

PREPARED STATEMENT OF

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PERMANENT SELECT COMMITTEE ON INTELLIGENCE

of the

U.S. HOUSE OF REPRESENTATIVES

On

NATIONAL SECURITY LETTERS

I want to thank the Subcommittee for holding today's hearing on the Office of Inspector General's (OIG) findings on the Federal Bureau of Investigation's (FBI) use of National Security Letters (NSLs).

The problems identified by the OIG are significant, and although some mistakes are understandable given the complexities facing the FBI and Department of Justice (DOJ) in the wake of September 11, they should not be excused lightly. It is of critical import to eliminate the abuses of NSLs found by the OIG; but it is equally important, and indeed possible, to do so without impeding the FBI's use of NSLs which have proven to be a very effective tool against terrorism. It would be unrealistic to expect that the major reorganization at DOJ and the FBI with the increased focus on terrorism that was occurring during the time period covered by the OIG report could be implemented without some human error. Thus Congress wisely authorized the OIG investigation and report to ensure the proper use of NSLs, and, if necessary, to recommend appropriate steps to eliminate any problems with their use.

DOJ and the FBI have responded appropriately to the OIG's report and have already started to implement the OIG's recommendations along with additional protections to ensure the proper use of NSLs. This response to the report evinces the essence of good management – not covering up problems when they arise, but acknowledging that they occurred and then quickly taking the appropriate steps to correct the problems and to prevent their recurrence. This Subcommittee through its oversight function also has an important role to play to assist in identifying the errors so they are not repeated; however, the goal should not be the elimination or curtailment of NSLs, the “bread and butter” of the FBI's counterterrorism activities. Rather, the goal must be to ensure that NSLs are properly used and not abused, such that these tools remain the important national security tools they have become.

Fifteen years after the first provision for national security letters was enacted by Congress, the USA PATRIOT Act added one additional NSL provision and slightly amended the four previous provisions to aid law enforcement in the fight against terrorism. When evaluating the Inspector General's report on the FBI's use of NSLs, it is important to (1) remember the significant challenges the FBI was facing during the period covered by the Inspector General's review and the major organizational changes

the DOJ and FBI were undergoing in the aftermath of the September 11th attacks; (2) recognize that in most cases identified by the report, the FBI was seeking to obtain information it could have obtained properly by following applicable statutes and internal policies; and (3) note the Inspector General did not find any indication that the FBI's use of the NSL authorities constituted intentional misconduct.

The PATRIOT Act did not create NSLs; rather, the precursor to NSLs originated in a 1978 provision of the Right to Financial Privacy Act (RFPA) that removed restrictions on the release of customer information in response to law enforcement requests, but allowed institutions served to decline such requests. Congress closed that loophole in 1986 when it affirmatively granted the FBI access to financial institution records by allowing them to issue an NSL to the relevant institution in foreign intelligence cases. Congress also included a nondisclosure provision in the amendment, prohibiting the institution from disclosing that the FBI accessed a person's records, although they did not provide for judicial enforcement or penalties of this provision.¹

Also in 1986, Congress included a provision in the Electronic Communications Privacy Act (ECPA) which gave the FBI authority to access records for communications service providers in foreign counterintelligence investigations. ECPA had a similarly unenforceable nondisclosure provision.²

Then in 1997, Congress enacted an additional NSL provision that permitted the FBI to access credit, travel, and financial records of federal employees seeking security clearance.³ And still another NSL provision was passed as an amendment to the Fair Credit Reporting Act (FCRA), which gave the FBI access to credit agency records under similar conditions to the RFPA NSLs.⁴ While all of the four statutes included nondisclosure provisions, only the final authorization in the FCRA section authorized judicial enforcement if and when there were unauthorized disclosures.

The USA PATRIOT Act built on these existing NSL statutes by adding a fifth NSL provision as an amendment to the Fair Credit Reporting Act, thereby allowing the FBI and other government agencies authorized to conduct investigations into terrorism to

¹ Right to Financial Privacy Act, 12 U.S.C. § 3414 (1999).

² Electronic Communications Privacy Act, 18 U.S.C. § 2709 (1999).

³ National Security Act of 1947, 50 U.S.C. § 436 (1999).

⁴ Fair Credit Reporting Act, 15 U.S.C. § 1681u (1999).

obtain full consumer credit reports in international terrorism investigations.⁵ In addition to this fifth NSL stipulation, the PATRIOT Act amended the four previous NSL provisions to encompass requests in investigations relating to international terrorism, no longer confining the requests to foreign powers and their agents in foreign intelligence cases.

The Act also added the caveat that no investigation could be predicated exclusively on First Amendment-protected activities. The Act also prohibited institutions and their officers from disclosing that an NSL had been requested under any of the five statutory provisions, and for the first time provided for judicial enforcement of the confidentiality provisions in all previous provisions.⁶

Subsequently in 2005, the USA PATRIOT Improvement and Reauthorization Act responded to concerns over NSLs by expressly providing for judicial review of the NSLs and their confidentiality requirements.⁷ It was also in the Reauthorization Act that Congress directed the OIG to review the effectiveness and use of NSLs.

OIG was directed to look into instances of improper and illegal use of NSLs. Of the 26 possible violations the FBI reported to the Office of General Counsel, four were due to error on the part of the third-party recipient of the NSL. The report concluded that the remaining 22 arose from FBI errors, such as typographical mistakes of dates and names, incorrectly noting the statute under which the NSL was authorized, and incorrectly identifying the classification of the investigation (counterintelligence versus counterterrorism) in the NSL. In most cases, it appears that the FBI was seeking to obtain information that it could have obtained by following applicable statutes and internal policies, including correctly identifying the NSL statute or the type of investigation in which the NSL would be used. None of these identified errors demonstrate an abuse or willful expansion of those powers Congress granted to the FBI, but rather a lack of familiarity with the new guidelines.

⁵ United and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 15 U.S.C. § 1681v (2005).

⁶ United and Strengthening America by Providing the Appropriate Tools Required to Intercept and Obstruct Terrorism Act, 18 U.S.C. § 2709, 50 U.S.C. § 436, 15 U.S.C. § 1681u, 1681v, 12 U.S.C. § 3414 (2005).

⁷ USA PATRIOT Improvement and Reauthorization Act of 2005, 18 U.S.C. § 2709, 50 U.S.C. § 436, 15 U.S.C. § 1681u, 1681v, 12 U.S.C. § 3414 (2006).

The OIG also independently found 22 possible violations in 77 investigative files which contained 293 NSLs. While it is problematic that these potential violations were unreported, these violations were also due to simple error rather than nefarious intent, including improper requests under statutes that authorized NSLs for investigations into international terrorism and not counterintelligence, incorrect references to the ECPA, asserting authority under FCRA(u) instead of FCRA(v), and overcollection, such as when a third party gave records other than those requested. The report importantly concluded that these violations, reported or unreported, “did not reveal intentional violations of national security letter authorities” and found no indication that the FBI’s use of NSL authorities constituted intentional misconduct. Rather, the report found confusion about the authorities available under the various NSL statutes.

In the relevant period, it appears that counterterrorism investigators were not accustomed to the amended NSLs. Even without these changes, some degree of human error was inevitable, particularly given the significant challenges the FBI was facing during the period covered by the Inspector General’s review and the major organizational changes it was undergoing. Human error should not be confused with abuse of authority. It is unrealistic to expect that with so many changes in counterterrorism procedure and intelligence community organization there would be no mistakes. Congress even anticipated such errors in directing the OIG to survey the usage of NSLs in the years after their adjusted implementation, and DOJ and the FBI have responded as they should.

DOJ and the FBI have already taken steps to correct and improve upon the use of NSLs by implementing appropriate safeguards to ensure the protection of individual privacy rights. The FBI adopted the OIG recommendations and independently requested that the OIG issue a follow-up audit in July on the FBI’s implementation of the recommendations.⁸ The following are just a few of the important policies and procedures that DOJ and the FBI have implemented or will implement to ensure the proper use of NSLs:

FBI Director Mueller has issued a Bureau-wide directive prohibiting the use of the exigent letters described in the OIG’s report; ordered an expedited review by the

⁸ Dep’t of Justice Media Release, *Department of Justice Corrective Actions on the FBI Use of National Security Letters* (Mar. 20, 2007), available at http://www.usdoj.gov/opa/pr/2007/March/07_nsd_168.html.

Inspection Division of the unit that issued the exigent letters described in the OIG's report; issued a new policy requiring the retention of copies of signed NSLs; and ordered an intense investigation and accounting to correct past inaccuracies on the use of NSLs in past Congressional reports.

The FBI's Inspection Division has already launched a retrospective audit of the use of NSLs in all 56 FBI field offices, based on the OIG's methodology for identifying potential NSL misuses.

The FBI Office of General Counsel has been assigned to ensure that NSLs comply with applicable statutes, guidelines, and policies. The FBI is also developing a new training course on the proper use of NSLs, and will re-issue comprehensive guidelines throughout the Bureau concerning the proper use of NSLs.

New levels of oversight are being established in which DOJ and the FBI will begin conducting comprehensive reviews of the use of NSLs, including having the DOJ's National Security Division review all potential violations, and promptly report any violations that raise serious civil rights or privacy issues.

These actions are appropriate given the report's findings. If there was willful disregard or abuse of the FBI's use NSLs, it would have been essential to take additional steps to address such violations immediately.

But correcting mistakes should not be confused with eliminating the issuance of NSLs – we cannot afford to lose what FBI agents described in the OIG Report as their “bread and butter,” an essential tool for counterterrorism investigators. NSLs are used to establish evidence to support Foreign Intelligence Surveillance Act applications for electronic surveillance, physical searches, or trace orders, assess links between investigative subjects and others, collect information to develop national security investigations, generate leads for other field divisions, and develop analytical productions for distribution within DOJ.

With such useful applications, it is no wonder counterterrorism investigators chose to increasingly employ NSLs after September 11⁹ – they can and should use any and all tools provided to them in the fight against terrorism.

It is my hope that we are able to distinguish allegations of abuse from human error and contextualize the OIG report's findings with the significant challenges the FBI faced during the period covered by the review, so we do not hastily or prematurely deprive our national security team of an essential means to defend America.

⁹ The OIG report stated that in 2000, there were 8,500 reported requests; in 2003, there were 39,000; in 2004, there were 56,000; and in 2005, there were 47,000. After independently reviewing records, the report concluded that from 2003 to 2005, there were 143,074 requests.