwest border might also focus on violent transnational gangs. And our offices around the country from large cities to rural areas are concerning themselves with rises in violent crime where they occur.

As the FIGs evolved, each office developed its own model for intelligence gathering and operations. As our intelligence capabilities continued to increase, it was necessary to evaluate

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the different models that had emerged and move towards uniformity. And so we established a Strategic Execution Team (SET) to help us assess our intelligence program, evaluate best practices, decide what works and what does not work, and then standardize it across the Bureau. The purpose of the SET is to accelerate improvements to our intelligence capabilities, to ensure we are an intelligence-driven organization and to drive a change in mindsets throughout the FBI. To do this, we restructured the FIGs so they all conform to one model, which is slightly modified depending on whether the size of the field office is considered to be small, medium, or large. As newly restructured, we believe the FIGs will be able to better coordinate with each other and with Headquarters. And because they all follow a single model, a Special Agent or analyst working on the FIG in the Atlanta office could easily transition to the FIG in the Albany office.

This effort has been integral to the FBI's effort to establish itself as a full partner in the wider intelligence community. The FIGs now have well-defined requirements for intelligence gathering, analysis, use, and production. And managers are now accountable for ensuring that intelligence production is high-quality, lawful, and relevant to the requirements not just of their local community but of the larger intelligence and law enforcement communities. In short, the FIGs now operate consistently with the FBI's position as a full and active member of the intelligence community.

We regularly share this intelligence with our partners in more than 18,000 law enforcement agencies around the country. We also collaborate closely with our international counterparts. And as the world continues to flatten and threats continue to migrate across borders, it is more important than ever for the FBI to be able to develop and disseminate information that will assist our partners.

Our national security is at stake. Indeed, our global security is at stake. And so we are hard at work implementing the recommendations of the SET. We have already implemented the recommendations in 24 field offices. By December, we will complete the rollout to the remaining field offices.

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This is not a program that is being implemented as a quick fix. This work is critical to the long-term success of the FBI. We are training FBI personnel at all levels in order to inculcate the intelligence mission long past the rollout. We have clear metrics for success and clear accountability for ensuring they are met. We are committed to fully implementing these plans and making our intelligence capability second to none.

II. Investigative Techniques/Attorney General Guidelines

Our employees are collecting, analyzing, and sharing intelligence under an improved internal framework, and soon they will also be operating under new investigative guidelines. I would like to spend a few moments discussing the new Attorney General Guidelines for Domestic FBI Operations, which are in the process of being finalized and which have been briefed to your staffs. With the help and input of this Committee it is my hope and expectation that we can make these guidelines effective for agents operating in the field in the near term.

Special Agents have previously depended on several sets of guidelines to guide their investigations. Each set was tailored to a particular program or topical area, and different rules therefore governed different types of investigations. These included different rules for national security investigations versus criminal investigations.

To give you a few examples, the guidelines governing national security investigations prohibited recruiting or tasking sources unless the FBI had at least a Preliminary Investigation open. They also prohibited physical surveillance other than casual observation in that context. The General Crimes Guidelines, which governed other criminal investigations, did not contain these limitations.

For the most part, these rules were sufficient and appropriate for the threats they were meant to address. However, criminal threats and national security threats no longer fall neatly into separate categories. The threat of today, and of the future, is a dangerous convergence of terrorists, hostile foreign governments, and criminal groups operating over the Internet and through interconnected, sophisticated networks. We may see organized crime laundering money

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for drug groups. Drug groups selling weapons to terrorists. Terrorists committing white-collar fraud to raise money for their operations. And most threatening of all, hostile foreign governments arming terrorists with an arsenal of biological, chemical and radiological weapons.

Historically, the Attorney General Guidelines have been periodically updated to address the increased sophistication of the threats we face and updated to ensure that civil liberties are protected as more sophisticated tools became available to counter these threats. The new Attorney General Guidelines are the next logical step in the evolution of the Guidelines and a necessary step if the FBI is to continue its transformation from a traditional law enforcement agency into an intelligence-driven organization that succeeds as both a premier law enforcement agency and a full-fledged member of the United States Intelligence Community. The result is a single set of guidelines that are reconciled, consolidated, and most importantly simplified. No longer will there be different rules for different types of investigations.

The new guidelines will replace five separate sets of guidelines with a single set of rules to govern the domestic activities of our employees. The new guidelines set consistent rules that apply across all operational programs, whether criminal or national security. They will give us the ability to be more proactive and the flexibility to address complex threats that do not fall solely under one program. They will eliminate inconsistencies that have the potential to cause confusion and create compliance traps for our employees.

The new guidelines are not designed to give, and do not give, the FBI any broad new authorities. The vast majority of the authorities outlined in the guidelines are not new, but techniques that were permissible under certain circumstances for criminal matters will now also be available for national security matters, and vice versa.

The FBI has the responsibility — indeed, the privilege — of upholding the Constitution. We know that if we safeguard our civil liberties but leave our country vulnerable to terrorism and crime, we have lost. If we protect America from terrorism and crime but sacrifice our civil liberties, we have lost. We are always mindful that our mission is not just to safeguard American

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lives, but also to safeguard American liberties. We must strike a balance. The new guidelines have been carefully designed to ensure that we can and do strike that balance.

The new guidelines and policy frame work will provide strong oversight and accountability. They will help us to realize the improvements being implemented across the field by the SET, which I just discussed. And they will allow us to be more proactive, more predictive, and more preventative — and better able to meet the threats of the future.

III. Technology

The third area of focus is technology, which goes hand-in-hand with intelligence. Our mission is to gather the right intelligence, analyze it the right way, and share it with the right people at the right time. In order to do that, we must have the right technology.

As you know, we have made substantial progress in replacing and transforming the FBI's information technology systems to help us confront current threats and mission needs.

Our flagship program is Sentinel, a web-based case management system designed to support both our law enforcement and intelligence mission. Phase I was deployed Bureau-wide in June 2007. Information is accessible as web content rather than the former green screen presentation. Sentinel will move us from our dependence on paper files and will make information more accessible, faster, and easier to analyze.

Phase I set the foundation for the entire enterprise. Working with Lockheed Martin, we are developing and incrementally delivering Phase II service. The first Phase II delivery occurred this April and continues through Summer 2009. The remaining phases will continue to deliver additional capability through the end of the program in Summer 2010.

Other information technology systems that will dramatically enhance our ability to efficiently carry out our mission include: DELTA, which is a human source management database that will provide a uniform means to administer all facets of human source operation

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more efficiently and accurately; the Operational Response and Investigative Online Network, which is the next generation Crisis Information Management System and provides case-management and related information-processing capabilities to support federal, State, local, and tribal law enforcement and emergency personnel at special events or other critical incidents; and e-GUARDIAN, a suspicious incident reporting information-sharing system for federal, State, and local law enforcement.

We are also working to strengthen the information technology programs that allow us to communicate with our partners.

For example, we have improved our ability to disseminate intelligence reports by integrating our reports and messaging systems, allowing intelligence reports to be created, reviewed, and disseminated without interruption. We have also launched an initiative to consolidate the FBI's Unclassified Network with Law Enforcement Online (LEO), which is the secure network we use to share unclassified information with registered law enforcement partners. This will provide a single platform for FBI employees to communicate with internal and external partners. LEO already supports over 115,000 of our partners. We have also expanded our desktop Internet access to over 19,000 agents, analysts, task force, and support personnel. When completed, we anticipate approximately 39,000 Internet-connected desktops will have been deployed at all FBI locations. In addition, we have distributed over 20,000 BlackBerry devices that have email, Internet browsing, and custom features to FBI personnel.

Another one of our near-term goals is to make LEO the system of choice for transmitting international fingerprint cards from all over the world. And we have initiated an Advance Authentication project to implement stronger, simpler user authentication for LEO users. This is scheduled to deploy in November 2008.

We are also in the midst of developing the Next Generation Identification (NGI) system. NGI will expand the FBI's Integrated Automated Fingerprint Identification System (IAFIS), beyond fingerprints to advanced biometrics. It will also produce faster returns of information, enabling law enforcement and counterterrorism officials to make tactical decisions in the field.

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Criminals ranging from identity thieves to document forgers to terrorists are taking advantage of modern technology to shield their identities and activities. This trend will only accelerate. And so our new system will include not just fingerprints, but additional biometric data from criminals and terrorists. It will give us — and all our law enforcement and intelligence partners — bigger, better, and faster capabilities as we move forward.

Part and parcel with our work to improve and enhance our ability to manage, make available, and quickly search biometrics information are efforts we have ongoing to enable our own Agents and our partners with deployable biometrics tools. We are presently piloting a number of systems that hold promise to be very useful in not only the collection of biometrics data, but also support the rapid search of biometrics databases in the field. The true power of advanced biometrics in the national and homeland security arenas is only realized when authorized users, ranging from patrol officers working the streets of America to Department of State officers screening Visa applicants abroad, have the ability to quickly gather data on those persons they encounter and in real time search appropriate databases. That kind of capability requires close collaboration with other federal, State, and local agencies, who also collect and store biometric data; the development and deployment of portable and interoperable technology; and strict adherence to all applicable laws and regulations to ensure our actions protect privacy and preserve civil liberties. Such collaboration has taken a giant leap forward with the completion of a memorandum of understanding between the Departments of Justice, State, and Homeland Security for the sharing of their respective biometric data, and will become operational this October.

And we have also developed a system called the Law Enforcement National Data Exchange (N-DEx). N-DEx is a national information-sharing system, accessible to law enforcement agencies through a secure website. It will allow nationwide searches from a single access point. We successfully completed the initial deployment this past March and will continue to refine it.

Law enforcement officers will now be able to search databases for information on everything from tattoos to cars, allowing them to link cases that previously seemed isolated.

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They will be able to see crime trends and hotspots, access threat level assessments of individuals or locations, and use mapping technology. It is not a new records system; it just allows us to connect the information we already have. Crime and criminals move freely across jurisdictions, and so must we. N-DEx is exactly the type of technology we need to connect dots and connect law enforcement agencies from coast to coast.

IV. Human Capital

Everything I have just discussed — the SET initiative, the new Attorney General Guidelines, and improved technology — will strengthen the FBI's intelligence capability and make us a world-class national security organization. That is the goal we strive for every day. And this goal begins and ends with the FBI's most important asset — its people.

As you know, we have been hard at work building a strong Human Resources program in order to ensure we have optimal recruiting, hiring, training, and retention of our employees.

Our current challenges are threefold: One, we confront an aging workforce. About 70 percent of our employees are between the ages of 35 and 54, and another 10 percent are older than 55. Two, we require a workforce with a broad range of highly specialized skills. And three, we need to not just retain these employees but also train them to lead the FBI into the future.

Historically, the FBI has attracted recruits from the law enforcement, legal, and military communities, particularly to fill our Special Agent ranks. This has served us well as a law enforcement agency. But as we develop into a national security organization, we also require employees with specialized skills — intelligence analysts, scientists, linguists, and computer experts.

And so we are implementing a number of programs to target our recruitment of individuals with these critical skills and to fill our ranks with fresh talent — people who are ready to build on the foundation laid by our senior employees. New employees are bringing

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significant skills and experiences acquired from prior employment or academic pursuits. In our current New Agents classes we have individuals with backgrounds in computer network engineering, computer programming, Arabic language and literature, and in various sciences. Several trainees also bring with them prior intelligence experience, military and otherwise.

We have approached our human resources challenges strategically, just as we would a complex investigation or operation.

First, we are strengthening our relationships with universities as a primary source of recruiting individuals who want to build a career in national security at the FBI. Our goal for the next several years is to hire 300-400 recent college graduates per year. We also plan to hire about 300 Honors Interns each summer, with the hope of bringing them on board in the future and creating a pool of talent for agent and non-agent careers in the Bureau.

Second, we are conducting a separate targeted intelligence hiring initiative to bring hundreds more intelligence analysts on board. Our program is modeled after successful programs in other intelligence agencies. We are using what we call the "best athlete" approach, targeting students at selected colleges and universities. We are looking for students pursuing analytic majors, including the hard sciences, math, economics, and engineering, as well as students with foreign language skills.

In addition, as part of the SET initiative, we piloted new recruiting techniques for intelligence analysts on four campuses, employing some of the same methods that have worked for successful corporations. We plan to apply what we have learned to our future recruiting efforts.

Third, we are expanding our career paths for intelligence analysts and intelligence Special Agents so that we can grow a highly skilled cadre of intelligence professionals. The analyst career path provides early training, mentoring, and a range of job experiences, as well as opportunities for advancement. Analysts will rotate through a series of positions to become fully familiar with all aspects of the intelligence cycle, and then can choose a specialty considering the

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needs of the organization, and progress all the way up through the ranks of the Senior Executive Service.

We have also developed a career path for Special Agents who specialize in intelligence. While all agents play a role in intelligence collection, Intelligence Special Agents are playing dedicated roles on the Field Intelligence Group. This follows a recommendation of the SET initiative. Intelligence Special Agents focus on collecting intelligence against requirements by conducting liaison and managing human sources. In essence, they are dedicated Human Intelligence (HUMINT) collectors, whose mission is to recruit and use human sources to fill in "the spaces between the cases."

Fourth, we are strengthening our training programs. The FBI Academy at Quantico and the National Academy have long been considered premier law enforcement training academies. We need to build a similar program that focuses solely on intelligence. And so we have established an Intelligence Training Section at Quantico. We have also developed HUMINT training courses jointly with the Central Intelligence Agency (CIA), and we are leveraging CIA instructors to provide the training. And we have revamped the New Agents Training curriculum to include an additional 100 hours of national security and intelligence training.

We have worked hard to develop and provide more training opportunities for employees at all levels. We have leveraged technology for many courses, which employees can take online through our Virtual Academy. We are aiming to increase the length and number of training opportunities available to the greatest extent possible, given budgetary constraints. Where we cannot provide specialized training courses ourselves, we plan to expand our partnerships with other Intelligence Community programs, noted academic universities, and private industry.

We are focusing on developing leadership at all levels, to ensure the FBI has solid leadership as we move into our second century of service. Career paths are an important part of our effort, because each time employees move another step along their career paths and up the ladder, they build invaluable skills, which they bring to their next assignments. One of our goals is to establish career paths for all professional staff, not just agents and analysts.

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Finally, we are focused not just on building isolated skills but on building a culture of leadership. We have developed a number of leadership programs, each of them geared to specific levels of management. For example, we partnered with the Kellogg School of Management to provide leadership training to our managers and executives. We initiated a succession plan for Senior Executive Service positions, to ensure we have highly-qualified managers moving up through the ranks and ready to take the places of retiring employees. We are working to create higher-level, senior management positions and leadership opportunities for all personnel, including our intelligence cadre and professional staff. We want to emphasize to our people and to the American public that leadership is a core value at the FBI and anyone can be promoted into senior positions based on their leadership ability, not just based on their job title.

The FBI has always been fortunate to have tremendously talented leaders. Many of them rose through the ranks of the Senior Executive Service, some were recruited from outside of the FBI, and others simply led from whatever position they held. But we cannot have leadership on an ad hoc basis. We must have an ethos of leadership at all levels.

That is why we are placing such an emphasis on human capital. We know how important it is to invest the time and resources in our employees, and develop their leadership potential over time. The men and women of the FBI have always been willing to do whatever it took, with whatever equipment they had, to carry out the mission of the FBI. They are extraordinarily dedicated public servants. A recent survey of FBI employees that included standardized questions that are asked in private industry and in other sectors of government, including the intelligence community, supports this. The survey highlighted the fact that our employees overwhelmingly feel that their work is important, that they enjoy their work, and that they are committed to the mission of the FBI. Enhancing the leadership capability of those who are leading such motivated and talented individuals and investing the time and resources into developing all employees through all levels of the organization can only enhance the FBI's ability to accomplish our national security mission. We are committed to providing the training, the mentoring, and the job experiences that will hone their management skills. We know that

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today's young employees are the leaders of tomorrow's FBI, and we are committed to ensuring that the FBI has continuous and strong leadership well into the future.

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VI. Conclusion

Over the past 100 years, the FBI earned a reputation for protecting America that remains unmatched. As we round the corner on a century of service, we in the FBI are always mindful of the dedicated people who came before us — the agents and professional staff who worked so hard to build the FBI into the agency that we cherish and on which America depends. Whenever I swear in a class of New Agents, I always tell them that when they go anywhere in the world and tell someone they are an FBI Special Agent, they will immediately have that person's respect. We are determined that they always will.

Unlike the FBI of 1908, today's FBI is much more than a law enforcement organization. The American public requires that we be a national security organization, driven by intelligence and dedicated to protecting our country from all threats to our freedom.

For 100 years, the men and women of the FBI have dedicated themselves to safeguarding justice, to upholding the rule of law, and to defending freedom. As we look back on the past 100 years, we renew our pledge to serve our country and to protect our fellow citizens with fidelity, bravery, and integrity for the next 100 years, and beyond.

Mr. Chairman, I would like to conclude by thanking you and this Committee for your service and your support. Many of the accomplishments we have realized during the past seven years — and many of the goals we will realize in the future — are in great part due to your efforts.

On behalf of the men and women of the FBI, I look forward to working with you in the years to come as we continue to develop the capabilities we need to defeat the threats of the future. I would be happy to answer any questions you may have.

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