



OFFICE OF BOB BARR

Member of Congress, 1995-2003

TESTIMONY IN OPPOSITION TO
SUNSETTED PROVISIONS OF THE USA
PATRIOT ACT
BEFORE THE U.S. HOUSE JUDICIARY
SUBCOMMITTEE ON CRIME, TERRORISM AND
HOMELAND SECURITY
BY
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Chairman Sensenbrenner, Ranking Member Scott and members of the Subcommittee, thank you for inviting me to testify on the USA PATRIOT Act, and in particular those provisions set to expire later this month.

From 1995 to 2003, I had the honor to represent Georgia's Seventh District in the United States House of Representatives, serving that entire, eight-year period with many of you on the House Judiciary Committee.

From 1986 to 1990, I served as the United States Attorney for the Northern District of Georgia after being nominated by President Ronald Reagan. Following my tenure as U.S. Attorney, I served as president of the Southeastern Legal Foundation. Earlier, and for much of the 1970s, I served with the Central Intelligence Agency.

I currently serve as CEO and President of Liberty Strategies, Inc. and practice law in Atlanta, Georgia. I am also a member of The Constitution Project's Initiative on Liberty and Security, and an adjunct professor at Atlanta's John Marshall Law School.

I understand the Chairman introduced legislation last week that would make the so-called "lone-wolf" authority in the USA PATRIOT Act permanent; and would extend the Section 215 and roving "John Doe" wiretap authorities in the Act for another six years, until 2017. I urge

this committee to reject this approach tomorrow during its markup, and either amend these sections in order to bring them into full compliance with the letter and the intent of our Constitution, or else allow them to expire.

In the aftermath of 9/11, the government itself has become one of the major threats to the very thing it was designed to protect – our liberty. We have sacrificed our liberty for, at best, perceived security. We have allowed the government to largely render the Fourth Amendment a nullity by way of the PATRIOT Act and warrantless wiretapping programs that empower the government to snoop on its own citizens.

There is a reason why the Founding Fathers – men well-studied in the history of governments – set up our Republic with a system of checks and balances, due process, and federalism. These procedural safeguards are absolutely crucial to securing and defending our rights. Without them, we have a government unaccountable to the people; and one which perceives itself as being above the law. As Michael German, Senior Policy Counsel for the American Civil Liberties Union and himself a former FBI Special Agent, pointed out, “under the PATRIOT Act the government now has the right to know what you’re doing, but you have no right to know what [it is] doing.”

Supporting repeal, or at the very least reform, of those provisions of the USA PATRIOT Act set to expire at the end of this month — provisions far too broad and not essential to investigating and thwarting terrorist plots or acts — would be an important signal to this President, that those civil liberties put on hold the past 9-1/2 years, must not be considered permanently frozen. Such a move by this committee will help him hold true to his promises of an open and transparent government.

This reform is absolutely crucial if we do not want to live in a society in which there are essentially no limits on the powers of the government. In a January 2011 report, the Electronic Frontier Foundation (EFF) details possible 40,000 violations of law, Executive Order, or other regulations governing intelligence investigations by the FBI from 2001 to 2008. Though nobody knows the full extent of the abuse, due to the shroud of secrecy surrounding intelligence investigations, this estimate is based on review of nearly 2,500 pages of documents released by the FBI as a result of a Freedom of Information Act suit. I have attached a copy of this EFF report to my written statement.

Many urge that the provisions of the USA PATRIOT Act under consideration for sunset be continued in law unless repeated and serious abuses of these provisions can be conclusively established. With all due respect, this is a red herring. In our system of government, and as clearly reflected in both the body of our Constitution and with even greater clarity in our Bill of Rights, a law is not to be *presumed* constitutional so long as the government does not abuse it (or does not abuse it too seriously). It is *not* up to the citizenry to prove government is abusing a law before that law might be determined to be improper. This is, of course, true *a fortiori* where a law empowers the government to retain a veil of secrecy over its exercise of that law. If a law is contrary to the Fourth Amendment, for example, the law *itself* is the abuse; and the Congress in its oversight role, should not be loathe to step in and correct it; regardless of whether citizens can chronicle abuses of it.

However, as detailed, for example, in the EFF report, there have been abuses of this law.

Today I would like to draw your attention to two sections of the PATRIOT Act in particular. The first is Section 215, also known as the “business records” provision, which is scheduled to expire at the end of this month. This very powerful tool permits the government to obtain any tangible thing, to collect information, on persons not suspected of any wrongdoing.

Section 215 amended what was special authority under FISA (the Foreign Intelligence Surveillance Act) to seize rental car, self-storage and airline records for national security investigations. Prior to the USA PATRIOT Act, the underlying statutes -- 50 U.S.C. §§ 1861, 1862 -- applied only to a limited subset of businesses, and it required a showing of "specific and articulable facts" that *the individual target* was in fact an agent of a foreign power.

Section 215 of the PATRIOT Act removed both of these limitations, thereby greatly expanding the power of the government to reach all "tangible things." This includes books, records, papers, documents and other items; even membership lists of political organizations, gun purchase records, medical records, and genetic information – basically any document, item or record that the government contends is a "tangible thing." It lowers the evidentiary standard below even that of

standard grand jury subpoenas, which are pegged to at least some showing of relevance to criminal activities. Under Section 215, the government is not even required to show that items sought relate to a person under suspicion or investigation. The link between the government invading a person's privacy and a reasonable suspicion of wrongdoing by that person – the foundation of the Fourth Amendment to our Constitution – has been completely severed by this provision.

Congress should amend this section to require a showing to a judge of specific and articulable facts demonstrating that the material sought pertains to a suspected agent of foreign powers. The provision also should include minimization procedures to ensure that the scope of the order is no greater than necessary to accomplish the investigative purpose.

Another section of the PATRIOT Act this sub-committee should address is that relating to National Security Letters (NSLs). NSLs are administrative subpoenas requiring businesses to produce personal communication, financial and credit records, but with no prior judicial approval and with no required nexus to a suspected terrorist. Before the PATRIOT Act, NSLs could only obtain information on suspected agents of foreign powers such as terrorists or spies; but now can be issued to collect information on anyone and to obtain any records the executive branch on its own determines to be “relevant” to an investigation.

Audits conducted by the Justice Department's Inspector General released in 2007 and 2008 have confirmed fears of critics of these provisions: unchecked powers are being used to collect information on innocent U.S. persons, which ultimately is stockpiled in government databases indefinitely, and is accessible by virtually unlimited numbers of law enforcement and intelligence personnel. More than 143,000 NSL requests were issued between 2003 and 2005, and the latest numbers plucked by the Inspector General (IG) confirm that a majority of NSLs are now being issued about U.S. persons. That data is being stored in government databases, including one containing over 560 million separate records, and another having over 30,000 authorized users.

The reports also document that FBI agents are issuing NSLs for people two or three times removed from a suspected terrorist, even when there is no indication that those people are anything other than innocent links

or share some common element with a known or suspected terrorist or a known associate of a known or suspected terrorist.

The IG also found over 700 instances in which Federal Bureau of Investigation (FBI) agents issued so-called "exigent letters," claiming emergency circumstances and the immediate need for records. According to the reports, agents often lied about the existence of an "emergency," and never followed up with an actual legal request as promised. The NSLs or grand jury subpoenas that could have legally obtained the information never materialized. These exigent letters and sham processes continued even in the face of legal advice from the FBI General Counsel's office to cease.

While the FBI has taken important steps to create more accountability for, and internal checks and balances on NSLs, those changes do not address the fundamental question of whether the FBI should have access to information about people who are not suspected of any criminal wrongdoing or who are not or cannot be linked to terrorists or terrorist organizations. The FBI should not have easy or unfettered access to such information; and only an amendment to the statute can create that meaningful limitation. In fact, the Justice Department and the FBI have testified before this very committee that collecting innocent information is their goal. They claim that they must collect the information first, and sift through it looking for evidence of wrongdoing later; a process that in essence turns the Fourth Amendment on its head.

Congress should exercise its oversight responsibility by requiring that NSLs be used only to obtain information pertaining to suspected terrorists or spies, and by re-establishing the previous, probable cause requirement.

I have concerns also about the other two sections of the PATRIOT Act that you will be voting on tomorrow. The first is the so-called "roving John Doe wiretap," that permits the Foreign Intelligence Surveillance Court to issue wiretap orders to monitor multiple phones or email addresses that specify neither the person to be monitored nor the place to be tapped. This violates the Fourth Amendment's requirement that a warrant state with particularity the things to be searched or seized. This provision should be corrected to require that if the wiretap order does not specify the location of the surveillance, then it must identify the

target, or vice versa, in order to meet constitutional muster. Otherwise, the power should be allowed to sunset.

The other section is the so-called “lone wolf authority” that permits Foreign Intelligence Surveillance Act (FISA) surveillance of non-US persons even if they are not suspected to be connected to a foreign organization, terrorist group or government. This provision eliminated the FISA requirement that surveillance properly be conducted against persons actually suspected of being agents of foreign powers or terrorist organizations. As the Constitution Project has pointed out, “Under FISA, the government can obtain a warrant without a showing of probable cause that a crime is being committed or is about to be committed. FISA’s authorization of secret wiretaps and secret home searches in the United States is an exception to traditional Fourth Amendment standards, which has been justified on the basis that these extraordinary surveillance powers are limited to investigations of foreign powers and their agents. By eliminating the requirement to show a connection to any foreign group, the ‘lone wolf’ provision undermines this justification for the lower FISA standards and raises serious constitutional concerns under the Fourth Amendment.”

Considering that the Justice Department told Congress in March that the government has never once relied upon this authority in conjunction with the constitutional issues this provision raises, reauthorization is impossible to justify with a straight face. Persons suspected of terrorist activities would still be reachable and subject to traditional and established criminal law and foreign intelligence gathering standards.

In sum, I urge this subcommittee and the full Judiciary Committee as well, to allow the provisions of the USA PATRIOT Act that are set to sunset at the end of this month to expire; or, at the very least, to reform these provisions and bring them in line with the Constitution lest we allow the exigencies of the day to undermine our liberties.

Though our Constitution and Bill of Rights have taken some hits in the years since 9/11, it is not too late to reset the constitutional clock and roll back excessive, post-9/11 powers. History has shown, as recently as the Waco tragedy in 1993, for example, that government agents and agencies do fall prey to abusing government powers. Another subcommittee of this Judiciary Committee took the lead in 1995 to conduct extensive hearings on those abuses; and the full House refused

in 1996 to grant federal law enforcement many of the expanded powers it asked for, partially in recognition of such abuses.

In many other countries, it is neither acceptable nor lawful to reflect openly on and refine past action. In America, however, it is not only allowable, it is our *obligation* to regularly reexamine decisions made by the federal government; especially perhaps, those enacted during the panic of an event like the terrorist attacks of September 11th 2001. It is an essential responsibility of the Congress to review and reconsider powers previously granted to the Executive branch; to determine whether such authorities remain essential and necessary or whether they have been abused and should be reined in.

Certainly, our (or any) country suffering through the immediate fallout from the worst terrorist attack on American soil ever is liable to make some mistakes in responding legislatively thereto. To err isn't just human; it's a direct result of representative democracy. But also human, is the ability to learn from and *correct* our mistakes.

Case in point: myself. I voted for the USA PATRIOT Act. I did so only after I and a broad coalition of other Members and outside organizations had secured a number of limiting amendments, and only after receiving assurances the Justice Department would use the Act's extensive powers as a limited, if extraordinary measure to meet a specific, extraordinary threat. Little did I or many of my colleagues, know it would shortly be used in contexts other than terrorism, and in conjunction with a wide array of other, privacy-invasive programs and activities.

That I can stand before you and urge the Act's correction should serve as a lesson to other lawmakers who might have voted for the USA PATRIOT Act, and supported similar initiatives. We all should be unafraid to revisit past decisions. Indeed, it is an obligation – not only as members of Congress with delegated oversight responsibilities, but as American citizens with a duty to ourselves and our children to preserve our liberties as the generations before us fought and died to do.

Thank you again for allowing me to testify today.

Attachment

Patterns of Misconduct: FBI Intelligence Violations from 2001 - 2008
A Report Prepared by the Electronic Frontier Foundation
January 2011



Patterns of Misconduct:

FBI Intelligence Violations from 2001 – 2008

A Report Prepared by the Electronic Frontier Foundation

January 2011



EXECUTIVE SUMMARY

In a review of nearly 2,500 pages of documents released by the Federal Bureau of Investigation as a result of litigation under the Freedom of Information Act, EFF uncovered alarming trends in the Bureau's intelligence investigation practices. The documents consist of reports made by the FBI to the Intelligence Oversight Board of violations committed during intelligence investigations from 2001 to 2008. The documents suggest that FBI intelligence investigations have compromised the civil liberties of American citizens far more frequently, and to a greater extent, than was previously assumed. In particular, EFF's analysis provides new insight into:

Number of Violations Committed by the FBI

- From 2001 to 2008, the FBI reported to the IOB approximately 800 violations of laws, Executive Orders, or other regulations governing intelligence investigations, although this number likely significantly under-represents the number of violations that actually occurred.
- From 2001 to 2008, the FBI investigated, at minimum, 7000 potential violations of laws, Executive Orders, or other regulations governing intelligence investigations.
- Based on the proportion of violations reported to the IOB and the FBI's own statements regarding the number of NSL violations that occurred, the actual number of possible violations that may have occurred in the nine years since 9/11 could approach 40,000 violations of law, Executive Order, or other regulations governing intelligence investigations.¹

¹ This figure is an estimate based, first, on the fact that a significant number of FBI violations went unreported, both internally and to the IOB; second, this estimate assumes the sample of violations reported to the IOB and released to EFF is representative of all violations that occurred, including those that went unreported; third, the estimate assumes violations occurred at the same rate over time. In the reports released to EFF, roughly 33% were violations of the NSIG, 33% were NSL violations, and 20% were other violations (the remaining violations were too heavily redacted to categorize). The estimate is based on an extrapolation from the OIG's estimate that 6,400 NSL violations occurred from 2003-2006. In the absence

Substantial Delays in the Intelligence Oversight Process

- From 2001 to 2008, both FBI and IOB oversight of intelligence activities was delayed and likely ineffectual; on average, 2.5 years elapsed between a violation's occurrence and its eventual reporting to the IOB.

Type and Frequency of FBI Intelligence Violations

- From 2001 to 2008, of the nearly 800 violations reported to the IOB:
 - over one-third involved FBI violation of rules governing internal oversight of intelligence investigations.
 - nearly one-third involved FBI abuse, misuse, or careless use of the Bureau's National Security Letter authority.
 - almost one-fifth involved an FBI violation of the Constitution, the Foreign Intelligence Surveillance Act, or other laws governing criminal investigations or intelligence gathering activities.
- From 2001 to 2008, in nearly half of all NSL violations, third-parties to whom NSLs were issued — phone companies, internet service providers, financial institutions, and credit agencies — contributed in some way to the FBI's unauthorized receipt of personal information.
- From 2001 to 2008, the FBI engaged in a number of flagrant legal violations, including:
 - submitting false or inaccurate declarations to courts.
 - using improper evidence to obtain federal grand jury subpoenas.
 - accessing password protected documents without a warrant.

For further information on this report, contact Mark Rumold, mark@eff.org, or Jennifer Lynch, jen@eff.org.

of robust FBI auditing and thorough oversight, estimates such as these are the only reasonable method to approximate the scope of the FBI's investigatory misconduct.

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INTRODUCTION

EFF's analysis of recently disclosed documents provides new insights into the Federal Bureau of Investigation's unlawful surveillance of Americans during intelligence investigations conducted between 2001 and 2008.

In response to EFF FOIA requests issued in 2008 and 2009, the FBI released reports of violations made to the Intelligence Oversight Board (IOB) — an independent, civilian intelligence-monitoring board that reports to the President on the legality of foreign and domestic intelligence operations. The nearly 2,500 pages of documents EFF received include FBI reports to the IOB from 2001 to 2008. The reports catalog 768 specific violations arising from FBI monitoring of U.S. citizens, resident aliens, and non-residents.

Following a series of government investigations into FBI intelligence abuses, EFF submitted FOIA requests in an effort to obtain the FBI's IOB reports. In 2007, the Department of Justice, Office of Inspector General released a report documenting the FBI's abuse of its National Security Letter (NSL) authority:² the report found, in an audit of only 10% of national security investigations, that the FBI may have committed as many as 3000 NSL violations and had failed to report many of those violations to the IOB.³ A 2008 OIG report confirmed and expanded the earlier report's findings and critically assessed the steps taken by the FBI to address the abuse of NSLs.⁴

Following the second OIG report in 2008, EFF submitted FOIA requests to eleven federal agencies and agency components requesting all reports of intelligence violations made to the IOB from 2001 to 2008. EFF submitted subsequent requests the following year for violations reported to the IOB from 2008 to 2009. In July 2009, after many agencies failed to respond to the request, EFF filed suit against eight defendants — including the CIA, NSA, Department of Defense, Department of Homeland Security, Department of

² DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (March 2007), *available at* <http://www.justice.gov/oig/special/s0703b/final.pdf>.

³ See R. Jeffrey Smith, *FBI Violations May Number 3,000, Official Says*, WASH. POST., March 21, 2007, *available at* <https://www.washingtonpost.com/wp-dyn/content/article/2007/03/20/AR2007032000921.html>.

⁴ DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (March 2008), *available at* <http://www.justice.gov/oig/special/s0803b/final.pdf>. Even before the OIG's official acknowledgement of FBI investigative abuses, EFF, other civil liberties organizations, and members of the media had documented numerous instances of improper government intelligence activities in the years following 9/11. For example, in 2005, a FOIA request seeking information about violations related to 13 national security investigations revealed numerous instances of FBI misconduct stemming from the Bureau's newly expanded powers under the USA PATRIOT Act.

Justice, Office of the Director of National Intelligence, Department of Energy, and Department of State — demanding the agencies comply with the law and produce the requested documents. In December 2009, the Court ordered the agencies to begin processing EFF’s request. In July 2010, two years after EFF’s initial FOIA request, the FBI began its release of documents. Over three separate installments in July, August, and October 2010, the FBI released nearly 2,500 pages of documents related to reports of intelligence violations to the IOB.

The documents released to EFF constitute the most complete picture of post-9/11 FBI intelligence abuses available to the public. Among other findings, EFF’s analysis of the documents shows that, from 2001 to 2008, significant delays occurred in the reporting of FBI violations to the IOB. The analysis also provides new insights into the type and frequency of violations committed by the Bureau. Most violations fell into one of three broad categories: first, FBI failure to comply with oversight guidelines; second, abuse of the FBI’s authority to issue National Security Letters; and, third, the FBI’s failure to carry out investigations within the bounds of the Constitution or other federal statutes governing intelligence-gathering. Finally, EFF’s analysis concludes that the FBI may have committed as many as 40,000 violations in the 10 years since the attacks of 9/11.

THE INTELLIGENCE OVERSIGHT BOARD

The Intelligence Oversight Board “was created in 1976 by President Ford in response to recommendations made by the Rockefeller Commission calling for a Presidential-level body with specific oversight responsibilities for the legality and propriety of US intelligence activities.”⁵ The Commission’s recommendations came in the wake of a series of congressional reports that revealed illegal and abusive intelligence activities targeting American and foreign citizens. These reports found that intelligence agencies had intercepted and read Americans’ mail, performed surveillance on civil rights leaders and other dissidents, and had orchestrated assassination attempts on foreign leaders.

In light of the Commission’s recommendation, President Ford established the IOB to provide an independent review of intelligence activities to better safeguard citizens’ civil liberties against these types of abusive practices. The IOB consists of five civilian members, all with top-level security clearances, selected by the President to serve on the IOB from the larger intelligence-monitoring body, the President’s Intelligence Advisory

⁵ President’s Intelligence Advisory Board and Intelligence Oversight Board, *PIAB History*, <http://www.whitehouse.gov/administration/eop/piab/history>.

Board (PIAB).⁶ The IOB's mission is to "oversee the Intelligence Community's compliance with the Constitution and all applicable laws, Executive Orders, and

Intelligence Oversight Board

- Established in 1976 to oversee US Intelligence Activities
- Created in wake of Congressional reports of abusive practices such as reading Americans' mail, unwarranted surveillance on civil rights leaders, and assassination attempts on foreign leaders
- Role of IOB diminished in wake of 9/11 and many intelligence abuses went unchecked and unreported

Presidential Directives."⁷ The IOB must then report to the President those violations the Board believes "may be unlawful or contrary to an Executive Order or presidential directive."⁸ Since its creation, the vast majority of the IOB's reports and investigations have remained secret.

Slight modifications to the IOB's authority and structure have occurred since its creation in 1976, but the IOB's oversight capacity remained largely unchanged for nearly 30 years. In the years following the attacks of 9/11, however, the Board's role within the intelligence community was diminished in several ways. First, from 2001 to 2003, President Bush failed to appoint advisers to serve on the IOB.⁹ Even when advisers were appointed, however, the IOB continued to provide little real oversight: the IOB did not forward a single instance of intelligence misconduct to the Attorney General until 2006, despite having received

notice of several hundred violations.¹⁰ Further, in 2008, President Bush significantly weakened the IOB's oversight capacity by removing its ability to refer violations to the Attorney General for criminal investigation.¹¹ President Bush also removed the IOB's authority to oversee intelligence agency general counsel and eliminated the requirement for quarterly agency reporting to the IOB.¹²

EFF's analysis of FBI reports to the IOB confirms the perceived inefficacy of the IOB's oversight from 2001 to 2008. Significant delays between violations occurring and their eventual reporting rendered the IOB's oversight capacity entirely impotent. On average, nearly two-and-a-half years passed between the occurrence of an FBI intelligence

⁶ *Id.*

⁷ President's Intelligence Advisory Board and Intelligence Oversight Board, *About the PIAB*, <http://www.whitehouse.gov/administration/eop/piab/about>.

⁸ *See, e.g.*, Exec. Order No. 13462 (Feb. 29, 2008), *available at* <http://www.fas.org/irp/offdocs/eo/eo-13462.htm>.

⁹ John Solomon, *In Intelligence World, a Mute Watchdog*, WASH. POST, Jul. 15, 2007, *available at* <https://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html>.

¹⁰ *Id.*

¹¹ Charlie Savage, *President Weakens Espionage Oversight*, BOS. GLOBE, Mar. 14, 2008, *available at* http://www.boston.com/news/nation/washington/articles/2008/03/14/president_weakens_espionage_oversight/?page=full.

¹² *Id.*

violation and its eventual reporting to the IOB. When a violation was reported within the FBI internally, on average, six months still passed before the Bureau reported the violation to the IOB, despite the Bureau's requirement to report IOB violations on a quarterly basis. In light of these significant gaps between the occurrence of a violation and its eventual reporting to the IOB, it seems unlikely that the IOB diligently fulfilled its intelligence oversight responsibilities for most of the past decade.

After taking office, President Obama rolled back some of the Bush Administration's changes to the IOB's authority, but the function and effectiveness of the Board still remains in question. In an October 2009 executive order, President Obama largely reversed the changes made to the IOB's oversight authority, and nine appointments have been made to the larger President's Intelligence Advisory Board.¹³ Nevertheless, the White House has not disclosed the composition or membership, if any, of the IOB, which continues to call into question the legitimacy of current intelligence oversight efforts.

FBI INTELLIGENCE VIOLATIONS REPORTED TO THE IOB

As noted above, in EFF's review of nearly 2,500 pages of documents released by the FBI, EFF uncovered alarming trends in the Bureau's intelligence investigation practices from 2001 to 2008. The documents suggest the FBI's intelligence investigations have compromised the civil liberties of American citizens far more frequently, and to a greater extent, than was previously assumed. Broadly, these documents show that the FBI most frequently committed three types of intelligence violations — violations of internal oversight guidelines for conducting investigations; violations stemming from the abuse of National Security Letters; and violations of the Fourth Amendment, Foreign Intelligence

Four Categories of FBI Intelligence Violations

1. Violations of internal oversight guidelines—*over 1/3 of all violations reported*
2. Violations of National Security Letter powers—*almost 1/3 of all violations reported*
3. Violations of the Constitution, FISA and other laws—*1/5 of all violations reported*
4. Remainder—Unclear from redactions

¹³ Charlie Savage, *Obama Order Strengthens Spy Oversight*, N.Y. TIMES, Oct. 29, 2009, at A16, available at <https://www.nytimes.com/2009/10/30/us/politics/30intel.html>.

Surveillance Act (FISA), and other laws governing intelligence investigations. Also, based on statements made by government officials and the proportion of violations occurring in the released reports, EFF estimates the FBI may have committed as many as 40,000 intelligence investigation violations over the past ten years.

Violations of Internal Oversight Guidelines

The first category of violation occurring with the most frequency involved the FBI's failure to comply with internal oversight guidelines for conducting investigations. This type of violation ultimately resulted in investigations occurring without any meaningful oversight from either FBI Headquarters or the IOB. Of the reports filed with the IOB, violations of oversight guidelines accounted for over a third of all FBI violations.

When the FBI fails to comply with its own internal guidelines there can be no meaningful oversight.

The Attorney General Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG)¹⁴ set forth various reporting rules, investigative requirements, and classification regulations for FBI agents to follow when conducting intelligence investigations.¹⁵ Originally issued in 1976 in the wake of the Church Committee's revelations of frequent and serious FBI violations of citizens' rights, the Guidelines task the Attorney General with ensuring that all government intelligence operations occur with sufficient oversight and within the bounds of the Constitution and other federal laws.¹⁶ For example, the NSIG requires that, upon initiating a new intelligence investigation, an agent report the investigation to FBI Headquarters within a specified period. Other guidelines set requirements for annual reporting of investigations, for information sharing practices between agencies, and — depending on the stage of the investigation and the level of internal authorization — for the investigative techniques FBI agents may use. Broadly, the Guidelines are intended to protect American citizens' constitutional rights from intrusive and overreaching intelligence investigations.

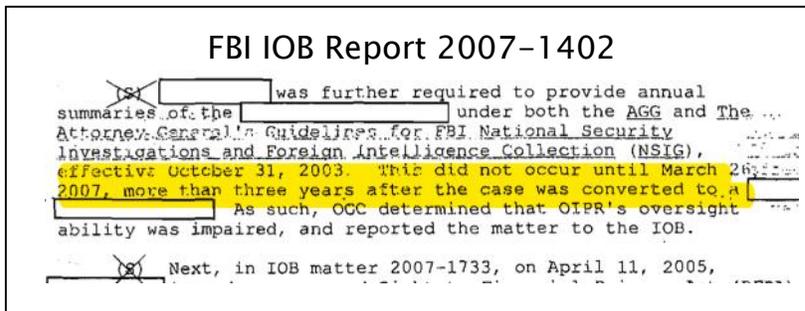
In 2006, Department of Justice Inspector General Glenn Fine reported to Congress on FBI compliance with the Attorney General's Guidelines for Domestic Investigations, a

¹⁴A previous version of the NSIG, the Attorney General's Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Collection ("FCIG") is referenced in some of the earlier released documents. The NSIG replaced the FCIG in October 2003.

¹⁵ A partially declassified version of the guidelines is available at <http://www.fas.org/irp/agency/doj/fbi/nsiguidelines.pdf>.

¹⁶ See ELECTRONIC PRIVACY INFORMATION CENTER, THE ATTORNEY GENERAL'S GUIDELINES, available at <http://epic.org/privacy/fbi/>.

distinct set of guidelines from the NSIG governing FBI domestic investigations.¹⁷ The OIG investigation revealed “significant non-compliance with the Guidelines.”¹⁸ EFF’s analysis demonstrates that the FBI’s non-compliance extends to the NSIG, as well: the FBI frequently violated its own internal oversight protocols for national security and intelligence investigations. These violations ranged from a failure to submit notification of the investigation of a US person to FBI Headquarters for three years,¹⁹ to a failure to report a violation within 14 days of its discovery,²⁰ to continuing to investigate a US person when the authority to do so had expired.²¹ In all cases involving violations of the



NSIG, though, the FBI only reported to the IOB when it determined the agency’s ability to supervise the investigation had been “substantially impaired.”

In a 2005 *Washington Post* article, a senior FBI official dismissed the severity of this type of violation, noting that the “vast majority of the potential [violations] reported have to do with administrative timelines and time frames for renewing orders.”²² But these guidelines are much more than mere “administrative timelines:” the NSIG exists in order to prevent intelligence agencies from invoking “national security” to monitor citizens engaging in constitutionally protected activities — *exactly* the type of monitoring the FBI was engaging in at the time.²³

Taken together, the FBI’s disregard for its own internal oversight requirements and the Bureau’s failure to timely report violations to the IOB undermined the safeguards

¹⁷ The FBI operates under two separate sets of guidelines issued by the Attorney General: one for domestic investigations, one for national security and intelligence investigations. For a thorough treatment of the gradual expansion of the Attorney General’s Domestic Guidelines, see EMILY BERMAN, BRENNAN CENTER FOR JUSTICE, DOMESTIC INTELLIGENCE: NEW POWERS, NEW RISKS (Jan. 2011), available at http://www.brennancenter.org/content/resource/domestic_intelligence_new_powers_new_risks/.

¹⁸ *Oversight of the Federal Bureau of Investigation: Hearing Before the Sen. Comm. on the Judiciary* (May 2, 2006) (statement of Glenn A. Fine, Inspector General, U.S. Department of Justice), available at <http://www.justice.gov/oig/testimony/0605.htm>.

¹⁹ FBI IOB Report 2007-1402, Appendix 1.

²⁰ FBI IOB Report 2001-46, Appendix 2.

²¹ FBI IOB Report 2003-25, Appendix 3.

²² Dan Eggen, *FBI Papers Indicate Intelligence Violations*, WASH. POST., Oct. 24, 2005, available at <https://www.washingtonpost.com/wp-dyn/content/article/2005/10/23/AR2005102301352.html>.

²³ See, e.g., DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI’S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS (September 2010), available at <http://www.justice.gov/oig/special/s1009r.pdf> (describing FBI surveillance of various American advocacy groups from 2001 to 2006).

established to protect civil liberties violations from occurring—the precise object of both the NSIG and the IOB.

Abuse of National Security Letters

In the reports disclosed to EFF, the second type of violation occurring with the most frequency involved FBI abuse of National Security Letters. These violations accounted for almost one-third of all reported violations. National Security Letters, or NSLs, are secret administrative subpoenas used by the FBI to obtain records from third-parties without any judicial review.²⁴ While NSLs have existed since the late-1970s, the USA PATRIOT Act greatly expanded the intelligence community's authority to issue NSLs. During the course of a terrorism or counterintelligence investigation, NSLs can be used to obtain just three types of records: (1) subscriber and “toll billing information” from telephone companies and “electronic communications services;”²⁵ (2) financial records from banks and other financial institutions;²⁶ and (3) consumer identifying information and the identity of financial institutions from credit bureaus.²⁷

The FBI's systemic abuse of NSLs has been well-documented — both by Justice Department investigations and through litigation and scrutiny of FBI practices by EFF. As noted above, in reports from 2007 and 2008, the Inspector General found that, between 2003 to 2006, the FBI may have committed as many as 6,400 violations of the FBI's NSL authority.²⁸ According to the 2008 Report, from 2003 to 2006, the FBI issued nearly 200,000 NSL requests; almost 60% of the 49,425 requests issued in 2006 were for investigations of U.S. citizens or legal aliens.²⁹

*The FBI issued
nearly 200,000
NSL requests
between 2003-
2006.*

²⁴ See Electronic Frontier Foundation, *National Security Letters*, <https://www.eff.org/issues/national-security-letters>.

²⁵ 18 U.S.C. § 2709.

²⁶ 12 U.S.C. § 3414.

²⁷ FBI has the authority to issue three different, but related, NSLs to credit agencies — an NSL pursuant to 15 U.S.C. § 1681(u)(a) for the names of financial institutions with which the subject has an account; an NSL pursuant to 15 U.S.C. 1681(u)(b) for consumer identifying information; and an NSL pursuant to 15 U.S.C. § 1681(v) for a full credit report. The FBI may only request a full credit report while investigating international terrorism cases.

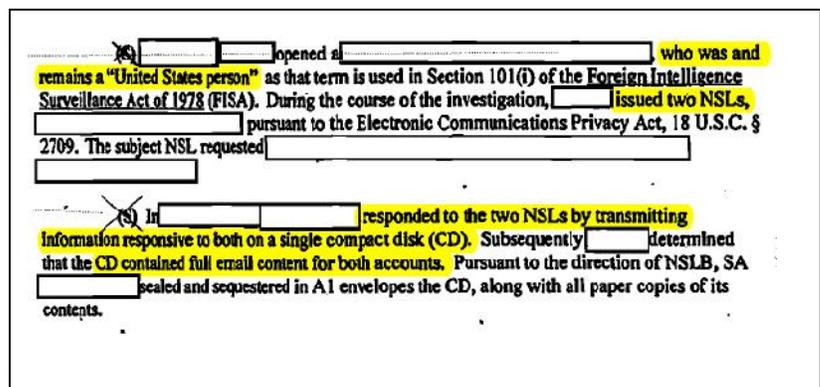
²⁸ See Jason Ryan, *FBI Search Abuses Could Number Thousands*, ABC NEWS, Apr. 16, 2008, available at <http://abcnews.go.com/TheLaw/DOJ/story?id=4661216&page=1>.

²⁹ DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (March 2008), available at <http://www.justice.gov/oig/special/s0803b/final.pdf>.

Earlier scrutiny of FBI practices by EFF also revealed abuses of the Bureau's NSL authority. Documents obtained in a response to a 2007 EFF FOIA request showed that the FBI issued an NSL to North Carolina State University to obtain educational records, in clear violation of the FBI's statutory authority.³⁰ EFF also filed a lawsuit challenging the legality of an NSL issued by the FBI to the Internet Archive. The government formally withdrew the NSL request in 2008.³¹

Analysis of the FBI's IOB reports released to EFF show that the Bureau committed violations involving NSLs for telephone and electronic communications records twice as often as it did for financial and credit records. While the FBI has publicly disclosed the *total* number of NSLs issued annually,³² the Bureau has refused to release the frequency with which the three individual types of NSLs issued. However, if the rate at which the FBI's NSL violations occurred is an indicator of the frequency with which the three types of requests were issued, then, on average, the FBI likely issued approximately 25,000 NSL requests for telephone and electronic communications records, 12,500 requests for financial records, and 12,500 requests for credit information annually from 2003 to 2006.

Perhaps most startling, however, was the frequency with which companies receiving NSLs — phone companies, internet providers, banks, or credit bureaus — contributed to the FBI's NSL abuse. In over half of all NSL violations reviewed by EFF, the private entity receiving the NSL either provided more information than requested or turned over information without receiving a valid legal justification from the FBI. Companies were all too willing to comply with the FBI's requests, and — in many cases — the Bureau readily incorporated the over-produced information into its investigatory databases.



For example, in a violation reported in 2006, the FBI requested email header information for two email addresses used by a U.S. person.³³ In response, the email service provider

³⁰ See Electronic Frontier Foundation, *Report on the Improper Use of an NSL to NC State University*, <https://www.eff.org/issues/foia/report-nsl-ncstate>.

³¹ See Electronic Frontier Foundation, *Internet Archive v. Mukasey*, <https://www.eff.org/cases/archive-v-mukasey>.

³² DEPARTMENT OF JUSTICE, OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FBI'S USE OF NATIONAL SECURITY LETTERS: ASSESSMENT OF CORRECTIVE ACTIONS AND EXAMINATION OF NSL USAGE IN 2006 (March 2008), available at <http://www.justice.gov/oig/special/s0803b/final.pdf>.

³³ FBI IOB Report 2006-246, Appendix 4.

returned two CDs containing the full content of all emails in the accounts. The FBI eventually (and properly) sequestered the CDs, notified the email provider of the overproduction, and re-issued an NSL for the originally requested header information; but, in response to the second NSL, the email provider *again* provided the FBI with the full content of all emails in the accounts.

Compounding the service providers’ problematic over-disclosure, the scope of the FBI’s authority to issue NSLs for electronic transactional records rests on unsettled and unclear legal grounds. The FBI’s NSL authority under the Electronic Communications Privacy Act (ECPA) allows the government to issue NSLs to traditional telephone service providers for non-content subscriber information and toll billing records — essentially, the name, address, length of service, and local and long distance call records.³⁴ ECPA also provides the authority to issue NSLs for “electronic communications transactional records.”³⁵ However, the exact scope of this remains unclear: according to the DOJ, “electronic communications transactional records” include “those categories of information parallel to . . . toll billing records for ordinary telephone service.”³⁶ What, exactly, “those categories of information” constitute — possibly including, for example, email “header” information, IP addresses, URLs, or other information — remains unclear.

Third parties, such as financial institutions or ISPs, responded to NSLs that lacked any legal justification.

Third-parties not only willingly cooperated with FBI NSLs when the legal justification was unclear, however: they responded to NSLs without any legal justification at all. In one instance, when requesting financial records from a bank under the Right to Financial Privacy Act, the FBI used language and statutory citations from ECPA — a statute entirely unrelated to financial records — for its legal authority; nevertheless, the financial institution complied with the FBI’s legally deficient request.³⁷ In another series of violations, the FBI improperly requested and received full credit reports on subjects of counterintelligence investigations.³⁸ The Fair Credit Reporting Act, the statute providing FBI authority to request credit information using an NSL, however, only provides that authority in terrorism investigations.³⁹ In other violations, the FBI failed to certify, as

³⁴ See 18 U.S.C. § 2709(a).

³⁵ *Id.*

³⁶ See Department of Justice, Office of Legal Counsel, Requests for Information under the Electronic Communications Privacy Act (November 2008) at 3 n. 3, available at <http://www.fas.org/irp/agency/doj/olc/ecpa.pdf>.

³⁷ FBI IOB Report 2007-718, Appendix 5.

³⁸ FBI IOB Report 2004-80, Appendix 6.

³⁹ See 15 U.S.C. § 1681(v).

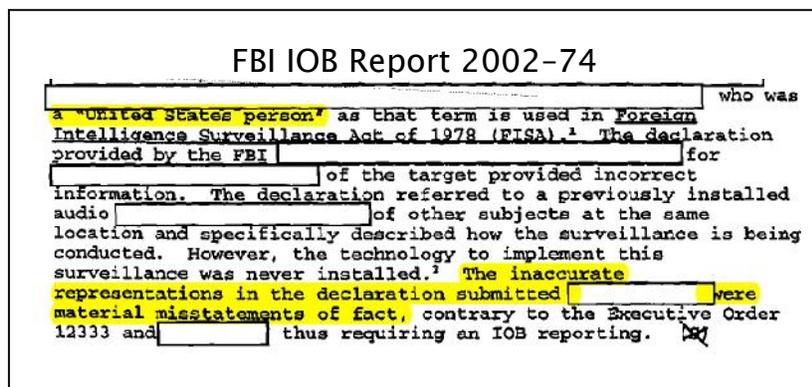
required by statute, that the NSL was relevant to a terrorism investigation and not being used to investigate constitutionally protected activities.⁴⁰ Again, despite the deficiency of the request, the third-party complied with the FBI's NSL.

The FBI's abuse of its NSL power has garnered much of the attention in the debate over the FBI's abusive intelligence practices. What has *not* received as much attention, however, is the unwillingness of companies and organizations to guard their clients' and users' sensitive, personal information in the face of these NSL requests — whether the request was legally justifiable or not. Undeniably, if the FBI had complied with the law, the vast majority of NSL violations would never have occurred. Nevertheless, many of the businesses and organizations with which Americans trust their most private information are not applying any scrutiny to unjustifiable requests from the FBI and are not responding to valid requests in a responsible manner.

Violations of the Constitution, FISA, and Other Legal Authorities

The third category of FBI intelligence violations reported to the IOB, accounting for almost 20% of all reports, are violations of the Constitution, the Foreign Intelligence Surveillance Act (FISA), and other federal laws governing criminal investigations and intelligence-gathering activities. The first two types of intelligence violations committed by the FBI — violations of the NSIG and NSL abuse — were readily susceptible to categorization: these violations occurred with great frequency, and the violations were often repetitive and largely similar. On the other hand, violations falling into the third category were, in general, unique, and often flagrant, violations of a variety of legal authorities.

Violations falling into this third category were consistently the most brazen and egregious violations. For example, in two separate incidents, the FBI reported to the IOB that its agents had made false statements in written declarations to courts.⁴¹ Another reported violation involved the FBI's use of improper evidence to



⁴⁰ FBI IOB Report 2007-1209, Appendix 7.

obtain grand jury subpoenas.⁴² Other violations involved FBI's use of a target's username and password to access and download account information⁴³ and a warrantless search of password-protected files.⁴⁴

Of the reports reviewed by EFF, however, this type of violation was also generally the most redacted. One four-page report (on average, most reports are only one or two paragraphs) is almost entirely redacted, with the exception of one paragraph that notes the "scope of [the FBI agent's] alleged offenses" warranted reporting to the IOB: the three pages detailing the offenses, however, are almost entirely redacted.⁴⁵ Moreover, solely from the documents provided to EFF, it is evident that the FBI is withholding information on an inconsistent and arbitrary basis. For example, one IOB report, which details the issuance of NSLs without proper authority in the wake of the attacks on September 11th, was inadvertently included twice in the FBI's document release: one is nearly entirely redacted; the other, almost entirely free from redactions.⁴⁶ Numerous documents throughout the FBI's release provide similar evidence of the agency's inconsistent and arbitrary practice of redacting and withholding documents.⁴⁷

While the reports documenting the FBI's abuse of the Constitution, FISA, and other intelligence laws are troubling, EFF's analysis is necessarily incomplete: it is impossible to know the severity of the FBI's legal violations until the Bureau stops concealing its most serious violations behind a wall of arbitrary secrecy.

TOTAL NUMBER OF VIOLATIONS FROM 2001 TO 2008

Both the frequency and type of violations revealed in the FBI's release to EFF are staggering. At a minimum, these documents already demonstrate the need for greater accountability and improved oversight mechanisms for American intelligence agencies. Yet, at the same time, the FBI continues to withhold critical information on the circumstances, rate of occurrence, and severity of these violations. And, if past experience is any guide, it is likely that the FBI is either withholding or failing to report many violations altogether.

⁴¹ FBI IOB Report 2002-72, Appendix 8; FBI IOB Report 2002-74, Appendix 9.

⁴² FBI IOB Report 2005-03, Appendix 10.

⁴³ FBI IOB Report 2007-1693, Appendix 11.

⁴⁴ FBI IOB Report 2006-224, Appendix 12.

⁴⁵ FBI IOB Report 2008-255, Appendix 13.

⁴⁶ FBI IOB Report 2001-69, Appendix 14.

⁴⁷ See Jennifer Lynch, *FBI Arbitrarily Covers up Evidence of Misconduct: Is this the Transparency Obama Promised?*, Electronic Frontier Foundation Deeplinks, available at <https://www.eff.org/deeplinks/2010/12/fbi-arbitrarily-covers-evidence-misconduct>.

In the absence of robust auditing and full disclosure from the Bureau, the only method for approximating the scope of the FBI's abusive intelligence practices is to extrapolate from information contained within these releases and public statements made by government officials. The IOB reports, themselves, provide some insight into the sheer number of FBI intelligence violations. In previous litigation, EFF fought the FBI to release the IOB matter numbers that accompany every IOB report. While not every IOB "matter" is ultimately reported to the IOB, the numbers provide some indication of the number of violations investigated by the FBI. Based on IOB matter numbers on the reports released to EFF, it is clear that, at minimum, the FBI investigated approximately 7,000 instances of alleged misconduct from 2001 to 2008.

The number of FBI intelligence violations since 9/11 could approach 40,000.

The actual number of violations that occurred from 2001 to 2008, however, is likely much higher. The Inspector General has acknowledged that as many as 6,400 potential NSL violations may have occurred between 2003-2006;⁴⁸ if the proportion of violations released to EFF is representative of all FBI intelligence violations during that time period, then the number of *total* violations during that four year time-period may have topped 17,000 — or an average of 4,250 serious intelligence violations per year. In the nine years since 2001, EFF estimates that total could approach 40,000 possible violations.⁴⁹

CONCLUSION

From 2001 to 2008, the FBI frequently and flagrantly violated laws intended to check abusive intelligence investigations of American citizens. While many believed the era of abusive FBI practices would end with the Bush Administration, there is little evidence that President Obama has taken significant measures to change past FBI practices. Two years into his term, the President has not publicly disclosed any appointments to the IOB,

⁴⁸ See Jason Ryan, *FBI Search Abuses Could Number Thousands*, ABC NEWS, Apr. 16, 2008, available at <http://abcnews.go.com/TheLaw/DOJ/story?id=4661216&page=1>.

⁴⁹ This figure is an estimate based, first, on the fact that a significant number of FBI violations went unreported, both internally and to the IOB; second, this estimate assumes the sample of violations reported to the IOB and released to EFF is representative of all violations that occurred, including those that went unreported; third, the estimate assumes violations occurred at the same rate over time. In the reports released to EFF, roughly 33% were violations of the NSIG, 33% were NSL violations, and 20% were other violations (the remaining violations were too heavily redacted to categorize). The estimate is based on an extrapolation from the OIG's estimate that 6,400 NSL violations occurred from 2003-2006. In the absence of robust FBI auditing and thorough oversight, however, estimates are the only reasonable method to approximate the scope of the FBI's investigatory misconduct.

and his campaign promise of unprecedented transparency within the executive branch has gone largely unfulfilled — especially within the intelligence community.

Congress, however, has an opportunity to remedy these abuses: portions of the USA PATRIOT Act expire in late February, and a bill has already been introduced in the House of Representatives to reauthorize it. Instead of simply rubber-stamping the intelligence community's continuing abuse of American's civil liberties, Congress should seize this opportunity to investigate the practices of the FBI and other intelligence agencies, and to demand greater accountability, disclosure, and reporting from these agencies. Until then, the FBI's pattern of misconduct will continue.

For further information on this Report, contact Mark Rumold, mark@eff.org, or Jennifer Lynch, jen@eff.org.

Appendix: IOB Reports

Appendix 1—IOB Report 2007-1402



U.S. Department of Justice

Federal Bureau of Investigation

~~SECRET~~

Office of the General Counsel

Washington, D.C. 20535

June 3, 2008

VIA SECURE FACSIMILE
AND U.S. MAIL

Homer S. Pointer, Counsel
Intelligence Oversight Board
Room 5020
New Executive Office Building
725 17th Street, N.W.
Washington, D.C. 20503
Secure Facsimile: [redacted]

COPY

Dear Mr. Pointer:

(U) This letter is in response to your request that the Federal Bureau of Investigation, Office of the General Counsel (OGC), clarify three of its recent reports to the Intelligence Oversight Board and the Office of the Director of National Intelligence. The three matters to which you seek clarification are: 2007-1402; 2007-1733; and 2007-2160.

(U) ~~(S)~~ In 2007-1402, the [redacted] Field Office opened a [redacted] of a United States person on [redacted]. The [redacted] was extended on [redacted] and converted to a [redacted] on [redacted] No. [redacted] notification of this investigation was provided to FBI Headquarters (FBIHQ) until [redacted].

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(U) ~~(S)~~ [redacted] of the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (AGG), effective March 8, 1999. However, once the investigation was

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(U) Derived From : FBI NSISCG 20080301
Declassify On: 06/03/2018

~~SECRET~~

DECLASSIFIED BY 65179DWH/p13
ON 05-08-2010

Cardozo-IOB-11

~~SECRET~~

[Redacted]

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(U) ~~(S)~~ [Redacted] was further required to provide annual summaries of the [Redacted] under both the AGG and The Attorney General's Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG), effective October 31, 2003. This did not occur until March 26, 2007, more than three years after the case was converted to a [Redacted]. As such, OGC determined that OIPR's oversight ability was impaired, and reported the matter to the IOB.

(U) ~~(S)~~ Next, in IOB matter 2007-1733, on April 11, 2005, [Redacted] issued an approved Right to Financial Privacy Act (RFPA) National Security Letter (NSL) to a financial institution for the subject's financial records from [Redacted]. The financial institution returned financial records for the time period requested, plus additional records prior to [Redacted]. [Redacted] analyzed the results and uploaded a summary to an FBI database. The data exceeding the scope of the NSL has since been sequestered and purged from the FBI database. [Redacted] was unaware of the need to report this matter as a potential IOB error until the Inspection Division (INSD) audit of March 2007.

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(U) ~~(S)~~ By agreement with the Counsel to the IOB, third party errors in the collection of information pursuant to an NSL are not reportable unless the FBI has compounded the error. Here, [Redacted] analyzed and uploaded the overproduction into an FBI database, thus compounding the error. Accordingly, OGC reported this matter to the IOB.

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(U) ~~(S)~~ OGC advised [Redacted]

(U) ~~(S)~~ Finally, in IOB matter 2007-2160, the [Redacted] Field Office [Redacted] reported that, on [Redacted] it opened a [Redacted] on a non-United States person. The [Redacted] expired on [Redacted]. Following the expiration of the [Redacted] on [Redacted]

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Appendix 3—IOB Report 2003-25

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(U) ~~(S)~~ In IOB matter 2003-04, the FBI initiated a [redacted] on a non-United States person. The [redacted] [redacted] Due to an administrative error, and after the [redacted] had expired, the FBI conducted an

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(U) ~~(S)~~ Finally, in IOB matter 2003-25, the FBI initiated a [redacted] on a United States person. The [redacted] expired on [redacted] Due to administrative error, and after the expiration of the [redacted] the FBI interviewed the subject of the inquiry on [redacted] Upon realizing that the [redacted] had expired, the FBI extended the investigation.

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(U) ~~(S)~~ [redacted]

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(U) Please do not hesitate to contact [redacted] or me if you have any questions regarding these or any other IOB matters.

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Sincerely,

Julie F. Thomas
Julie F. Thomas
Deputy General Counsel
National Security Law Branch

~~SECRET~~

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Cardozo-IOB-16

Appendix 4—IOB Report 2006-246

DATE: 06-30-2010
CLASSIFIED BY 65179/DMH/PLJ/LCW
REASON: 1.4 (c)
DECLASSIFY ON: 06-30-2035

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[redacted] DIVISION
IOB MATTER 2006-246 (U)

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(U) ~~(S)~~ The [redacted] Division reported this potential IOB matter involving unauthorized surveillance.

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(S) ~~(S)~~ [redacted] opened a [redacted] who was and remains a "United States person" as that term is used in Section 101(i) of the Foreign Intelligence Surveillance Act of 1978 (FISA). During the course of the investigation, [redacted] issued two NSLs, [redacted] pursuant to the Electronic Communications Privacy Act, 18 U.S.C. § 2709. The subject NSL requested [redacted]

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(U) ~~(S)~~ In [redacted] responded to the two NSLs by transmitting information responsive to both on a single compact disk (CD). Subsequently [redacted] determined that the CD contained full email content for both accounts. Pursuant to the direction of NSLB, SA [redacted] sealed and sequestered in A1 envelopes the CD, along with all paper copies of its contents.

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~~(S)~~ On [redacted] contacted [redacted] and advised regarding overproduction and requested verification of compliance with the limits of National Security Letters. In the interest of administrative purity, on [redacted] served [redacted] with another NSL, requesting [redacted]

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(S) ~~(S)~~ On [redacted] transmitted a CD to the FBI [redacted] Office. Once again information responsive to multiple NSLs was included on the CD.

(S) ~~(S)~~ On [redacted] after having the information separated by email account/NSL, [redacted] determined that once again [redacted] had provided full email content. Based upon advice of CDC [redacted] and NSLB SSA [redacted] and SA [redacted] took corrective action and ensured that the CDs, along with all paper copies of their contents, were sealed and sequestered in IA envelopes.

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(S) ~~(S)~~ Despite the fact that [redacted] limited the scope of the subject NSL to [redacted] [redacted] provided content information concerning an e-mail account. Thus, the FBI unintentionally received that content information not contemplated by the NSL. Such viewing of [redacted] was not authorized under the Electronic Communications Privacy Act, Foreign Intelligence Surveillance Act and/or E.O. 12333. Under these circumstances, it is OGC's opinion that the error, although inadvertent, must be reported to IOB.

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(U) OGC has referred this matter to the FBI's Inspection Division for action deemed appropriate.

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

Hofmann-IOB-666

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Appendix 5—IOB Report 2007-718

~~SECRET~~

DECLASSIFIED BY 65179 UCLP/PLG/JN
ON 07-01-2010

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] FIELD OFFICE
IOB MATTER 2007-718

(U) ~~(S)~~ The [REDACTED] Division reported on 02/23/2007 [REDACTED]

[REDACTED] a National Security Letter (NSL) was issued for financial records [REDACTED] under authority of the Electronic Communications Privacy Act rather than the Right to Financial Privacy Act. The NSL was approved in an EC which also cited the incorrect legal authority and did not articulate the facts supporting its issuance.

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(U) This matter has been reported to the FBI's Inspection Division for appropriate action.

Hofmann-IOB-1072

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~~SECRET~~

Appendix 6—IOB Report 2004-80

DECLASSIFIED BY 65179/DMH/PLJ/sdb
ON 06-30-2010

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER IOB 2004-80 (U)

(U)

~~(S)~~ Investigation of this IOB matter has determined that the [redacted] Field Office obtained consumer credit reports from two credit reporting companies in connection with an authorized counterintelligence investigation using a National Security Letter (NSL) that referred to Title 15, United States Code, Section 1681v, when in fact that section only permits the use of NSLs to request credit reports for authorized counterterrorism cases. Title 15, United States Code, Section 1681u, allows the FBI to use an NSL to obtain certain information from credit reporting agencies in authorized counterintelligence cases, specifically, the names and addresses of financial institutions at which the subject of the investigation maintains an account. In order for the FBI to obtain a credit report in a counterintelligence case, it must apply for an ex parte court order under the terms of Title 18, United States Code, Section 1681u(c).

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(U)

~~(S)~~ The credit reports that were procured from credit reporting companies by citing 15 U.S.C. §1681v were not properly obtained. Although the error in statutory citation appears to have been inadvertent, and the [redacted] office immediately retrieved and sealed the credit reports once the error was discovered, this matter has been referred to the FBI's Office of Professional Responsibility for such action as may be appropriate.

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~~Derived from: G-3
Declassify on: X25-1~~

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Appendix 7—IOB Report 2007-1209

DECLASSIFIED BY 65179\DMH\sdh
ON 05-05-2010

~~SECRET//20180131~~

(U)

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] FIELD OFFICE
IOB MATTER 2007-1209-NSL (U)

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~~(S)~~ During an authorized [REDACTED] [REDACTED] of a presumed U.S. person, [REDACTED] sent a National Security Letter (NSL) under the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2709. The NSL requested subscriber information and transactional records from the service provider. [REDACTED] did not, however, include in the NSL a certification that the information sought was relevant to an authorized investigation to protect against international terrorism and that the investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States. Notwithstanding the lack of certification, the service provider produced materials in response to the NSL.

(U) This matter is being reported because the field office's NSL did not comply with the requirements imposed by ECPA to obtain subscriber information and transactional records. Specifically, the NSL did not include the appropriate certification. The field office was instructed to sequester the NSL results. The [REDACTED] has expired; therefore, the field office cannot issue a curative NSL at this time. The field office must contact the service provider and ask whether the NSL results should be returned or destroyed, with appropriate documentation to the file.

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(U)

~~(S) Derived From: G-3
Declassify On: 11/30/2017~~

~~SECRET//20180131
Cardozo-IOB-271~~

Appendix 8—IOB Report 2002-72

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

DATE: 07-02-2010
CLASSIFIED BY 65179/DHH/plj/lcw
REASON: 1.4 (c)
DECLASSIFY ON: 07-02-2035

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER

[REDACTED] DIVISION AND THE

[REDACTED] DIVISION,

FBI HEADQUARTERS

IOB MATTER 2002-72 (U)

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As reported by the [REDACTED],
FBI Headquarters, on [REDACTED]

[REDACTED] . On [REDACTED]

[REDACTED]. In each of the declarations that accompanied the
Government's applications [REDACTED], the Government described
events that took place on [REDACTED], and stated,
in pertinent part, that "[REDACTED]

" This was incorrect. In fact, [REDACTED]

Additionally, a footnote
in the Government's [REDACTED] declaration indicated that

This, too, was incorrect. As stated above, [REDACTED]

These errors, detected on [REDACTED]
were repeated in all three declarations. They were reported [REDACTED]

on [REDACTED] and subsequently were briefed to [REDACTED].
They have also been reported to the
FBI's Office of Professional Responsibility for action deemed
appropriate.

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Derived from: G-3
Declassify on: X1

~~SECRET~~

APPROVED:

Crim. Inv.	Inspection	Training
CJS	Laboratory	Off. of EEO
Finance	National Sec.	Affairs
Director	Gen. Counsel	GPR
Deputy Director	Info. Reg.	Personnel
		Cong. Affs.

Hofmann 108-2374

MSL
10/10/02

Appendix 9—IOB Report 2002-74

DATE: 06-29-2010
CLASSIFIED BY 65179 DMH/plj
REASON: 1.4 (c)
DECLASSIFY ON: 06-29-2035

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] DIVISION AND
COUNTERTERRORISM DIVISION
2002-74 (U)

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(S) Investigation of this IOB matter has determined that, on [REDACTED] the [REDACTED] Division obtained an order, [REDACTED] who was a "United States person" as that term is used in Foreign Intelligence Surveillance Act of 1978 (FISA).¹ The declaration provided by the FBI [REDACTED] for [REDACTED] of the target provided incorrect information. The declaration referred to a previously installed audio [REDACTED] of other subjects at the same location and specifically described how the surveillance is being conducted. However, the technology to implement this surveillance was never installed.² The inaccurate representations in the declaration submitted [REDACTED] were material misstatements of fact, contrary to the Executive Order 12333 and [REDACTED] thus requiring an IOB reporting. ~~DS~~

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This matter has been referred to the FBI's Office of Professional Responsibility for action deemed appropriate. (U)

~~Derived from: G-3
Declassify on: K25-1~~

~~SECRET~~ APPROVED: *NSC/B/C/K/O*
jacobs

Crim. Inv.	Inspection	Training	
C&S	Laboratory	Off. of EEO	
Finance	National Sec.	Affairs	
Director	Gen. Counsel	OPR	Off. of Public &
Deputy Director	Info. Res.	Personnel	Cong. Affs.

¹ (U) The FISA is codified at 50 U.S.C. 1801 et seq. A "United States person" is defined in Section 101(i) of the FISA as: "a citizen of the United States, [or] an alien lawfully admitted for permanent residence"

² (U) The Office of Intelligence Policy and Review was timely notified of this error.

Hofmann-IOB-174

Appendix 10—IOB Report 2005-03

DATE: 06-30-2010
CLASSIFIED BY 65179/DNH/PLJ/sdb
REASON: 1.4 (c)
DECLASSIFY ON: 06-30-2035

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[redacted] FIELD OFFICE
IOB MATTER 2005-03 (U)

(S)

Review of this IOB matter has determined that on [redacted]
[redacted] opened a [redacted] on U.S. persons.
[redacted]
[redacted] provided
[redacted] and other [redacted] sections information derived from surveillance
that had been authorized pursuant to the [redacted]
[redacted] Electronic Communications (ECs) to
[redacted] clearly instructed that [redacted] information provided
could not be incorporated into any criminal affidavit, criminal court
proceedings, subpoenas, or for other legal or judicial purposes.
Despite the caveats to this effect contained in the ECs, the [redacted]
Division sought and obtained Federal Grand Jury Subpoenas (seeking
[redacted]
[redacted] based on [redacted] information. (S)

(U)

To prevent future IOB violations, [redacted] stated that the
squad supervisor would closely monitor Federal Grand Jury and
National Security Letter requests, and instruct the case agent to
review the web-based training regarding the handling of classified
information. Additionally, [redacted] instructed the case agent to
remove all information provided pursuant to the Federal Grand Jury
Subpoena from the case file, seal it in an envelope, and secure it in
the squad supervisor's safe. [redacted]

[redacted]
[redacted]
[redacted] Department of Justice (DOJ),
for delivery to [redacted]
and eventual destruction. (S)

This matter has been referred to the FBI's Inspection
Division for action deemed appropriate. (U)

~~(S)~~

~~Derived From : G-3
Declassify On: K25-1~~

~~SECRET~~

Hofmann-IOB-432

Appendix 11—IOB Report 2007-1693

DECLASSIFIED BY 65179DML/plj
ON 05-10-2010

~~SECRET//20180205~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] FIELD OFFICE
IOB MATTER 2007-1693 (U)

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(U)

[REDACTED]

(U)

[REDACTED]

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b7E

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[REDACTED]

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[REDACTED]

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(U)

[REDACTED] (S) [REDACTED]

[REDACTED] Based upon our analysis, in accordance with the reporting requirements of Section 2.4 of E.O. 12863, the CL's unauthorized activities of logging onto the target's [REDACTED] with the target's username and password, and downloading activity reports from the target's account must be reported to the IOB because the surveillance resulted in the unauthorized acquisition of information from a [REDACTED] [REDACTED] not authorized to be monitored under the Foreign Intelligence Surveillance Act or Executive Order 12333.

~~Derived From : G-3~~

~~Declassify on: 02/01/2018-301~~
~~Card 2018-301~~

~~SECRET//20180205~~

Appendix 12—IOB Report 2006-224

DATE: 06-30-2010
CLASSIFIED BY 65179/DMH/PLJ/LCV
REASON: 1.4 (c)
DECLASSIFY ON: 06-30-2035

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

~~SECRET/ORCON,NOFORN~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] DIVISION
IOB MATTER 2006-224(U)

(U) ~~(S)~~ The [REDACTED] Division reported this potential IOB matter involving unauthorized surveillance.

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(U) [REDACTED]

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(S) ~~(S/OC/NF)~~ On December 5, 2005, SA [REDACTED] was presented with information regarding the [REDACTED]

[REDACTED]

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[REDACTED] NSLB was promptly contacted.

(U) ~~(S/OC/NF)~~ Later on December 5, 2005, NSLB determined that the file could not be viewed without a court order because of the password protection. The file was sequestered, and all individuals receiving the file were told to sequester the information.

(U) ~~(S/OC/NF)~~ Emergency search authority was granted by the Attorney General on [REDACTED] for the FBI [REDACTED]

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b7E

(U) While neither the subject of the investigation, nor the sender of the email are US-PERS, because the server where the file was located is in the US, Fourth Amendment protections apply. Applicable decisional law holds that the password-protected file should not have been viewed without a specifically tailored order. As a consequence of opening a password-protected file, the FBI improperly obtained electronic data. Thus, the surveillance was not authorized under the Foreign Intelligence Surveillance Act or E.O. 12333.

OGC has referred this matter to the FBI's Inspection Division for action deemed appropriate. (U)

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

Hofmann-IOB-675

~~SECRET/ORCON,NOFORN~~

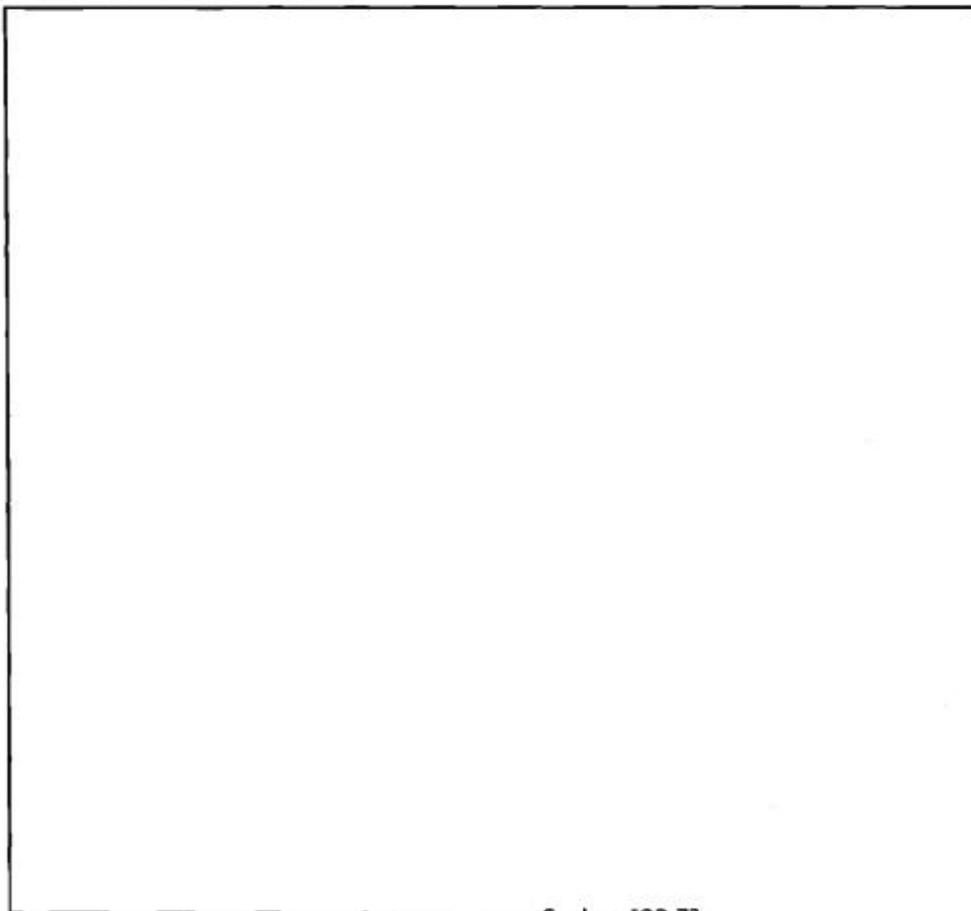
Appendix 13—IOB Report 2008-255

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED
DATE 05-06-2010 BY 65179/DMH/sdb

INTELLIGENCE OVERSIGHT BOARD MATTER 2008-255

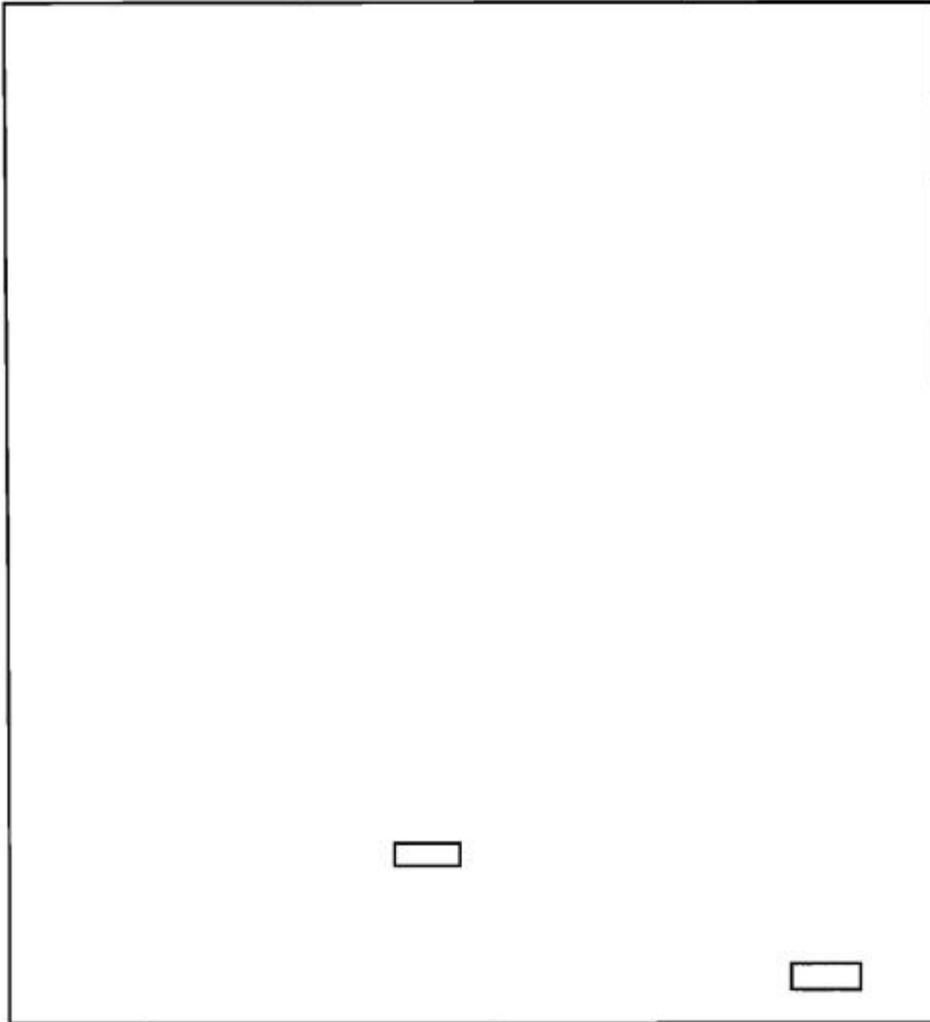
This adjudication relates to a series of alleged actions by FBI Special Agent [redacted] (SSA [redacted]) which were the subject of a Department of Justice Office of the Inspector General (OIG) and FBI internal investigation. The alleged facts of this case have already been brought to the attention of the IOB. On or about April 10, 2008, OGC orally notified the Counsel to the Intelligence Oversight Board of the details of this incident, and memorialized that report in the form of a letter dated April 15, 2008. This memorandum provides greater details about the matter.

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Cardozo-IOB-73



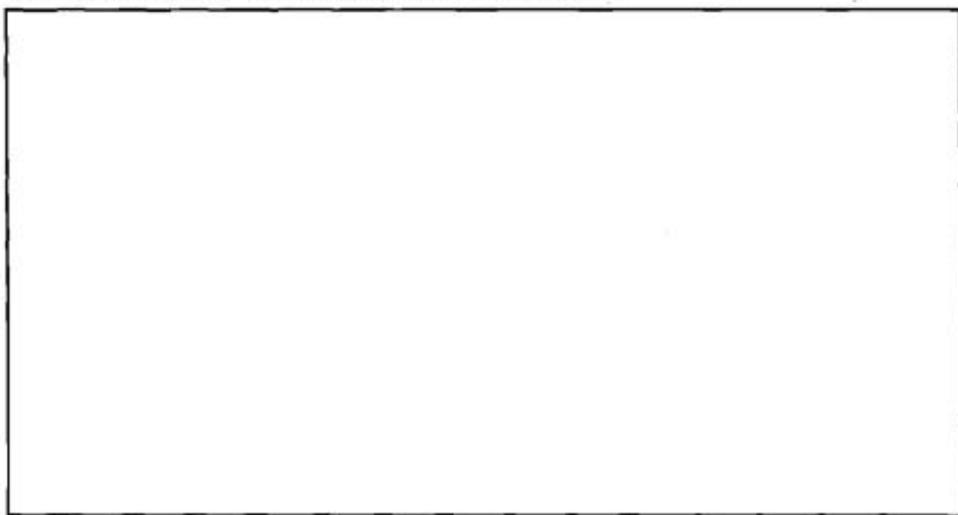
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b7E



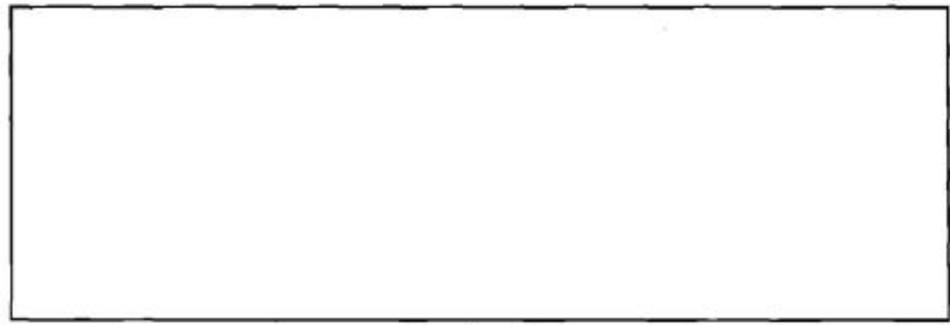
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b7C
b7E

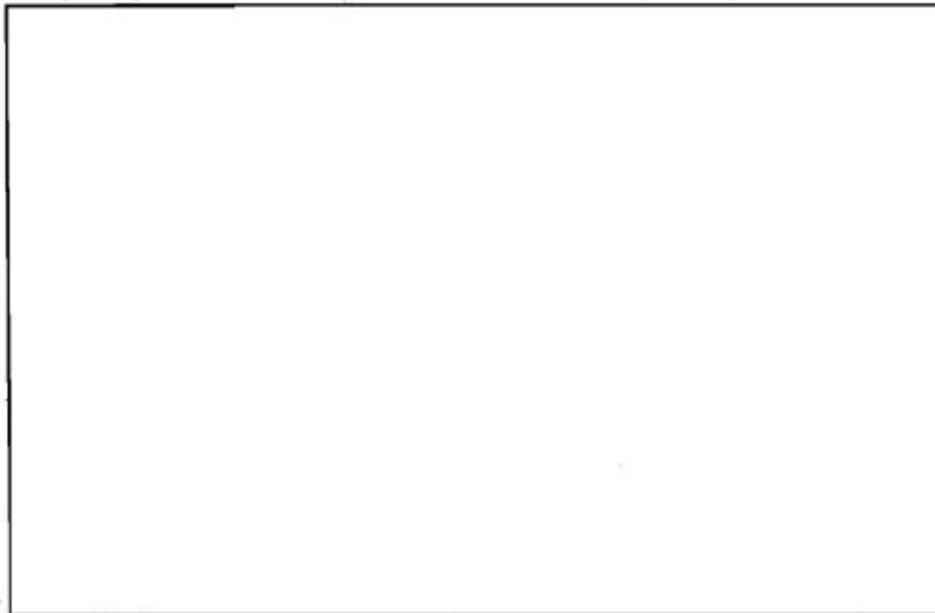


Lapses of internal FBI controls or FBI policies, without more, are generally not reportable to the IOB. In the instant case, however, OGC is reporting these FBI policy violations to the IOB based upon the scope of these alleged offenses and for the reasons described below.



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Further, OGC concludes that these matters may constitute a violation of the Attorney General Guidelines for FBI National Security Investigations and Foreign Intelligence Collection (NSIG), [redacted]

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Internal FBI review found while some of SSA [redacted]s



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OGC does not believe any other provisions of the NSIG are implicated by SSA [redacted]s alleged misconduct.

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Accordingly, OGC concludes that SSA [redacted]s alleged misconduct is reportable to the IOB pursuant to Executive Order 13462, the July 17, 2008 Intelligence Board Reporting Criteria, and the April 17, 2007 memorandum authored by Stephen J. Hadley, Assistant to the President for National Security Affairs.

Appendix 14—IOB Report 2001-69

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE.

DATE: 07-02-2010
CLASSIFIED BY: 65179/DMM/plj/lcw
REASON: 1.4 (c)
DECLASSIFY ON: 07-02-2035

~~SECRET~~

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[REDACTED] DIVISION
IOB MATTER 2001-69 (U)

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The Federal Bureau of Investigation (FBI) has
determined the [REDACTED] Division [REDACTED]

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(S)

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[REDACTED] as the legal authority to request
the information. The letters were signed by the Acting Special
Agent in Charge who, at that time, did not have legal authority
to issue National Security Letters. This matter has been
reported to the FBI's Office of Professional Responsibility for
action deemed appropriate. ~~NSL~~

~~Classified by: 39645 NCB/OGC~~
~~Reason: 1.5(c)~~
~~Declassify on: A1~~

~~SECRET~~

APPROVED:

Crim. Inv.	Inspection	Training
C.I.S.	Hofmann	108-2303
Finance	Gen. Inv.	Off. of EEO
Director	Gen. Coun.	Africa
Deputy Director	Info. Sys.	Off. of Public &
		Org. Affs.

NSL: myw

~~SECRET~~

DATE: 07-01-2010
CLASSIFIED BY 65179 DMH/plj/lcw
REASON: 1.4 (c)
DECLASSIFY ON: 07-01-2035

INTELLIGENCE OVERSIGHT BOARD (IOB) MATTER
[redacted] DIVISION
IOB MATTER 2001-69 (U)

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(S) The Federal Bureau of Investigation (FBI) has
determined the [redacted] Division obtained financial records
pertaining to a suspected terrorist without proper authority.
(S) In this regard, in [redacted] in conjunction with an on-going
international terrorism investigation of [redacted]
[redacted] Division personnel prepared and issued requests for
hotel records pertaining to the subject and his companion,
[redacted] and financial records pertaining to the subject.
The latter request was sent by facsimile within hours of the
attacks on the World Trade Center and the Pentagon to [redacted]
[redacted] requesting bank and credit card records.
Although the letters prepared by [redacted] only "requested"
information from the record-holders, those responsible for
preparing the correspondence incorrectly styled them as National
Security Letters (see 50 U.S.C. § 1851 and 12 U.S.C. § 3414) and
recited the certification language [redacted]
[redacted] as the legal authority to request
the information. The letters were signed by the Acting Special
Agent in Charge who, at that time, did not have legal authority
to issue National Security Letters. This matter has been
reported to the FBI's Office of Professional Responsibility for
action deemed appropriate. X

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~~Classified by: 22645, NSA/OGC
Reason: 1.5(c)
Declassify on: X1~~

~~SECRET~~

APPROVED:

Crim. Inv.	_____	Inspection	_____	Training	_____
CIS	_____	Laboratory	_____	Off. of EEO	_____
Recs. Mgmt.	_____	Ident. Sec.	_____	Off. of Int. Affs.	_____
Director	_____	Gen. Counsel	_____	Off. of Public &	_____
Deputy Director	_____	Info. Sys.	_____	Comm. Affs.	_____

A/M

NSL 11: 170

Hofmann-IOB-1143