



Department of Justice

STATEMENT OF

**KENNETH L. WAINSTEIN
ASSISTANT ATTORNEY GENERAL
NATIONAL SECURITY DIVISION
DEPARTMENT OF JUSTICE**

BEFORE THE

**PERMANENT SELECT COMMITTEE ON INTELLIGENCE
UNITED STATES HOUSE OF REPRESENTATIVE**

CONCERNING

**THE JUSTICE DEPARTMENT INSPECTOR GENERAL'S FINDINGS ON
THE FBI'S USE OF NATIONAL SECURITY LETTERS**

PRESENTED

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**Statement of
Kenneth L. Wainstein
Assistant Attorney General**

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Permanent Select Committee on Intelligence
United States House of Representatives**

**Concerning the
Justice Department Inspector General's Findings on
the FBI's Use of National Security Letters**

March 28, 2007

Thank you, Chairman Reyes, and Ranking Member Hoekstra, and good morning to all the distinguished members of this committee. I look forward to speaking to you today regarding the recent reports of the Department of Justice's Inspector General regarding the FBI's use of national security letters and the authority granted in Section 215 of the USA PATRIOT Act.

Let me briefly mention at the outset the Inspector General's findings with respect to Section 215 of the USA PATRIOT Act, which authorizes specified FBI officials to file applications with the Foreign Intelligence Surveillance Court to compel production of business records and other tangible things in connection with national security investigations. The Inspector General's report indicates that this authority has been used responsibly. Indeed, the Inspector General did not make any specific recommendations for improvements or other modifications to Justice Department procedures and practices for use of this authority. While the Inspector General did determine that there were some initial delays in using section 215 authority, he noted that they did not result in any harm to national security. The Inspector General also explained that many of the legal, bureaucratic, and process impediments that initially got in the way have now been addressed by the Department.

While the Inspector General also identified two instances of what he determined were “improper” uses of a section 215 order, both involved inadvertent mistakes by an agent or a third party that resulted in small amounts of overcollection. This overcollected information was sequestered and destroyed, and each matter was reported to the Intelligence Oversight Board and the Court, in accordance with FBI procedures. That captures the primary findings of the Inspector General’s 215 report, and I look forward to answering any questions that you may have on that report.

Now, I’d like to turn to a more detailed discussion of the Inspector General’s report on the FBI’s use of NSLs. As you well know, the Inspector General found that the FBI did not have sufficient controls, did not provide adequate training, and in some instances, failed to follow its own policies and the Attorney General’s Guidelines in using NSLs. The report also finds that an FBI headquarters component issued “exigent letters” to obtain telephone records in a manner that was inconsistent with the Bureau’s rules and procedures. I’d like to thank the Inspector General for bringing these troubling issues to our attention, and I want you to assure you that the Attorney General and the Director of the FBI are both extremely concerned about the serious issues raised by the Inspector General’s report.

I expect that much of our discussion today will focus on the problems the Inspector General identified, and on the significant efforts already underway at the Department of Justice to correct those problems. But in the course of this discussion there is another finding in the Inspector General’s report that I hope this Committee will not lose sight of: his conclusion, recently reiterated in Congressional testimony, that NSLs have proven to be an “indispensable tool” in the FBI’s national security investigations. We appreciate the Inspector General’s findings in this regard, and we agree that NSLs are a crucial part of our effort to protect the

American people from the threat of international terrorism. We are committed to ensuring that NSLs are used properly and effectively, and with due regard and respect for the civil liberties and rights of all Americans.

Mr. Fine and Deputy Director Pistole have talked at length about the shortcomings identified by the Inspector General's report, and I will not recite them again here. But I want to assure you that the Department of Justice recognizes that the problems are serious, and that we are focused on correcting these deficiencies and putting in place mechanisms that will help ensure that these problems do not recur in the future. And I'd like to offer details on some of the efforts that we have already begun taking within the Department of Justice, at the Attorney General's direction, to address the issues identified by the Inspector General's report.

First, the Attorney General has ordered the Justice Department's new National Security Division and the Department's Chief Privacy and Civil Liberties Officer to work closely with the FBI to take corrective actions, including implementing all of the recommendations made by the Inspector General, to report directly to the Attorney General on a regular basis, and to advise him on any additional actions or efforts that need to be undertaken to resolve the issues identified by the Inspector General. The Attorney General has also asked the Inspector General to report back to him in four months on the FBI's implementation of the Inspector General's recommendations.

Second, just over a week ago, the FBI Director ordered the Bureau's Inspection Division to launch a one-time, retrospective audit of the use of NSLs in all 56 FBI field offices nationwide. This audit drew upon the methodology the Inspector General used in identifying the underreporting of NSLs and the potential Intelligence Oversight Board (IOB) violations in his report. While this audit is being led and conducted by approximately 150 members of the FBI's

Inspection Division, the Justice Department's National Security Division and Privacy Office participated in six of the FBI-led field office inspections.

This initial one-time audit will be the beginning of a process of routine reviews of the FBI's use of NSLs. At the Attorney General's direction, the National Security Division will begin regular NSL audits next month, working in conjunction with the Justice Department's Privacy Office and the FBI's Inspection Division and Office of the General Counsel. We expect that these reviews will be conducted in 15 field offices or FBI headquarters components each year. These regular audits represent a substantial, new level of oversight by career Justice Department lawyers with many years of intelligence and law enforcement experience.

These audits also represent a new *kind* of Main Justice oversight of FBI national security investigations. Upon the advent of the National Security Division in September 2006, the Attorney General directed me to establish an oversight unit and capacity to extend beyond the primarily Foreign Intelligence Surveillance Act oversight that the Office of Intelligence Policy and Review had conducted prior to its merger into the new division. The Attorney General's concept was to develop a process for regular oversight of all aspects of FBI national security investigations and their compliance with the National Security Investigation Guidelines. We have been developing that capacity and will use these audits starting next month as the vehicle for that oversight. We are currently in the process of defining those aspects of national security investigations – including the use of NSLs – that will be reviewed during these site visits.

Third, several steps are being taken concerning the Inspector General's finding that an FBI headquarters component issued "exigent letters," which made the promise of future legal process in exchange for the immediate production of telephone records. The Inspector General found that these letters were not always sent in exigent circumstances, and that the legal process

promised often did not follow in a timely fashion. Earlier this month, the FBI issued a Bureau-wide directive prohibiting the use of the letters described in the Inspector General's report. The FBI also now requires that any effort to obtain ECPA-protected records on an emergency basis must be undertaken pursuant to the statutory authority contained in 18 U.S.C. § 2702, and that any such request must set out the basic facts of the emergency so that the provider can make some assessment of the emergency situation. The FBI Director has also ordered the FBI Inspection Division to conduct an expedited review of the Headquarters unit that issued these letters, in order to determine management responsibility for the use of these letters. In addition, all field offices have been asked to identify any use of an exigent letter or anything akin to an exigent letter, and the Inspection Division will review the results of this effort and report to the Director.

Fourth, the FBI is taking a number of steps to ensure that the type of Intelligence Oversight Board (IOB) violations that it reported and that were discovered by the Inspector General do not take place in the future. For example, the FBI is developing an automated system to prepare NSLs that will address the typographical and other errors that led to inconsistencies within NSLs and to the issuance of NSLs from inappropriate investigations or files. The FBI also issued guidance last year regarding the handling of "overcollected" information requiring the information to be sequestered and reported to the Office of General Counsel. Where the information is not relevant to an authorized investigation, the information will be destroyed or returned; it will not be entered into an FBI database. Where the information is relevant to an authorized investigation, it will be sequestered until a new NSL can be properly issued to cover the extra data. At that point, the information may properly be entered into FBI databases.

Fifth, the Attorney General has ordered the National Security Division to begin reviewing all FBI referrals of IOB violations both to identify recurring problems, and to assess the FBI's response to these violations. This review will focus on whether the IOB referrals suggest that a change in policy, training, or oversight mechanisms is required. The Attorney General has ordered the National Security Division to report to him semiannually on these referrals and to also inform the Justice Department's Privacy Office of any IOB referral that raises serious civil rights or privacy issues.

Sixth, the FBI is taking a number of steps to improve the accuracy of the reporting of NSL statistics to Congress. The FBI began developing a new NSL tracking database last year and hopes to have it deployed to four large field offices this year. Until this new system is fully deployed, FBI field offices will conduct hand counts of NSLs and report to the Office of General Counsel, on a monthly basis, the quantity of NSLs issued by that office. Moreover, in order to obtain a better accounting of the past use of NSLs and to correct any inaccuracies in past Congressional reports, the FBI Director has ordered an intensive process to query various computer systems to locate files where NSLs may have been issued, but which were mistakenly not reported to FBI OGC. In addition, the FBI OGC is correcting data entry errors in the existing database. Once this process is complete, the Department will provide updated copies of recent reports to Congress.

Seventh, in consultation with the National Security Division, the FBI will review and make any necessary revisions to existing FBI guidance and will re-issue comprehensive guidelines throughout the Bureau concerning the proper use of NSLs. Similarly, the Justice Department's Executive Office for United States Attorneys will review its existing training materials and guidance regarding terrorism investigations and prosecutions in order to ensure

that NSLs are properly described in such materials. The FBI has also initiated the development of a new training course on the use of NSLs. Once this course has been fully developed, the FBI will issue a directive mandating training for all Special Agents-in-Charge, Assistant Special Agents-in-Charge, Chief Division Counsel, and all appropriate FBI agents and analysts. While this course is being developed, FBI OGC has instructed its attorneys that anytime they are in a field office, no matter the reason for their visit, they must schedule mandatory NSL training.

Finally, the Office of the Director of National Intelligence and the Department of Justice's Chief Privacy and Civil Liberties Officer have jointly convened a working group to examine how NSL-derived information is used and retained by the FBI. The National Security Division, the FBI's Privacy Officer, and the Department of Justice's Office of Legal Policy will be represented on this working group.

As the head of the Department's new National Security Division, I look forward to working closely with the FBI to ensure that *all* the corrective measures ordered by the Attorney General and described today, as well as the reforms recommended by the Inspector General, are fully and expeditiously implemented. I am also committed to providing this Committee with information regarding our implementation of these corrective actions. We also welcome this Committee's advice on other steps that can be taken to ensure that these problems do not happen again.

I would like to offer one final thought. There are those who have suggested that we should eliminate or drastically curtail the FBI's authority to use NSLs. This would be a mistake. NSLs are important building blocks in national security investigations, and we must continue use them if we are to be successful at heading off the threat of international terrorism in the United States. While we readily acknowledge that there were problems in the way we handled the use

of NSL authority, the solution to those problems is not to deny us this critically important tool. Rather, the solution is to ensure that we use it properly in the future. I therefore urge this Committee to allow the Department of Justice to fully implement the substantial reforms and corrective measures, some of which I have just described, and to work closely with us to review the implementation of these reforms.

I look forward to your questions.