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Congress of the United States

House of Representatives

COMMITTEE ON THE JUDICIARY

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September 5, 2008

BY FAX AND U.S. MAIL

The Honorable Robert S. Mueller, III
Director
Federal Bureau of Investigation
U.S. Department of Justice
935 Pennsylvania Ave., NW
Washington, DC 20535

Dear Director Mueller:

As the Committee prepares for our FBI oversight hearing on September 16 at which you will testify, we have become increasingly concerned about a number of troubling issues that have recently surfaced in media reports and congressional briefings implicating the actions and operations of the FBI. These issues pertain to the FBI's Amerithrax investigation, further revelations about the Bureau's use of exigent letters, the Bureau's investigative approach to this country's mortgage crisis, and the expanded FBI investigative and intelligence gathering powers resulting from the proposed Attorney General guidelines concerning the FBI's domestic operations. To help facilitate a meaningful hearing on September 16 and further the Committee's oversight efforts and the important work of the FBI, we are writing to ask that in advance of the hearing, you address in writing these serious concerns, as specified below.

FBI Amerithrax investigation

Notwithstanding the Department's closure of the Amerithrax investigation, important and lingering questions remain that are crucial for you to address, especially since there will never be a trial to examine the facts of the case. Specifically, we ask that you address several questions in advance of the September 16 hearing: 1) Media reports indicate that from the inception of the Bureau's investigation, White House officials initially pressed you and the Bureau to demonstrate that the anthrax attacks were a second wave Al Qaeda assault or that the anthrax that

The Honorable Robert S. Mueller, III
Page Two
September 5, 2008

was used in the attacks was of a “weapons grade” quality that could link the attacks to Iraq.¹ Please explain what happened, including the identity of any individuals in the White House who requested that you pursue that path of investigation; 2) Please explain how and why government scientist Steven Hatfill remained a suspect in the investigation for as long as he did in light of the evidence clearly pointing elsewhere; 3) Even after Dr. Bruce Ivins became the prime suspect in the investigation, please explain why the government allowed him to retain his security clearance at Fort Detrick for approximately two years; 4) In the initial congressional briefings on the Dr. Ivins case and in the affidavit in support of the search warrants, it was stated that Dr. Ivins had provided a “misleading” anthrax sample when originally requested to do so – that is, a sample that was not from the anthrax that was actually under his control at the lab – and that this confounded the ability of the investigators to link the seized anthrax to him. Subsequently, a New York Times story stated that, in fact, the FBI had mis-handled the original sample that Dr. Ivins had provided. As reported in the New York Times:

[F.B.I.] officials acknowledged at the closed-door briefing, according to people who were there, that the sample Dr. Ivins gave them in 2002 did in fact come from the same strain used in the attacks, but, because of limitations in the bureau’s testing methods and Dr. Ivins’s failure to provide the sample in the format requested, the F.B.I. did not realize that it was a correct match until three years later.²

Please clarify exactly what the true facts are. In particular, did flaws or other procedural delays associated with the FBI’s evidence handling procedures in any way delay the identification of the anthrax used in the attacks as having come from Dr. Ivins’s strain?

FBI improper collection of reporters’ phone records

Recent revelations about the Bureau’s improper collection of the phone records of *New York Times* and *Washington Post* reporters in the newspapers’ Indonesia bureaus in 2004 have

¹ See, e.g., James Meek, “FBI was told to blame Anthrax scare on Al Qaeda by White House officials,” N.Y. DAILY NEWS, Aug. 2, 2008; Richard Butler, “Who Made the Anthrax,” N.Y. TIMES, October 18, 2001.

² Eric Lichtblau and David Johnston, “F.B.I. Will Present Scientific Evidence in Anthrax Case to Counter Doubts,” N.Y. TIMES, Aug. 15, 2008, available at http://www.nytimes.com/2008/08/16/washington/16anthrax.html?_r=1&ref=science&oref=slogin.

once again heightened the concern about the need for accountability within the Bureau.³ Although the Bureau apologized to the editors of the respective newspapers and purged the information from the Bureau's databases, we ask that you explain prior to the hearing why this happened, who, if anyone, will be disciplined for these actions, and what other actions will be taken. Furthermore, the Indonesia incident underlines the problems associated with the FBI's past use of exigent letters and is yet another link in the chain of NSL-related abuses that two previous Inspector General reports have documented. While apologies and tighter internal controls are important steps towards rectifying these issues, the Bureau must do a better job of ensuring that accountability is restored, and appropriate personnel are disciplined, when actions violating the privacy rights of our citizens occur during its investigations. Moreover, as Congress weighs the USA PATRIOT ACT and other additional authorities pertaining to national security, these repeated instances of the FBI's abuse of authorities suggest to some that the FBI has been irresponsible with the expanded powers that Congress has given it. What steps are you going to take, and would you recommend the Committee and Congress take, to ensure that the FBI will not continue to engage in such systemic abuses of broad surveillance authorities?

FBI actions concerning the subprime mortgage crisis

We are also concerned about recent reports indicating that the FBI may have contributed to the current subprime mortgage crisis by failing to act on its knowledge of wide-scale mortgage fraud. In September 2004, Chris Swecker, Assistant Director of the Criminal Investigative Division and Acting Executive Assistant Director for Law Enforcement at the FBI, apparently stated during a press briefing that mortgage fraud could cause multibillion-dollar losses to financial institutions. As reported by CNN on September 17, 2004, Mr. Swecker said this fraud "has the potential to be an epidemic" and that "[w]e think we can prevent a problem that could have as much impact as the S&L crisis."⁴ Mr. Swecker and other representatives from the FBI and the Justice Department reportedly stated at this briefing that mortgage-related fraud was a nationwide problem and they identified the top states that were "'hot spots' for mortgage fraud," including Michigan, California, Florida, and Nevada. It now appears that Mr. Swecker not only correctly assessed the scope and magnitude of the problem, but even pinpointed the exact states where much of the problem subsequently occurred. It also appears that the FBI failed to prioritize this crime, as evidenced by the reported decrease in the number of agents devoted to

³ See, e.g., Eric Lichtblau, "F.B.I.'s Use of Phone Records Shows Need to Protect the Press, Senators Say," N.Y. TIMES, Aug. 12, 2008.

⁴ Terry Frieden, CNN Washington Bureau, Sept. 17, 2004; see Richard B. Schmitt, "FBI Saw Threat of Mortgage Crisis," L.A. TIMES, Aug. 25, 2008.

the issue⁵ and the Attorney General's refusal to create a national task force to centralize FBI mortgage fraud investigations.⁶ These facts suggest that the Justice Department and the FBI may have seriously erred in addressing the potential, and now existing, mortgage crisis. These missteps may well have contributed to this crisis, in which more than 700,000, or one in every 171, of our nation's households received at least one foreclosure-related notice from April to June of this year.⁷ Indeed, it is estimated that 2.5 million homes will face foreclosure this year, an increase from 1.5 million in 2007.⁸

Accordingly, we request that you respond to the following questions in advance of the hearing: 1) What actions, if any, did the FBI undertake in response to Mr. Swecker's September 2004 assessment of the mortgage fraud problem? 2) Who in the FBI was responsible for acting upon this assessment? 3) Is the August 25, 2008 Los Angeles Times article correct in stating that the FBI devoted fewer rather than additional resources notwithstanding Mr. Swecker's request for additional resources?⁹ 4) Please provide the number of agents assigned to deal with mortgage fraud for fiscal years 2001 through 2008. 5) Please explain whether you believe that a national task force of law enforcement officials would help address this epidemic of mortgage fraud.

Proposed Attorney General guidelines concerning FBI domestic operations

As you know, serious concerns have been raised about the Attorney General's announced plans to issue consolidated guidelines concerning FBI domestic operations and the effect of such guidelines on Americans' constitutionally protected rights. It is important to ensure that the constitutional rights of Americans are protected and all stages of terrorism and criminal investigation. It is not clear to us that the proposed consolidated guidelines will prevent innocent citizens from coming under a cloud of suspicion for their legitimate religious and political

⁵ Richard B. Schmitt, "FBI Saw Threat of Mortgage Crisis," L.A. TIMES, Aug. 25, 2008 (noting that although Mr. Swecker and "other FBI criminal investigators sought additional assistance to take on the mortgage scoundrels. . . . They ended up with fewer resources, rather than more.").

⁶ Eric Lichtblau, "Mukasey Declines to Create a U.S. Task Force to Investigate Mortgage Fraud," N.Y. TIMES, June 6, 2008.

⁷ *Home Foreclosures Double in 2nd Quarter*, NPR, July 25, 2008.

⁸ *Id.*

⁹ Richard B. Schmitt, *FBI Saw Threat of Mortgage Crisis*, L.A. TIMES, Aug. 25, 2008 (noting that although Mr. Swecker and "other FBI criminal investigators sought additional assistance to take on the mortgage scoundrels. . . . They ended up with fewer resources, rather than more.").

The Honorable Robert S. Mueller, III
Page Five
September 5, 2008

activities.

We appreciate the efforts of FBI and DOJ staff in conducting briefings for House Judiciary Committee staff on the draft guidelines, as well as Attorney General Mukasey's determination not to sign the guidelines until after your testimony before our Committee and before the Senate Judiciary Committee on September 17. However, we question the need to consolidate the FBI guidelines during the waning days of the Administration only a month before the election, as opposed to providing suggestions for the new Administration to consider early next year.

Important information from the FBI and DOJ is needed for our hearing to be meaningful and effective. We ask that you provide the following information relating to the guidelines in advance of the hearings: 1) What is the rationale for combining several different guidelines concerning very different types of investigations involving criminal activity, terrorism, and foreign intelligence gathering into one set of guidelines? 2) Concerns have been raised about the lack of specific protection in the guidelines against improper FBI undercover spying against domestic groups and against abuse of investigative techniques such as "pretext" interviews, physical surveillance, and recruitment of human sources at the "threat assessment" stage, which requires little supervision or basis for suspicion. Please explain what safeguards will be provided with respect to such possible abuse; 3) What specific safeguards will be utilized to prevent improper racial, religious, or ethnic profiling, which must not be allowed? 4) Will the Administration consider reinstating the guidelines of former Attorney General Edward Levi to protect against improper federal government invasions of privacy, but which were rescinded early in the Administration, or at the very least require that when FBI agents attend public events undercover that a Special Agent in Charge is also in attendance, so that there is some level of accountability to the public? 5) Will the Administration consider providing suggested changes to the criminal activity, terrorism and foreign intelligence gathering guidelines for the next Administration and not issue the proposed guidelines on October 1st?

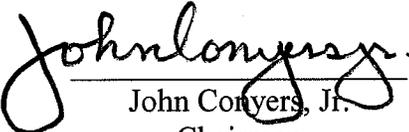
In addition, it is important that the Committee be provided a copy of the draft guidelines prior to the hearings. Committee staff have been able to review the guidelines, but have not been permitted to retain copies or provide them to Members. Meaningful questioning will be impossible without copies of the guidelines themselves. By copy of this letter to you and Attorney General Mukasey, we ask that the Department and the FBI cooperate to make these draft guidelines available to Committee Members and staff as soon as possible and in advance of the September 16 hearing.

In order to allow all Committee members to review your answers to these questions in

The Honorable Robert S. Mueller, III
Page Six
September 5, 2008

advance of the September 16, hearing, we would very much appreciate receiving them no later than Monday, September 15 at noon. At your convenience, we would be pleased to receive them either in a letter in response to this letter, or as part of or an attachment to your written testimony. Please direct your responses to the Judiciary Committee office, 2138 Rayburn House Office Building, Washington, DC 20515 (tel: 202-225-3951; fax: 202-225-7680). Thank you for your prompt cooperation. We look forward to seeing you on September 16.

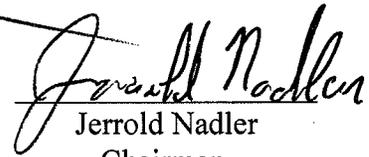
Sincerely,



John Conyers, Jr.
Chairman



Robert C. "Bobby" Scott
Chairman, Subcommittee
on Crime, Terrorism and
Homeland Security



Jerrold Nadler
Chairman,
Subcommittee on the
Constitution, Civil
Rights and Civil
Liberties

cc: The Honorable Michael B. Mukasey
The Honorable Lamar Smith
The Honorable Louie Gohmert
The Honorable Trent Franks
Richard Powers
Keith Nelson