Calendar No. 32

108TH CONGRESS *1st Session* | SENATE | REPORT 108–40

AMENDMENT OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 TO ALLOW SURVEILLANCE OF NON-UNITED STATES PERSONS WHO ENGAGE IN OR PREPARE FOR INTERNATIONAL TERRORISM WITHOUT AFFILIATION WITH A FOREIGN GOVERNMENT OR INTERNATIONAL TERRORIST GROUP

APRIL 29, 2003.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 113]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 113) to exclude United States persons from the definition of "foreign power" under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism, having considered the same, reports favorably thereon with amendment, and recommends that the bill as amended do pass.

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I. PURPOSE

The purpose of S. 113 is to amend the Foreign Intelligence Surveillance Act of 1978 (FISA), title 50, United States Code, to permit surveillance of so-called "lone wolf" foreign terrorists. S. 113 would allow a FISA warrant to issue upon probable cause that a non-United States person is engaged in or preparing for international terrorism, without requiring a specific showing that the non-United States person also is affiliated with a foreign power. By eliminating the requirement of a foreign-power link for FISA warrants in such cases, S. 113 would allow U.S. intelligence agencies to monitor foreign terrorists who, though not affiliated with a group or government, pose a serious threat to the people of the United States. In light of the significant risk of devastating attacks that can be carried out by non-United States persons acting alone, individual terrorists must be monitored and stopped, regardless of whether they operate in coordination with other individuals or organizations.

II. BACKGROUND ON THE LEGISLATION

THE 107TH CONGRESS

In the 107th Congress, S. 2586 was introduced on June 5, 2002 by Senators Schumer and Kyl. S. 2586 was identical to S. 113 as introduced in the 108th Congress.

THE 108TH CONGRESS

In the 108th Congress, Senator Kyl introduced S. 113 on January 9, 2003. Senate Judiciary Committee Chairman Hatch, Senator DeWine, and Senator Schumer were original co-sponsors of S. 113. Senator Chambliss and Senator Sessions became co-sponsors of S. 113, on January 28, and February 6, 2003, respectively.

III. NEED FOR THE LEGISLATION

S. 113 expands the Foreign Intelligence Surveillance Act of 1978 to permit surveillance or physical searches relating to non-United States persons where there is probable cause to believe that such individual is involved in international terrorism, without regard to whether such persons are affiliated with a foreign government or terrorist group.

The September 11, 2001 terrorist attacks on the people of the United States underscored the need for this legislation. Several weeks before those attacks, federal law enforcement agents identi-

fied one of the participants in that conspiracy as a suspected international terrorist. These agents sought to obtain a FISA warrant to search his belongings. One of the principal factors that prevented the issuance of such a warrant was FISA's requirement that the target be an agent of a foreign power. Even if federal agents had been able to demonstrate that this person was preparing to commit an act of international terrorism, based on the suspicious conduct that had first brought him to the attention of authorities, the agents would not have been able to obtain a warrant to search him absent a link to a foreign power. As a result, these federal agents spent three critical weeks before September 11 seeking to establish this terrorist's tenuous connection to groups of Chechen rebels—groups for whom we now know this terrorist was not working.

It is not certain that a search of this terrorist would necessarily have led to the discovery of the September 11 conspiracy. We do know, however, that information in this terrorist's effects would have linked him to two of the actual September 11 hijackers, and to a high-level organizer of the attacks who was captured in 2002 in Pakistan. And we do know that suspending the requirement of a foreign-power link for lone-wolf terrorists would have eliminated the major obstacle to federal agents' investigation of this terrorist—the need to fit this square peg into the round hole of the current FISA statute.[1]

FISA allows a specially designated court to issue an order authorizing electronic surveillance or a physical search upon probable cause that the target of the warrant is "a foreign power or an agent of a foreign power." 50 U.S.C. § 1805(a)(3)(A), § 1824(a)(3)(A). The words "foreign power" and "agent of a foreign power" are defined in § 1801 of FISA. "Foreign power" includes "a group engaged in international terrorism or activities in preparation therefor," § 1801(a)(4), and "agent of a foreign power" includes any person who "knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power." § 1801(b)(2)(C).

Requiring that targets of a FISA warrant be linked to a foreign government or international terrorist organization may have made sense when FISA was enacted in 1978; in that year, the typical FISA target was a Soviet spy or a member of one of the hierarchical, military-style terror groups of that era. Today, however, the United States faces a much different threat. The United States is confronted not only by specific groups or governments, but by a movement of Islamist extremists. This movement does not maintain a fixed structure or membership list, and its adherents do not always advertise their affiliation with this cause. Moreover, in response to the United States' efforts to fight terrorism around the

[1] In their joint additional views, Senators Leahy and Feingold express some confusion as to why the investigation of the suspected 20th September 11 hijacker was impeded by FISA's current requirement that every suspected international terrorist also be shown to be an agent of a foreign power. Senators Leahy and Feingold suggest that the F.B.I. had "all the evidence it needed to procure" a warrant for this individual. To the extent that Senators Leahy and Feingold refer to a FISA warrant, it would appear that they do not appreciate the meaning of the term "agent" as employed by FISA. The current FISA's "agent" requirement, and its effect on the investigation of the September 11 conspiracy, were described by the FBI in a September 24, 2002 joint hearing before the Intelligence Committees. The relevant passages from that hearing are attached as Appendix A to this report.

world, this movement increasingly has begun operating in a more decentralized manner.[2]

The origins and evolution of the Islamist terrorist threat, and the difficulties posed by FISA's current framework, were described in detail by Spike Bowman, the Deputy General Counsel of the FBI, at a Senate Select Committee on Intelligence hearing on the predecessor to S. 113. Mr. Bowman testified:

> When FISA was enacted, terrorism was very different from what we see today. In the 1970s, terrorism more often targeted individuals, often carefully selected. This was the usual pattern of the Japanese Red Army, the Red Brigades and similar organizations listed by name in the legislative history of FISA. Today we see terrorism far more lethal and far more indiscriminate than could have been imagined in 1978. It takes only the events of September 11, 2001, to fully comprehend the difference of a couple of decades. But there is another difference as well. Where we once saw terrorism formed solely around organized groups, today we often see individuals willing to commit indiscriminate acts of terror. It may be that these individuals are affiliated with groups we do not see, but it may be that they are simply radicals who desire to bring about destruction.
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> * * * * * * *
>
> [W]e are increasingly seeing terrorist suspects who appear to operate at a distance from these [terrorists] organizations. In perhaps an oversimplification, but illustrative nevertheless, what we see today are (1) agents of foreign powers in the traditional sense who are associated with some organization or discernible group (2) individuals who appear to have connections with multiple terrorist organizations but who do not appear to owe allegiance to any one of them, but rather owe allegiance to the International Jihad movement and (3) individuals who appear to be personally oriented toward terrorism but with whom there is no known connection to a foreign power.
>
> This phenomenon, which we have seen * * * growing for the past two or three years, appears to stem from a so-

[2] Senator Leahy has included with his additional views an appendix with a 37-page report prepared by Senators Leahy, Grassley and Specter critiquing the FBI's pre-September 11 intelligence activities and the FBI in general, which itself is accompanied by a substantial appendix of exhibits. Senator Leahy previously has introduced the same document into the Congressional Record. On February 27, 2003, Chairman Hatch presented to Senator Leahy a letter identifying numerous inaccuracies, errors, and apparent misunderstandings in Senator Leahy's personal report. We include Chairman Hatch's letter as Appendix B to this report.

Senators Leahy and Feingold also suggest that more information about U.S. intelligence agencies' surveillance of suspected terrorists and other counterintelligence activities should be made public. The Department of Justice previously has indicated to Senator Leahy that the disclosures that he recommends would reveal sensitive information about U.S. anti-terrorism efforts to terrorist organizations. A copy of the Department's letter to Senator Leahy is included in Appendix C to this report.

Senators Leahy and Feingold also question the propriety of FISA investigations that extend to public libraries, raising the specter of J. Edgar Hoover. The Department of Justice previously has explained to Senator Leahy in responses to written questions the relevant legal standards governing FISA investigations, and why some investigations lead to public libraries. The Department has indicated, for example, that some FBI offices "followed up on leads concerning e-mail and Internet use information about specific [September 11] hijackers from computers in public libraries." We include the relevant Department of Justice responses to written questions in Appendix D to this report.

cial movement that began at some imprecise time, but certainly more than a decade ago. It is a global phenomenon which the FBI refers to as the International Jihad Movement. By way of background we believe we can see the contemporary development of this movement, and its focus on terrorism, rooted in the Soviet invasion of Afghanistan.

* * * * * * *

During the decade-long Soviet/Afghan conflict, anywhere from 10,000 to 25,000 Muslim fighters representing some forty-three countries put aside substantial cultural differences to fight alongside each other in Afghanistan. The force drawing them together was the Islamic concept of "umma" or Muslim community. In this concept, nationalism is secondary to the Muslim community as a whole. As a result, Muslims from disparate cultures trained together, formed relationships, sometimes assembled in groups that otherwise would have been at odds with one another[,] and acquired common ideologies. * * *

Following the withdrawal of the Soviet forces in Afghanistan, many of these fighters returned to their homelands, but they returned with new skills and dangerous ideas. They now had newly acquired terrorist training as guerrilla warfare [had been] the only way they could combat the more advanced Soviet forces.

* * * * * * *

Information from a variety of sources repeatedly carries the theme from Islamic radicals that expresses the opinion that we just don't get it. Terrorists world-wide speak of jihad and wonder why the western world is focused on groups rather than on concepts that make them a community.

* * * * * * *

The lesson to be taken from [how Islamist terrorists share information] is that al-Qaida is far less a large organization than a facilitator, sometimes orchestrator of Islamic militants around the globe. These militants are linked by ideas and goals, not by organizational structure.

* * * * * * *

The United States and its allies, to include law enforcement and intelligence components worldwide[,] have had an impact on the terrorists, but [the terrorists] are adapting to changing circumstances. Speaking solely from an operational perspective, investigation of these individuals who have no clear connection to organized terrorism, or tenuous ties to multiple organizations, is becoming increasingly difficult.

The current FISA statute has served the nation well, but the International Jihad Movement demonstrates the need to consider whether a different formulation is needed to address the contemporary terrorist problem.

The Committee notes that when FISA was enacted in 1978, the Soviet invasion of Afghanistan had not yet occurred and both Iran and Iraq were considered allies of the United States. The world has

changed. It is the responsibility of Congress to adapt our laws to these changes, and to ensure that law enforcement and intelligence agencies have at their disposal all of the tools they need to combat the terrorist threat currently facing the United States. The Committee concludes that enactment of S. 113's modification of FISA to facilitate surveillance of lone-wolf terrorists would further Congress's fulfillment of this responsibility.[3]

IV. HEARINGS

S. 2586 was originally referred to the Senate Select Committee on Intelligence. It held one hearing on S. 2586 on July 31, 2002, and then referred the matter to the Judiciary Committee for consideration.

Testimony at the July 31, 2002 hearing was received from six witnesses: Senator Charles E. Schumer of New York; Mr. James Baker, Counsel for Intelligence Policy, Officer of Intelligence and Policy Review, Department of Justice; Mr. Marion E. (Spike) Bowman, Deputy General Counsel, Federal Bureau of Investigation; Mr. Fred Manget, Deputy General Counsel, Office of General Counsel, Central Intelligence Agency; Mr. Jerry Berman, Executive Director, Center for Democracy and Technology; and Professor Clifford Fishman, Columbus School of Law, Catholic University of America.

V. COMMITTEE CONSIDERATION

THE SENATE JUDICIARY COMMITTEE CONSIDERATION DURING THE 107TH CONGRESS

The Committee on the Judiciary did not consider S. 2586 in executive session during the 107th Congress.

THE SENATE JUDICIARY COMMITTEE CONSIDERATION DURING THE 108TH CONGRESS

The Committee on the Judiciary, with a quorum present, met in open and executive session on March 6, 2003, to consider S. 113.

Senator Kyl offered a substitute amendment on behalf of himself, Senator Schumer, Senator Biden, and Senator DeWine, which the

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[3] In a separate statement of additional views on S. 113, Senator Feingold expresses concerns about the constitutionality of allowing surveillance of lone-wolf terrorists pursuant to FISA. He suggests that by allowing searches of persons involved in international terrorism without regard to whether such persons are affiliated with foreign powers, S. 113 "writes out of the statute a key requirement necessary to the lawfulness of such searches." In order to address Senator Feingold's concerns, the Committee attaches as Appendix E to this report a letter presenting the views of the U.S. Department of Justice on S. 2586, the predecessor bill to S. 113.

The Department of Justice's letter provides a detailed analysis of the relevant Fourth Amendment jurisprudence, concluding that the bill's authorization of lone-wolf surveillance would "satisfy constitutional requirements." The Department emphasizes that anyone monitored pursuant to the lone-wolf authority would be someone who, at the very least, is involved in terrorist acts that "transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." (Quoting 50 U.S.C. § 1801(c)(3).) Therefore, a FISA warrant obtained pursuant to this authority necessarily would "be limited to collecting foreign intelligence for the 'international responsibilities of the United States, and the duties of the Federal Government to the States in matters involving foreign terrorism.'" (Quoting *United States* v. *Dugan,* 743 F.2d 59, 73 (2d Cir. 1984).) The Department concludes "the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for S. 2568." The Department additionally notes that when FISA was enacted it was understood to allow surveillance of groups as small as two or three persons. The Department concludes that "[t]he interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group * * * and a case involving a single terrorist."

Committee adopted by unanimous consent. The substitute amendment made three changes to S. 113. First, the amendment changed the location within FISA of S. 113's authorization of surveillance and searches of lone-wolf terrorists. As originally introduced, S. 113 would have amended 50 U.S.C. § 1801(a), which defines the term "foreign power" for purposes of FISA. The Kyl-Schumer-Biden-DeWine amendment modified S. 113 so that it amends § 1801(b), which defines the term "agent of a foreign power" for purposes of FISA. Placing the authorization to monitor lone-wolf terrorists in subsection 1801(b) does not alter the substance of S. 113.

The second change made by the substitute amendment was to subject the lone-wolf authorization to the same sunset provision that applies to the USA PATRIOT Act of 2001 (Public Law 107–56; 115 Stat. 295).

The third change made by the substitute amendment was to change the stated purpose of the bill. The original stated purpose of both S. 113 and its predecessor, S. 2586—"to exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 related to international terrorism"—does not accurately describe the purpose of the bill, and appears to reflect a misunderstanding of its effect. The new stated purpose supplied by the substitute amendment—"to expand the Foreign Intelligence Surveillance Act of 1978 ('FISA') to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group"—is that suggested by the Department of Justice in its July 31, 2002 Statement of Administration Policy on S. 2586.

The only other amendment to S. 113 that was considered by the Judiciary Committee was an amendment offered by Senator Feingold. This proposal would have amended FISA to allow discovery of applications and affidavits filed in support of a FISA warrant under the standards and procedures of the Classified Information Procedures Act of 1980 (18 U.S.C. App.).

The Committee, on a 11–4 rollcall vote, defeated the Feingold amendment. The vote on the amendment was as follows:

Tally: 4 Yes, 11 No, 4 Not Voting

Republicans (10)

N Hatch (R–Utah)
N Grassley (R–Iowa)
N Specter (R–Pa.)
N Kyl (R–Ariz.)
N DeWine (R–Ohio)
N Sessions (R–Ala.)
N Graham (R–S.C.)
N Craig (R–ID)
N Chambliss (R–Ga.)
N Cornyn (R–Tex.)

Democrats (9)

Y Leahy (D–Vt.)
Y Kennedy (D–Mass.)
NV Biden (D–Del.)
NV Kohl (D–Wis.)
NV Feinstein (D–Calif.)
Y Feingold (D–Wis.)

N Schumer (D–N.Y.)
Y Durbin (D–Ill.)
NV Edwards (D–N.C.)

The Committee then voted 19–0 to report favorably S. 113 to the full Senate with a recommendation that the bill do pass.

VI. Section-by-Section Analysis and Discussion

Section 1. Treatment as agent of a foreign power under Foreign Intelligence Surveillance Act of 1978 of non-United States persons who engage in international terrorism without affiliation with international terrorist groups

Section 1 includes two paragraphs. Paragraph (a) amends the definition of an "agent of a foreign power," 50 U.S.C. §1801(b)(1), to include in a new subparagraph (C) a non-United States person who "engages in international terrorism or activities in preparation therefor." Paragraph (b) subjects this new authority to the sunset provision in section 224 of the USA PATRIOT Act of 2001 (Public Law 107–56; 115 Stat. 295), which terminates the authority on December 31, 2005.

VII. Congressional Budget Office Cost Estimate

In compliance with paragraph 11(a) of rule XXVI of the standing rules of the Senate, the Committee sets forth, with respect to the bill, S. 113, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974.

S. 113—A bill to amend the Foreign Intelligence Surveillance Act of 1978 to cover individuals, other than United States persons, who engage in international terrorism without affiliation with an international terrorist group

CBO estimates that implementing S. 113 would not result in any significant cost to the federal government. Enacting S. 113 could affect direct spending and receipts, but CBO estimates that any such effects would not be significant. S. 113 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on state, local, or tribal governments.

S. 113 would amend the Foreign Intelligence Surveillance Act of 1978 to expand the definition of "agent of a foreign power." Under the bill, this designation would include persons (other than U.S. persons) who engage in or prepare for international terrorist acts on their own. This would enable the Attorney General to use electronic surveillance to acquire information on such individuals. The provisions of S. 113 would expire on December 31, 2005.

Implementing the bill could result in more successful investigations and prosecutions in certain cases involving terrorist acts. CBO expects that any increase in costs for law enforcement, court proceedings, or prison operations would not be significant because of the small number of cases likely to be affected. Any such additional costs would be subject to the availability of appropriated funds.

Because those prosecuted and convicted under S. 113 could be subject to criminal fines, the federal government might collect additional fines if the bill is enacted. Collections of such fines are recorded in the budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and later spent. CBO expects that any additional receipts and direct spending would be negligible because of the small number of cases involved.

VIII. Regulatory Impact Statement

In compliance with paragraph 11(b)(1), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 113 will not have a significant regulatory impact.

IX. Additional Views

ADDITIONAL VIEWS OF SENATOR LEAHY AND SENATOR FEINGOLD

In times of national stress there is an understandable impulse for the government to seek more power. Sometimes more power is needed, and sometimes it is not. Appropriate checks on new grants of power to government, and meaningful oversight of how that power is used, are always warranted however. While we supported reporting S. 113 from the Judiciary Committee because of the sunset provision that was added at the markup, we remain concerned that this measure will not ensure that the government's FISA power is being used as effectively or appropriately as is necessary.

Sunset provisions, such as the one that we and other Democratic Senators helped add during our markup, allow us to adopt such measures as S. 113 on a temporary basis. Without strong means to conduct oversight, however, there is no way to determine whether those tools are working, and whether they are being properly used. We hope that we can consider such important oversight mechanisms as are contained in the Leahy-Grassley-Specter-Feingold Domestic Surveillance Oversight Act of 2003, S. 436, in order to reinforce and make more meaningful a system of checks and balances for expansions of power such as those in S. 113.

After the September 11 attacks, many from both sides of the aisle worked together in a bipartisan fashion and with unprecedented speed to craft and enact the USA PATRIOT Act, which enhanced the government's surveillance powers. Since that time, however, we have had a difficult time in gaining cooperation from the Department of Justice in our bipartisan oversight efforts to evaluate how those powers are being used.

Now, as we consider S. 113—and as we hear of Administration plans to unveil a proposed sequel to the USA PATRIOT Act, which is being developed without bipartisan consultation—it is vital for us also to examine and understand how federal agencies are using the power that they already have. We must answer two questions:

> First, is that power being used effectively? The American people want to feel safer, but, more than that, they want to be safer; they want and need results, not rhetoric.
>
> Second, is that power being used appropriately, so that our liberties are not sacrificed, so that the openness of our society and our government are preserved, and so that our tax dollars are not squandered?

Unfortunately, the FBI and the Department of Justice have either been unwilling or unable to help us to answer these basic questions. Moreover, the information that we have gleaned on our

own through our bipartisan oversight efforts has not inspired confidence.

Last month, Senators Grassley, Specter and Leahy released a detailed report based on the oversight that the Judiciary Committee conducted in the 107th Congress ("FISA Implementation Failures Report," or "FIF Report"). While it is not a report of the Committee because it was released after Senator Hatch had assumed the chair, the FIF report distills our bipartisan findings and conclusions from numerous hearings, classified briefings and other oversight activities in the 107th Congress.

The Committee's oversight work demonstrated the pressing need for reform of the FBI. In particular, the FIF Report focused on the FBI's failures in implementing FISA, the very law that S. 113 seeks to further amend. That FIF Report is being included as Attachment A to these views, because it bears so directly on some of the claims made about the urgency of passing S. 113, and the continuing need for proper oversight checks to balance such proposals. (See Attachment A).

The Administration's response to our bipartisan oversight report has been to dismiss it as "old news" relating to problems that are all already fixed. In short, "everything is fine" at the FBI and they plan to do nothing to respond to the systemic problems identified and described in the Specter-Grassley-Leahy report. Despite the need for Congress to understand how today's FISA statute, as amended by the USA PATRIOT Act, is being used and interpreted by federal agencies, Congress, while being kept in the dark, is being asked instead to expand the FISA statute still further.

This bill, S. 113, adopts a "quick fix" approach. With catchy monikers like the "Moussaoui fix" and the "lone wolf" bill, it is aimed at making Americans feel safer, but it does not address the chronic problems that actually plague the effectiveness of our intelligence gatherers. The rationales justifying this bill have shifted over time as well.

In many ways, S. 113 seems to be a legislative change in search of a rationale. First, we were told that this amendment to FISA would have allowed the FBI to obtain a warrant before 9–11 to search the computer and belongings of Zacarias Moussaoui. Then, after it became clear from the Joint Intelligence Committee investigation and our bipartisan Judiciary Committee oversight, spearheaded by Senators Specter and Grassley, that the FBI had all the evidence it needed to procure such a warrant had they only understood the proper legal standard and properly analyzed that information, the rationale changed. Next, we were told that the bill was necessary to conduct surveillance of "lone wolf terrorists," who purportedly operate in isolation. Next, after it became clear that few, if any, international terrorists work alone and that existing criminal tools such as Title III were sufficient to handle those rare cases, we were told that the measure was necessary because it was hard to prove the connection between terrorists.

Now, in this report, the implication is revived that the FBI's pre-9/11 failures were due in large part to problems with the law, but

in a vague manner.[1] The Committee Report even goes so far as to opaquely offer that "Iran and Iraq were considered allies of the United States" in 1978 as yet another rational supporting passage of S. 113. It is difficult to understand precisely what relevance such facts might have to a FISA change dealing exclusively with persons who have no ties whatsoever to any foreign government. It appears, however, that the search for a rationale to support this bill—and one that can be put forth without any meaningful oversight of FISA's actual implementation—continues in full force. When the sunset on this measure arrives we will need stronger rationales than this to justify its extension.

The evidence outlined in the FIF Report, accompanying these views as Attachment A, and coauthored by Senators Specter, Grassley and Leahy, persuasively and completely rebuts that claim. The FBI was not properly trained, manned, or equipped to fight organized terrorism before 9/11. We do not know the scope of S. 113, which is why the addition of the sunset provision is so important. What we do know about S. 113 is that it will not fix the real problems that plagued the FBI before 9/11 and that continue at the FBI now—poor training, inadequate information analysis, headquarters bottlenecks, and a culture that punishes internal dissent.[2] In private briefings, even FBI representatives have said that they do not need this change in the law in order to protect against terrorism. They are getting all the warrants they want under the current law.

What is needed more than S. 113 is internal reform spurred by the kind of increased oversight structure set forth in the Domestic Surveillance Oversight Act of 2003, S. 436. That bill, which Senator Leahy introduced with Senators Grassley and Specter, would provide for increased reporting on how the government is using its domestic surveillance powers. It would allow us to monitor trends so we can know whether more surveillance is being focused on Americans than on non-U.S. persons. It would end the secret case law that has hampered the implementation of FISA over the last 24 years. It would allow us to follow up on reports that the FBI is reviving the long discredited practice from the Hoover days of monitoring public and school libraries. This is the type of information that we will need in order to assess whether further changes in the law are required, and also whether renewal or modification of the provisions already enacted is warranted.

We are all against terrorism. The unanswered question is whether the Congress will take real steps to ensure that the FBI and DOJ are not underusing, overusing or misusing the power that they already have and which we expanded in the USA PATRIOT Act. We must write fewer blank checks to the Executive Branch

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[1] In another section, however, the Committee Report all but concedes that this measure is no "Moussaoui fix," when it states, "It is not certain that it would have been possible to obtain a FISA warrant to search [Moussaoui] even if S. 113 had been enacted prior to the September 11 attacks." One also wonders, if this was indeed the true reason for the FBI's pre 9/11 woes, why the Administration did not request this FISA amendment as part of our USA PATRIOT Act legislation after the attacks.

[2] Indeed, only recently the FBI Director followed the recommendation of a DOJ Inspector General report and disciplined the FBI's most senior internal affairs officer, the Assistant Director for the Office of Professional Responsibility, for his mishandling of a whistleblower matter involving John Roberts, who gave important testimony to this Committee criticizing the FBI in the last Congress.

and instead focus more on ensuring that our constitutional system of checks and balances is enforced.

Another issue that must be closely examined is resource allocation. We need to know whether the continued expansion of FISA into the criminal arena will dilute its effectiveness as a foreign intelligence tool. The Senate Select Committee on Intelligence, through a letter written by the Chairman, had earlier asserted concurrent jurisdiction over this bill. Now, however, there is some move towards that Committee ceding exclusive jurisdiction over this FISA measure to the Judiciary Committee.

Whatever committee considers these matters, however, must carefully consider whether the changes proposed in S. 113, which remove FISA totally from its link to foreign powers, will result in the diversion of scarce counter terrorism resources away from intelligence gathering and into cases that could just as easily be prosecuted using the ample tools existing resources available in the criminal justice system. We must ensure that while we allow more flexibility in FISA's use (subject to a sunset), FISA continues in practice to be used for gathering foreign intelligence, not as merely another tool in exclusively criminal cases. A mechanism to protect that link to foreign intelligence would be a welcome addition to this proposal, and worth serious consideration.

If the Administration does insist on increasing its use of FISA for cases traditionally prosecuted as criminal matters, we should reconsider whether more of the basic due process protections of our criminal justice system should also be made applicable. For instance, Senator Leahy and others supported an amendment offered in Committee by Senator Feingold that would have required that the criminal discovery rules used for classified material under the Classified Information Procedures Act (CIPA) also be used for FISA materials. In the first 24 years of its existence, no FISA application of even a portion of such an application has been provided to a criminal defendant in discovery. While that rule may be defensible when criminal prosecution is an unintended byproduct of FISA surveillance, it is neither fair nor appropriate when criminal prosecution is the goal from the outset. It is especially difficult to defend in cases where the alleged terrorist is working alone, the very cases that S. 113 seeks to bring under the FISA rubric. More discussion by the Judiciary Committee of this and other aspects of FISA is merited. Without more fulsome oversight protections, measures such as S. 113 provide the illusion of security without actually making Americans safer.

Attachment A

FBI OVERSIGHT IN THE 107TH CONGRESS BY THE SENATE JUDICIARY COMMITTEE: FISA IMPLEMENTATION FAILURES—AN INTERIM REPORT BY SENATORS PATRICK LEAHY, CHARLES GRASSLEY, AND ARLEN SPECTER, FEBRUARY 2003

I. EXECUTIVE SUMMARY AND CONCLUSIONS

Working in a bipartisan manner in the 107th Congress, the Senate Judiciary Committee conducted the first comprehensive oversight of the FBI in nearly two decades. That oversight was aimed

not at tearing down the FBI but at identifying any problem areas as a necessary first step to finding constructive solutions and marshaling the attention and resources to implement improvements. The overarching goal of this oversight was to restore confidence in the FBI and make the FBI as strong and as great as it must be to fulfill this agency's multiple and critical missions of protecting the United States against crime, international terrorism, and foreign clandestine intelligence activity, within constitutional and statutory boundaries.

Shortly after the Committee initiated oversight hearings and had confirmed the new Director of the FBI, the Nation suffered the terrorist attacks of September 11, 2001, the most serious attacks on these shores since Pearl Harbor. While it is impossible to say what could have been done to stop these attacks from occurring, it is certainly possible in hindsight to say that the FBI, and therefore the Nation, would have benefitted from earlier close scrutiny by this Committee of the problems the agency faced, particularly as those problems affected the Foreign Intelligence Surveillance Act ("FISA") process. Such oversight might have led to corrective actions, as that is an important purpose of oversight.

In the immediate aftermath of the attacks, the Congress and, in particular, the Senate Judiciary Committee responded to demands by the Department of Justice (DOJ) and the FBI for greater powers to meet the security challenges posed by international terrorism. We worked together to craft the USA PATRIOT Act to provide such powers. With those enhanced powers comes an increased potential for abuse and the necessity of enhanced congressional oversight.

Our oversight has been multi-faceted. We have held public hearings, conducted informal briefings, convened closed hearings on matters of a classified nature, and posed written questions in letters in connection with hearings to the DOJ and FBI.[1] Although our oversight has focused primarily on the FBI, the Attorney General and the DOJ have ultimate responsibility for the performance of the FBI. Without both accountability and support on the part of the Attorney General and senior officials of the DOJ, the FBI cannot make necessary improvements or garner the resources to implement reforms.

At times, the DOJ and FBI have been cooperative in our oversight efforts. Unfortunately, however, at times the DOJ and FBI have either delayed answering or refused to answer fully legitimate oversight questions. Such reticence only further underscores the need for continued aggressive congressional oversight. Our constitutional system of checks and balances and our vital national security concerns demand no less. In the future, we urge the DOJ and FBI to embrace, rather than resist, the healthy scrutiny that legitimate congressional oversight brings.

One particular focus of our oversight efforts has been the Foreign Intelligence Surveillance Act (FISA). This report is focused on our FISA oversight for three reasons. *First,* the FISA is the law governing the exercise of the DOJ's and FBI's surveillance powers inside the United States to collect foreign intelligence information in

[1] This report is limited to non-classified information and has been submitted to the Department of Justice and FBI for a security review prior to its release and they have agreed that it contains no classified information.

the fight against terrorism and, as such, is vitally important to our national security. *Second,* the concerns revealed by our FISA oversight highlight the more systemic problems facing the FBI and the importance of close congressional oversight and scrutiny in helping to provide the resources and attention to correct such problems before they worsen. *Third,* members of this Committee led the effort to amend key provisions of the FISA in the USA PATRIOT Act, and the sunset or termination of those amendments in four years makes it imperative that the Committee carefully monitor how the FISA changes are being implemented.

This report is in no way intended to be a comprehensive study of what did, or did not, "go wrong" before the 9/11 attacks. That important work was commenced by the Joint Intelligence Committee in the 107th Congress and will be continued by the National Commission on Terrorist Attacks (the "9/11 Commission") established by an act of Congress at the end of the last session. The focus of this report is different than these other important inquiries. We have not attempted to analyze each and every piece of intelligence or the performance of each and every member of the Intelligence Community prior to the 9/11 attacks. Nor have we limited our inquiry to matters relating only to the 9/11 attacks. Rather, we have attempted, based upon an array of oversight activities related to the performance of the FBI over an extended period of time, to highlight broader and more systemic problems within the DOJ and FBI and to ascertain whether these systemic shortcomings played a role in the implementation of the FISA prior to the 9/11 attacks.

The FISA provides a statutory framework for electronic and other forms of surveillance in the context of foreign intelligence gathering. These types of investigations give rise to a tension between the government's legitimate national security interests, on the one hand, and, on the other hand, constitutional safeguards against unreasonable government searches and seizures and excessive government intrusion into the exercise of free speech, associational, and privacy rights. Congress, through legislation, has sought to strike a delicate balance between national security and constitutionally protected interests in this sensitive arena.

The oversight review this Committee has conducted during the 107th Congress has uncovered a number of problems in the FISA process: a misunderstanding of the rules governing the application procedure, varying interpretations of the law among key participants, and a break-down of communication among all those involved in the FISA application process. Most disturbing is the lack of accountability that has permeated the entire application procedure.

Our FISA oversight—especially oversight dealing with the time leading up to the 9/11 attacks—has reinforced the conclusion that the FBI must improve in the most basic aspects of its operations. Following is a list of our most important conclusions:

• FBI Headquarters did not properly support the efforts of its field offices in foreign intelligence matters. The role of FBI Headquarters in national security investigations is to "add value" in two ways: by applying legal and practical expertise in the processing of FISA surveillance applications and by integrating relevant infor-

mation from all available intelligence sources to evaluate the significance of particular information and to supplement information from the field. In short, Headquarters' role is to know the law and "connect the dots" from multiple sources both inside and outside the FBI. The FBI failed in this role before the 9/11 attacks. In fact, the bureaucratic hurdles erected by Headquarters (and DOJ) not only hindered investigations but contributed to inaccurate information being presented to the FISA Court, eroding the trust in the FBI of the special court that is key to the government's enforcement efforts in national security investigations.

• Key FBI agents and officials were inadequately trained in important aspects of not only FISA, but also fundamental aspects of criminal law.

• In the time leading up to the 9/11 attacks, the FBI and DOJ had not devoted sufficient resources to implementing the FISA, so that long delays both crippled enforcement efforts and demoralized line agents.

• The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA. Much more information, including all unclassified opinions and operating rules of the FISA Court and Court of Review, should be made public and/or provided to the Congress.

• The FBI's failure to analyze and disseminate properly the intelligence data in the agency's possession rendered useless important work of some of its best field agents. In short, the FBI did not know what it knew. While we are encouraged by the steps commenced by Director Mueller to address this problem, there is more work to be done.

• The FBI's information technology was, and remains, inadequate to meet the challenges facing the FBI, and FBI personnel are not adequately trained to use the technology that they do possess. We appreciate that Director Mueller is trying to address this endemic problem, but past performance indicates that close congressional scrutiny is necessary to ensure that improvements continue to be made swiftly and effectively.

• A deep-rooted culture of ignoring problems and discouraging employees from criticizing the FBI contributes to the FBI's repetition of its past mistakes in the foreign intelligence field. There has been little or no progress at the FBI in addressing this culture.

It is important to note that our oversight and conclusions in no way reflect on the fine and important work being done by the vast majority of line agents in the FBI. We want to commend the hard-working special agents and supervisory agents in the Phoenix and Minneapolis field offices for their dedication, professionalism, and initiative in serving the American people in the finest traditions of the FBI and law enforcement. Indeed, one of our most basic conclusions, both with respect to FISA and the FBI generally, is that institutional and management flaws prevent the FBI's field agents from operating to their full potential.

Although the DOJ and FBI have acknowledged shortcomings in some of these areas and begun efforts to reform, we cannot stress

strongly enough the urgency of this situation. The pace of improvement and reform must quicken.

We are issuing this interim public report now so that this information is available to the American people and Members of Congress as we evaluate the implementation of the USA PATRIOT Act amendments to the FISA and additional pending legislation, including the FBI Reform Act. We also note that many of the same concerns set forth in this report have already led to legislative reforms. Included in these was the bipartisan proposal, first made in the Senate, to establish a cabinet level Department of Homeland Security, a proposal that is already a legislative reality. Our oversight also helped us to craft and pass, for the first time in 20 years, the 21st Century Department of Justice appropriations Authorization Act, P.L. 107–296, designed to support important reforms at the Department of Justice and the FBI. In addition, concerns raised by this Committee about the need for training on basic legal concepts, such as probable cause, spurred the FBI to issue an electronic communication on September 16, 2002, from the FBI's Office of the General Counsel to all field offices explaining this critical legal standard.

Additionally, this report may assist the senior leadership of the DOJ and FBI, and other persons responsible for ensuring that FISA is used properly in defending against international terrorists.

II. OVERVIEW OF FBI OVERSIGHT IN THE 107TH CONGRESS

A. The Purposes of FBI Oversight: Enhancing Both Security and Liberty

Beginning in the summer of 2001 and continuing through the remainder of the 107th Congress, the Senate Judiciary Committee conducted intensive, bipartisan oversight of the FBI. The purpose of this comprehensive oversight effort was to reverse the trend of the prior decades, during which the FBI operated with only sporadic congressional oversight focused on its handling of specific incidents, such as the standoffs at Ruby Ridge, Idaho, or Waco, Texas, and the handling of the Peter Lee and Wen Ho Lee espionage cases. It was the view of both Democrats and Republicans on the Judiciary Committee that the FBI would benefit from a more hands-on approach and that congressional oversight would help identify problems within the FBI as a first step to ensuring that appropriate resources and attention were focused on constructive solutions. In short, the goal of this oversight was to ensure that the FBI would perform at its full potential. Strong and bipartisan oversight, while at times potentially embarrassing to any law enforcement agency, strengthens an agency in the long run. It helps inform the crafting of legislation to improve an agency's performance, and it casts light on both successes and problems in order to spur agencies to institute administrative reforms of their own accord. In short, the primary goal of FBI oversight is to help the FBI be as great and effective as it can be.

So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence

that these abuses have come after extended periods when the public and the Congress did not diligently monitor the FBI's activities. Even when agencies such as the FBI operate with the best of intentions (such as protecting our nation from foreign threats such as Communism in the 1950s and 1960s and fighting terrorism now), if left unchecked, the immense power wielded by such government agencies can lead them astray. Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and the FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable. In this way, congressional oversight plays a critical role in our democracy.

The importance of the dual goals of congressional oversight—improving FBI performance and protecting liberty—have been driven home since the 9/11 attacks. Even prior to the terrorist attacks, the Judiciary Committee had begun oversight and held hearings that had exposed several longstanding problems at the FBI, such as the double standard in discipline between line agents and senior executive officials. The 9/11 attacks on our country have forever redefined the stakes riding upon the FBI's success in fulfilling its mission to fight terrorism. It is no luxury that the FBI perform at its peak level—it is now a necessity.

At the time, the increased powers granted to the FBI and other law enforcement agencies after 9/11 attacks, in the USA PATRIOT Act, which Members of this Committee helped to craft, and through the actions of the Attorney General and the President, have made it more important than ever that Congress fulfills its role in protecting the liberty of our nation. Everyone would agree that winning the war on terrorism would be a hollow victory indeed if it came only at the cost of the very liberties we are fighting to preserve. By carefully overseeing the DOJ's and FBI's use of its broad powers, Congress can help to ensure that the false choice between fundamental liberty and basic security is one that our government never takes upon itself to make. For these reasons, in the post-9/11 world, FBI oversight has been, and will continue to be, more important than ever.

B. Judiciary Committee FBI Oversight Activities in the 107th Congress

1. Full Committee FBI Oversight Hearings

Beginning in July 2001, after Senator Leahy became chairman, the Senate Judiciary Committee held hearings that focused on certain longstanding and systemic problems at the FBI. These included hearings concerning: (1) the FBI's antiquated computer systems and its belated upgrade program; (2) the FBI's "circle the wagons" mentality, wherein those who report flaws in the FBI are punished for their frankness; and (3) the FBI's flawed internal disciplinary procedures and "double standard" in discipline, in which line FBI agents can be seriously punished for the same misconduct that only earns senior FBI executives a slap on the wrist. Such flaws were exemplified by the disciplinary actions taken (and not taken) by the FBI and DOJ after the incidents at Waco, Texas, and Ruby Ridge, Idaho, and the apparent adverse career effects experi-

enced by FBI agents participating in those investigations who answered the duty call to police their own.

The Committee's pre-9/11 FBI oversight efforts culminated with the confirmation hearings of the new FBI Director, Robert S. Mueller, III. Beginning on July 30, 2001, the Committee held two days of extensive hearings on Director Mueller's confirmation and closely questioned Director Mueller about the need to correct the information technology and other problems within the FBI. In conducting these hearings, Committee Members understood the critical role of the FBI Director in protecting our country from criminal, terrorist, and clandestine intelligence activities and recognized the many challenges facing the new Director.

Director Mueller was questioned very closely on the issue of congressional oversight, engaging in four rounds of questioning over two days. In response to one of Senator Specter's early questions, Director Mueller stated *"I understand, firmly believe in the right and the power of Congress to engage in its oversight function. It is not only a right, but it is a duty."*[2]

In response to a later question, Director Mueller stated:

> I absolutely agree that Congress is entitled to oversight of the ongoing responsibilities of the FBI and the Department of Justice. You mentioned at the outset the problems that you have had over a period of getting documents in ongoing investigations. And as I stated before and I'll state again, I think it is incumbent upon the FBI and the Department of Justice to attempt to accommodate every request from Congress swiftly and, where it cannot accommodate or believes that there are confidential issues that have to be raised, to bring to your attention and articulate with some specificity, not just the fact that there's ongoing investigation, not just the fact that there is an ongoing or an upcoming trial, but with specificity why producing the documents would interfere with either that trial or for some other reason or we believed covered by some issue of confidentiality.[3]

Incoming Director Mueller, at that time, frankly acknowledged that there was room for improvement in these areas at the FBI and vowed to cooperate with efforts to conduct congressional oversight of the FBI in the future.

Director Mueller assumed his duties on September 4, 2001, just one week before the terrorist attacks. After the terrorist attacks, there was a brief break from FBI oversight, as the Members of the Judiciary Committee worked with the White House to craft and pass the USA PATRIOT Act. In that new law, the Congress responded to the DOJ's and FBI's demands for increased powers but granted many of those powers only on a temporary basis, making them subject to termination at the end of 2005. The "sunset" of the increased FISA surveillance powers reflected the promise that the Congress would conduct vigilant oversight to evaluate the FBI's

[2] Hearing before the Senate Committee on the Judiciary, "Confirmation Hearing on the Nomination of Robert S. Mueller, III to be Director of the Federal Bureau of Investigation," 107th Congress, 2nd Session 69 (July 30–31, 2001) (emphasis added).

[3] *Id.*, at p. 89.

performance both before and after 9/11. Only in that way could Congress and the public be assured that the DOJ and FBI needed the increased powers in the first place, and were effectively and properly using these new powers to warrant extension of the sunset.

Passage of the USA PATRIOT Act did not solve the longstanding and acknowledged problems at the FBI. Rather, the 9/11 attacks created a new imperative to remedy systemic shortcomings at the FBI. Review of the FBI's pre-9/11 performance is not conducted to assess blame. The blame lies with the terrorists. Rather, such review is conducted to help the FBI prevent future attacks by not repeating the mistakes of the past. Thus, the enactment of the USA PATRIOT Act did not obviate the need to oversee the FBI; it augmented that need.

Within weeks of passage of the USA PATRIOT Act, the Senate Judiciary committee held hearings with Senior DOJ officials on implementation of the new law and other steps that were being taken by the Administration to combat terrorism. The Committee heard testimony on November 28, 2001, from Assistant Attorney General Michael Chertoff and, on December 6, 2001, from Attorney General Ashcroft. In response to written questions submitted in connection with the latter hearing, DOJ confirmed that shortly after the USA PATRIOT Act had been signed by the President on October 26, 2001, DOJ began to press the congress for additional changes to relax FISA requirements, including expansion of the definition of "foreign power" to include individual, non-U.S. persons engaged in international terrorism. DOJ explained that this proposal was to address the threat posed by a single foreign terrorist without an obvious tie to another person, group, or state overseas. Yet, when asked to "provide this Committee with information about specific cases that support your claim to need such broad new powers," DOJ was silent in its response and named no specific cases showing such a need, nor did it say that it could provide such specificity even in a classified setting.[4] In short, DOJ sought more power but was neither unwilling or unable to provide an example as to why.

Beginning in March 2002, the Committee convened another series of hearings monitoring the FBI's performance and its efforts to reform itself. On March 21, 2002, the Judiciary Committee held a hearing on the DOJ Inspector General's report on the belated production of documents in the Oklahoma City bombing case. That hearing highlighted longstanding in the FBI;s information technology and training regarding the use of, and access to, records. It also highlighted the persistence of a "head-in-the-sand' approach to problem, where shortcomings are ignored rather than addressed and the reporting of problems is discouraged rather than encouraged.

On April 9, 2002, the Committee held a hearing on the Webster Commission's report regarding former FBI Agent and Russian spy Robert Hansen's activities. That hearing exposed a deep-seated cultural bias against the importance of security at the FBI. One important finding brought to light at that hearing was the highly inappropriate handling of sensitive FISA materials in the time after

[4] Transcript, pp. 31–32 (emphasis added).

the 9/11 attacks. In short, massive amounts of the most sensitive and highly classified materials in the FBI's possession were made available on an unrestricted basis to nearly all FBI employees. Even more disturbing, this action was taken without proper consultation with the FBI's own security officials.

On May 8, 2002, the Judiciary Committee held an oversight hearing at which FBI Director Mueller and Deputy Attorney General Thompson testified regarding their efforts to reshape the FBI and the DOJ to address the threat of terrorism. It was at this hearing that the so-called "Phoenix Memorandum" was publicly discussed for the first time. Director Mueller explained in response to one question:

> [T]he Phoenix electronic communication contains suggestions from the agent as to steps that should be taken, or he suggested taking to look at other flight schools. . . . He made a recommendation that we initiate a program to look at flight schools. That was received at Headquarters. It was not acted on by September 11. I should say in passing that even if we had followed those suggestions at that time, it would not, given what we know since September 11, have enabled us to prevent the attacks of September 11. *But in the same breath I should say that what we learned from instances such as that is much about the weaknesses of our approach to counterterrorism prior to September 11.*[5]

In addition, Director Mueller first discussed at this hearing that FBI agents in Minnesota had been frustrated by Headquarters officials in obtaining a FISA warrant in the Zacharias Moussaoui investigation before the 9/11 attacks, and that one agent seeking the warrant had said that he was worried that Moussaoui would hijack an airplane and fly it into the World Trade center.[6]

On June 6, 2002, the Committee held another hearing at which Director Mueller testified further regarding the restructuring underway at the FBI. Significantly, that hearing also provided the first public forum for FBI Chief Division Counsel Coleen Rowley of the Minneapolis Division to voice constructive criticism about the FBI. Her criticisms, the subject of a lengthy letter sent to Director Mueller on May 21, 2002, which was also sent to Members of Congress, echoed many of the issues raised in this Committee's oversight hearings. Special Agent Rowley testified about "careerism" at the FBI and a mentality at FBI Headquarters that led Headquarters agents to more often stand in the way of field agents than to support them. She cited the Moussaoui case as only the most high profile instance of such an attitude. Special Agent Rowley also described a FBI computer system that prevented agents from accessing their own records and conducting even the most basic types of searches. In short, Special Agent Rowley's testimony reemphasized the importance of addressing the FBI's longstanding problems, not hiding from them, in the post-9/11 era.

As the head of the Department of Justice as a whole, the Attorney General has ultimate responsibility for the performance of the

[5] Transcript, pp. 31–32 (emphasis added).
[6] Transcript, May 8, 2002, pp. 61–62.

FBI. On July 25, 2002, the Judiciary Committee held an oversight hearing at which Attorney General Ashcroft testified. The Committee and the Attorney General engaged in a dialogue regarding the performance of the DOJ on many areas of interest, including the fight against terrorism. Among other things discussed at this hearing were the Attorney General's plans to implement the Terrorism Information and Prevention System (TIPS), which would have enlisted private citizens to monitor "suspicious" activities of other Americans. After questioning on the subject, Attorney General Ashcroft testified that he would seek restrictions on whether and how information generated through TIPS would be retained. Later, as part of the Homeland Security legislation, TIPS was prohibited altogether.

On September 10, 2002, the Committee held an oversight hearing specifically focusing on issues related to the FISA. Leading experts from the DOJ, from academia, and from the civil liberties and national security legal communities participated in a rare public debate on the FISA. That hearing brought before the public an important discussion about the reaches of domestic surveillance using FISA and the meaning of the USA PATRIOT Act. In addition, through the efforts of the Judiciary Committee, the public learned that this same debate was already raging in private. The FISA Court had rejected the DOJ's proposed procedure for implementing the USA PATRIOT Act, and the FISA Court of Review was hearing its first appeal in its 20-year-plus existence to address important issues regarding these USA PATRIOT Act amendments to the FISA. The Committee requested that the FISA Court of Review publicly release an unclassified version of the transcript of the oral argument and its opinion, which the Court agreed to do and furnished to the Committee. Thus, only through the bipartisan oversight work of the Judiciary Committee was the public first informed of the landmark legal opinion interpreting the FISA and the USA PATRIOT Act amendments overruling the FISC's position, accepting some of the DOJ's legal arguments, but rejecting others.

These are only the full Judiciary Committee hearings related to FBI oversight issues in the 107th Congress. The Judiciary Committee's subcommittees also convened numerous, bipartisan oversight hearings relating to the FBI's performance both before and after 9/11.

2. Other Oversight Activities: Classified Hearings, Written Requests, and Informal Briefings

The Judiciary Committee and its Members have fulfilled their oversight responsibilities through methods other than public hearings as well. Particularly with respect to FISA oversight, Members of the Judiciary Committee and its staff conducted a series of closed hearings and briefings, and made numerous written inquiries on the issues surrounding both the application for a FISA search warrant of accused international terrorist Zacharias Moussaoui's personal property before the 9/11 attacks and the post-9/11 implementation of the USA PATRIOT Act. As with all of our FBI oversight, these inquiries were intended to review the perform-

ance of the FBI and DOJ in order to improve that performance in the future.

The Judiciary Committee and its Members also exercised their oversight responsibilities over the DOJ and the FBI implementation of the FISA through written inquiries, written hearing questions, and other informal requests. These efforts included letters to the Attorney General and the FBI Director from Senator Leahy on November 1, 2001, and May 23, 2002, and from Senators Leahy, Specter, and Grassley on June 4, June 13, July 3, and July 31, 2002. In addition, these Members sent letters requesting information from the FISA Court and FISA Court of Review on July 16, July 31, and September 9, 2002. Such oversight efforts are important on a day-to-day basis because they are often the most efficient means of monitoring the activities of the FBI and DOJ.

3. DOJ and FBI Non-Responsiveness

Particularly with respect to our FISA oversight efforts, we are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Spector to ask the Attorney General directly, "how do we communicate with you and are you really too busy to respond?" [7]

Two clear examples of such reticence on the part of the DOJ and the FBI relate directly to our FISA oversight efforts. First, Chairman Sensenbrenner and Ranking Member Conyers of the House Judiciary Committee issued a set of 50 questions on June 13, 2002, in order to fulfill the House Judiciary Committee's oversight responsibilities to monitor the implementation of the USA PATRIOT Act, including its amendments to FISA. In connection with the July 25, 2002, oversight hearing with the Attorney General, Chairman Leahy posed the same questions to the Department on behalf of the Senate Judiciary Committee. Unfortunately, the Department refused to respond to the Judiciary Committee with answers to many of these legitimate questions. Indeed, it was only after Chairman Sensenbrenner publicly stated that he would subpoena the material that the Department provided any response at all to many of the questions posed, and to date some questions remain unanswered. Senator Leahy posed a total of 93 questions, including the 50 questions posed by the leadership of the House Judiciary Committee. While the DOJ responded to 56 of those questions in a series of letters on July 29, August 26, and December 23, 2002, thirty-seven questions remain unanswered. In addition, the DOJ attempted to respond to some of these requests by providing information not to the Judiciary Committees, which had made the request, but to the Intelligence Committees. Such attempts at forum shopping by the Executive Branch are not a productive means of facilitating legitimate oversight.

[7] Hearing of the Senate Judiciary Committee: Oversight of the Department of Justice, July 25, 2002, Transcript, p. 86.

Second, the FBI and DOJ repeatedly refused to provide Members of the Judiciary Committee with a copy of the FISA Court's May 17, 2002, opinion rejecting the DOJ's proposed implementation of the USA PATRIOT Act's FISA amendments. This refusal was made despite the fact that the opinion, which was highly critical of aspects of the FBI's past performance on FISA warrants, was not classified and bore directly upon the meaning of provisions in the USA PARIOT Act authored by Members of the Judiciary Committee. Indeed, the Committee eventually had to obtain the opinion not from the DOJ but directly from the FISA Court, and it was only through these efforts that the public was first made aware of the important appeal being pursued by the DOJ and the legal positions taken by the Department on the FISA Amendments.[8]

In both of these instances, and in others, the DOJ and FBI have made exercise of our oversight responsibilities difficult.[9] It is our sincere hope that the FBI and DOJ will reconsider their approach to congressional oversight in the future. The Congress and the American people deserve to know that their government is doing. Certainly, the Department should not expect Congress to be a "rubber stamp" on its requests for new or expanded powers if requests for information about how the Department has handled its existing powers have been either ignored or summarily paid lip service.

III. FISA OVERSIGHT: A CASE STUDY OF THE SYSTEMIC PROBLEMS PLAGUING THE FBI

A. Overview and Conclusions

The Judiciary Committee held a series of classified briefings for the purpose of reviewing the processing of FISA applications before the terrorist attacks on September 11, 2001. The Judiciary Committee sought to determine whether any problems at the FBI in the processing of FISA applications contributed to intelligence failures before September 11th; to evaluate the implementation of the changes to FISA enacted pursuant to the USA PATRIOT Act; and to determine whether additional legislation is necessary to improve this process and facilitate congressional oversight and public confidence in the FISA and the FBI.

We specifically sought to determine whether the systemic problems uncovered in our FBI oversight hearings commenced in the summer of 2001 contributed to any shortcomings that may have affected the FBI counterterrorism efforts prior to the 9/11 attacks.

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[8] The Final Report, dated December 10, 2002, of the Joint Inquiry of the House and Senate Intelligence Committees (hereafter "Final Report") noted a related issue of "excessive classification" and urged the Attorney General, and other Federal offices, to report to the Intelligence Committees on "a new and more realistic approach" to designating sensitive and classified information and "include proposals to protect against the use of the classification process as a shield to protect agency self-interest." (Recommendations, p. 13).

[9] Another example in which DOJ and FBI have resisted responding to the Committee's questions related to press reports that the Attorney General, on September 10, 2001, rejected the FBI's request for an additional $58 million increase in counterterrorism programs. In order to assess the accuracy of these reports, Senator Leahy requested information in written questions in connection with the July 25, 2002 oversight hearing, asking, in pertinent part: "The FBI had previously submitted a request to the Department for increases for (a) language services ($8,852,000); (b) field counterterrorism investigations ($28,066,000); (c) intelligence production (Field and HQ IRSs) ($20,894,000); (d) security ($137,566,000); (e) counterintelligence initiative ($30,355,000); and (f) secure telephone equipment ($6,501,000). Did the September 10th, request to OMB include any of these increases that the FBI had requested and, if so, which ones?" DOJ has not provided answers to this or related questions.

Not surprisingly, we conclude that they did. Indeed, in many ways the DOJ and FBI's shortcomings in implementing the FISA—including but not limited to the time period before the 9/11 attacks—present a compelling case for both comprehensive FBI reform and close congressional oversight and scrutiny of the justification for any further relaxation of FISA requirements. FISA applications are of the utmost importance to our national security. Our review suggests that the same fundamental problems within the FBI that have plagued the agency in other contexts also prevented both the FBI and DOJ from aggressively pursuing FISA applications in the period before the 9/11 attacks. Such problems caused the submission of key FISA applications to the FISA Court to have been significantly delayed or not made. More specifically, our concerns that the FBI and DOJ did not make effective use of FISA before making demands on the Congress for expanded FISA powers in the USA PATRIOT Act are bolstered by the following findings:

(1) The FBI and Justice Department were setting too high a standard to establish that there is "probable cause" that a person may be an "agent of a foreign power" and, therefore, may be subject to surveillance pursuant to FISA;

(2) FBI agents and key Headquarters officials were not sufficiently trained to understand the meanings of crucial legal terms and standards in the FISA process;

(3) Prior problems between the FBI and the FISA Court that resulted in the Court barring one FBI agent from appearing before it for allegedly filing inaccurate affidavits may have "chilled" the FBI and DOJ from aggressively seeking FISA warrants (although there is some contradictory information on this matter, we will seek to do additional oversight on this question);[10]

(4) FBI Headquarters fostered a culture that stifled rather than supported aggressive and creative investigative initiatives from agents in the field; and

(5) The FBI's difficulties in properly analyzing and disseminating information in its possession caused it not to seek FISA warrants that it should have sought. These difficulties are due to:

(a) a lack of proper resources dedicated to intelligence analysis;

(b) a "stove pipe" mentality where crucial intelligence is pigeonholed into a particular unit and may not be shared with other units;

(c) High turnover of senior agents at FBI Headquarters within critical counterterrorism and foreign intelligence units;

(d) Outmoded information technology that hinders access to, and dissemination of, important intelligence; and

[10] The Joint Inquiry's finding on this point is particularly apt: "During the summer of 2001, when the Intelligence Community was bracing for an imminent al-Qa'ida attack, difficulties with FBI applications for Foreign Intelligence Surveillance Act (FISA) surveillance and the FISA process led to a diminished level of coverage of suspected al-Qa'ida operatives in the United States. The effect of these difficulties was compounded by the perception that spread among FBI personnel at Headquarters and the field offices that the FISA process was lengthy and fraught with peril." (Final Report, Findings, p. 8).

(e) A lack of training for FBI agents to know how to use, and a lack of requirements that they do use, the technology available to search for and access relevant information.

We have found that, in combination, all of these factors contributed to the intelligence failures at the FBI prior to the 9/11 attacks.

We are also conscious of the extraordinary power FISA confers on the Executive branch. FISA contains safeguards, including judicial review by the FISA Court and certain limited reporting requirements to congressional intelligence committees, to ensure that this power is not abused. Such safeguards are no substitute, however, for the watchful eye of the public and the Judiciary Committees, which have broader oversight responsibilities for DOJ and the FBI. In addition to reviewing the effectiveness of the FBI's use of its FISA power, this Committee carries the important responsibility of checking that the FBI does not abuse its power to conduct surveillance within our borders. Increased congressional oversight is important in achieving that goal.

From the outset, we note that our discussion will not address any of the specific facts of the case against Zacharias Moussaoui that we have reviewed in our closed inquiries. That case is still pending trial, and, no matter how it is resolved, this Committee is not the appropriate forum for adjudicating the allegations in that case. Any of the facts recited in this report that bear on the substance of the Moussaoui case are already in the public record. To the extent that this report contains information we received in closed sessions, that information bears on abstract, procedural issues, and not any substantive issues relating to any criminal or national security investigation or proceeding. This is an interim report of what we have discovered to date. We hope to and should continue this important oversight in the 108th Congress.

B. Allegations Raised by Special Agent Rowley's Letter

The Judiciary Committee had initiated its FISA oversight inquiry several months before the revelations in the dramatic letter sent on May 21, 2002, to FBI Director Mueller by Special Agent Coleen Rowley. Indeed, it was this Committee's oversight about the FBI's counterintelligence operations before the 9/11 attacks that in part helped motivate SA Rowley to write this letter to the Directory.[11]

The observations and critiques of the FBI's FISA process in this letter only corroborated problems that the Judiciary Committee was uncovering. In her letter, SA Rowley detailed the problems the Minneapolis agents had in dealing with FBI Headquarters in their unsuccessful attempts to seek a FISA warrant for the search of Moussaoui's lap top computer and other personal belongings. These attempts proved fruitless, and Moussaoui's computer and personal belongings were not searched until September 11th, 2001, when

[11] SA Rowley notes in the first paragraphs of the letter, "I have deep concerns that a delicate and subtle shading/skewing of facts by you and others at the highest levels of FBI management has occurred and is occurring. * * * I base my concerns on * * * your congressional testimony and public comments." However, we wish to be clear that we do not believe that Director Mueller knowingly provided inaccurate or incomplete information to the Committee.

the Minneapolis agents were able to obtain a criminal search warrant after the attacks of that date. According to SA Rowley, with the exception of the fact of those attacks, the information presented in the warrant application establishing probable cause for the criminal search warrant was exactly the same as the facts that FBI Headquarters earlier had deemed inadequate to obtain a FISA search warrant.[12]

In her letter, SA Rowley raised many issued concerning the efforts by the agents assigned to the Minneapolis Field Office to obtain a FISA search warrant for Moussaoui's personal belongings. Two of the issues she raised were notable. *First,* SA Rowley corroborated that many of the cultural and management problems within the FBI (including what she referred to as "careerism") have significant effects on the FBI's law enforcement and intelligence gathering activities. This led to a perception among the Minneapolis agents that FBI Headquarters personnel had frustrated their efforts to obtain a FISA warrant by raising unnecessary objections to the information submitted by Minneapolis, modifying and removing that information, and limiting the efforts by the Minneapolis Field Office to contact other agencies for relevant information to bolster the probable cause for the warrant. These concerns echoed criticism that this Committee has heard in other contexts about the culture of FBI management and the effect of the bureaucracy in stifling initiative by FBI agents in the field.

In making this point, SA Rowley provided specific examples of the frustrating delays and roadblocks erected by Headquarters agents in the Moussaoui investigation:

> For example at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacharias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed on the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.[13]
>
> Eventually, on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis agent, the Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient

[12] Letter from Special Agent Coleen Rowley to FBI Director Robert S. Mueller, III, dated May 21, 2002, p. 3 (Rowley Letter). All citations to SA Rowley's letter are from a version of the letter that was released to the Judiciary Committee on June 6, 2002, by the DOJ and with classified or otherwise protected information redacted. This letter is attached as Exhibit A.

[13] Rowley Letter, p. 6, fn. 6.

> evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted; classified]. Obviously[,] verbal presentations are far more susceptible to mis-characterization and error.[14]

Even after the attacks had commenced, FBI Headquarters discouraged Minneapolis from securing a criminal search warrant to examine Moussaoui's belongs, dismissing the coordinated attack on the World Trade Center and Pentagon as a coincidence.[15]

Second, SA Rowley's letter highlighted the issue of the apparent lack of understanding of the applicable legal standards for establishing "probable cause" and the requisite statutory FISA requirements by FBI personnel in the Minneapolis Division and at FBI Headquarters. This issue will be discussed in more detail below.

C. Results of Investigation

1. The Mishandling of the Moussaoui FISA Application

Apart from SA Rowley's letter and her public testimony, the Judiciary Committee and its staff found additional corroboration that many of her concerns about the handling of the Moussaoui FISA application for a search warrant were justified.

At the outset, it is helpful to review how Headquarters "adds value" to field offices in national security investigations using FISA surveillance tools. Headquarters has three functions in such investigations. The first function is the ministerial function of actually assembling the FISA application in the proper format for review by the DOJ's Office of Intelligence Policy and Review OIPR and the FISA Court. The other two functions are more substantive and add "value" to the FISA application. The first substantive function is to assist the field by being experts on the legal aspects of FISA, and to provide guidance to the field as to the information needed to meet the statutory requirements of FISA. The second function is to supplement the information from the field in order to establish or strengthen the showing that there is "probable cause" that the FISA target was an "agent of a foreign power," by integrating additional relevant intelligence information both from within the FBI and from other intelligence or law enforcement organizations outside the FBI. It is with respect to the latter, substantive functions that Headquarters fell short in the Moussaoui FISA application and, as a consequence, never got to the first, more ministerial, function.

Our investigation revealed that the following events occurred in connection with this FISA application. We discovered that the Supervisory Special Agent (SSA) involved in reviewing the Moussaoui FISA request was assigned to the Radical Fundamentalist Unit (RFU) of the International Terrorism Operations Section of the

[14] Rowley Letter, p. 7.
[15] Rowley Letter, p. 4.

FBI's Counterterrorism Division. The Unit Chief of the RFU was the SSA's immediate supervisor. When the Minneapolis Division submitted its application for the FISA search warrant for Moussaoui's laptop computer and other property, the SSA was assigned the responsibility of processing the application for approval. Minneapolis submitted its application for the FISA warrant in the form of a 26-page Electronic Communication (EC), which contained all of the information that the Minneapolis agents had collected to establish that Moussaoui was an agent of a foreign power at the time. The SSA's responsibilities included integrating this information submitted by the Minneapolis division with information from other sources that the Minneapolis agents were not privy to, in order to establish there was probably cause that Moussaoui was an agent of a foreign power. In performing this fairly straightforward task, FBI Headquarters personnel failed miserably in at least two ways.

First, most surprisingly, the SSA never presented the information submitted by Minneapolis and from other sources in its written, original format to any of the FBI's attorneys in the National Security Law Unit (NSLU). The Minneapolis agents has submitted their information in the 26-page EC and a subsequent letterhead memorandum (LHM), but neither was shown to the attorneys. Instead, the SSA relied on short, verbal briefings to the attorneys, who opined that based on the information provided verbally by the SSA they could not establish that there was probably cause that Moussaoui was an agent of a foreign power. Each of the attorneys in the NSLU stated they did not receive documents on the Moussaoui FISA, but instead only received a short, verbal briefing from the SSA. As SA Rowley noted, however, "verbal presentations are far more susceptible to mis-characterization and error."

The failure of the SSA to provide the 26-page Minneapolis EC and the LHM to the attorneys, and the failure of the attorneys to review those documents, meant that the consideration by Headquarters officials of the evidence developed by the Minneapolis agents was truncated. The Committee has requested, but not yet received, the full 26-page Minneapolis EC (even, in explicably, in a classified setting).[16]

Second, the SSA's task was to help bolster the work of the Minneapolis agents and collect information that would establish probably cause that a "foreign power" existed, and that Moussaoui was its "agent." Indeed, sitting in the FBI computer system was the Phoenix memorandum, which senior FBI officials have conceded would have provided sufficient additional context to Moussaoui's conduct to have established probably cause.[17] Yet, neither the SSA nor anyone else at Headquarters consulted about the Moussaoui application ever conducted any computer searches for electronic or other information relevant to the application. Even the much tout-

[16] Rowley Letter, p. 7. This is yet another example of a hurdle being erected to effective congressional oversight.

[17] Joint Inquiry Hearing, Testimony of Eleanor Hill, Staff Director, September 24, 2002, p. 19: "The [FBI] attorneys also told the Staff that, if they had been aware of the Phoenix memo, they would have forwarded the FISA request to the Justice Department's Office of Intelligence Policy Review (OIPR). They reasoned that the particulars of the Phoenix memo changed the contest of the Moussaoui investigation and made a stronger case for the FISA warrant. None of them saw the Phoenix memo before September 11."

ed "Woods Procedures" governing the procedures to be followed by FBI personnel in preparing FISA applications do not require Headquarters personnel to conduct even the most basic subject matter computer searches or checks as part of the preparation and review of FISA applications.

2. General Findings.

We found that key FBI personnel involved in the FISA process were not properly trained to carry out their important duties. In addition, we found that the structural, management, and resource problems plaguing the FBI in general contributed to the intelligence failures prior to the 9/11 attacks.[18] Following are some of the most salient facts supporting these conclusions.

First, key FBI personnel responsible for protecting our country against terrorism did not understand the law. The SSA at FBI Headquarters responsible for assembling the facts in support of the Moussaoui FISA application testified before the Committee in a closed hearing that he did not know that "probable cause" was the applicable legal standard for obtaining a FISA warrant. In addition, he did not have a clear understanding of what the probable cause standard meant. The SSA was not a lawyer, and he was relying on FBI lawyers for their expertise on what constituted probable cause. In addition to not understanding the probable cause standard, the SSA's supervisor (the Unit Chief) responsible for reviewing FISA applications did not have a proper understanding of the legal definition of the "agent of a foreign power" requirement.[19] Specifically, he was under the incorrect impression that the statute required a link to an already identified or "recognized" terrorist organization, an interpretation that the FBI and the supervisor himself admitted was incorrect. Thus, key FBI officials did not have a proper understanding of either the relevant burden of proof (probable cause) or the substantive element of proof (agent of a foreign power). This fundamental breakdown in training on an important intelligence matter is of serious concern to this Committee.[20]

Second, the complaints contained in the Rowley letter about problems in the working relationship between field offices and FBI Headquarters are more widespread. There must be a dynamic relationship between Headquarters and field offices with Headquarters

[18] The Joint Inquiry by the Senate and House Select Committee on Intelligence similarly concluded that the FBI needs to "establish and sustain independent career tracks within the FBI that recognize and provide incentives for demonstrated skills and performance of counterterrorism agents and analysts; * * * implement training for agents in the effective use of analysts and analysis in their work; * * * improve national security law training of FBI personnel; * * * and finally solve the FBI's persistent and incapacitating information technology problems." (Final Report, Recommendations, p. 6).

[19] This finding was echoed by the Joint intelligence Committee: "In August 2001, the FBI's Minneapolis field office, in conjunction with the INS, detained Zacharias Moussaoui, a French national who had enrolled in flight training in Minnesota because FBI agents there suspected that Moussaoui was involved in a hijacking plot. FBI Headquarters attorneys determined that there was not probable cause to obtain a court order to search Moussaoui's belongings under the Foreign Intelligence Surveillance Act (FISA). However, personnel at FBI Headquarters, including the Radical Fundamentalist Unit and the National Security Law Unit, as well as agents in the Minneapolis field office, misunderstood the legal standard for obtaining an order under FISA." (Final Report, Findings, pp. 3–4).

[20] The Joint Intelligence Committee reached a similar conclusion and urged the Attorney General and the Director of the FBI to "take action necessary to ensure that: the Office of Intelligence Policy and Review and other Department of Justice components provide in-depth training to the FBI and other members of the Intelligence Community regarding the use of the Foreign Intelligence Surveillance Act (FISA) to address terrorist threats to the United States." (Final Report, Recommendations, p. 8).

providing direction to the efforts of agents in the field when required. At the same time, Headquarters personnel should serve to support field agents, not to stifle initiative by field agents and hinder the progress of significant cases. The FBI's Minneapolis office was not alone in this complaint. Our oversight also confirmed that agents from the FBI's Phoenix office, whose investigation and initiative resulted in the so-called "Phoenix Memorandum," warning about suspicious activity in U.S. aviation schools, also found their initiative dampened by a non-responsive FBI Headquarters.

So deficient was the FISA process that, according to at least one FBI supervisor, not only were new applications not acted upon in a timely manner, but the surveillance of existing targets of interest was often terminated, not because the facts no longer warranted surveillance, but because the application for extending FISA surveillance could not be completed in a timely manner. Thus, targets that represented a sufficient threat to national security that the Department had sought, and a FISA Court judge had approved, a FISA warrant were allowed to break free of surveillance for no reason other than the FBI and DOJ's failure to complete and submit the proper paper work. This failure is inexcusable.

Third, systemic management problems at FBI Headquarters led to a lack of accountability among senior FBI officials. A revolving door at FBI Headquarters resulted in agents who held key supervisory positions not having the required specialized knowledge to perform their jobs competently. A lack of proper communication produced a system where no single person was held accountable for mistakes. Therefore, there was little or no incentive to improve performance. *Fourth,* the layers of FBI and DOJ bureaucracy also helped lead to breakdowns in communication and serious errors in the materials presented to the FISA Court. The Committee learned that in the year before the Moussaoui case, one FBI supervisor was barred from appearing before the FISA due to inaccurate information presented in sworn affidavits to the Court. DOJ explained in a December 23, 2002, response to written questions from the July 25, 2002, oversight hearing that:

> One FBI supervisory special agent has been barred from appearing before the Court. In March of 2001, the government informed the Court of an error contained in a series of FISA applications. This error arose in the description of a "wall" procedure. The Presiding Judge of the Court at the time, Royce Lamberth, wrote to the Attorney General expressing concern over this error and barred one specifically-named FBI agent from appearing before the Court as a FISA affiant. * * * FBI Director Freeh personally met twice with then-Presiding Judge Lamberth to discuss the accuracy problems and necessary solutions.

As the Committee later learned from review of the FISA Court's May 17, 2002, opinion, that Court had complained of 75 inaccuracies in FISA affidavits submitted by the FBI, and the DOJ and FBI had to develop new procedures to ensure accuracy in presentations to that Court. These so-called "Woods Procedures" were declassified at the request of the authors and were made publicly available at the Committee's hearing on June 6, 2002. As DOJ further ex-

plained in its December 23, 2002, answers to written questions submitted on July 25, 2002:

> On April 6, 2001, the FBI disseminated to all field divisions and relevant Headquarters divisions a set of new mandatory procedures to be applied to all FISAs within the FBI. These procedures known as the "Woods procedures," are designed to help minimize errors in and ensure that the information provided to the Court is accurate. * * * They have been declassified at the request of your committee.

DOJ describes the inaccuracies cited in the FISA Court opinion as related to "errors in the 'wall' procedure" to keep separate information used for criminal prosecution and information collected under FISA and used for foreign intelligence. However, this does not appear to be the only problem the FBI and DOJ were having in the use of FISA.

An FBI document obtained under the Freedom of Information Act, which is attached to this report as Exhibit E, suggests that the errors committed were far broader. The document is a memorandum dated April 21, 2002, from the FBI's Counterterrorism Division, that details a series of inaccuracies and errors in handling FISA applications and wiretaps that have nothing whatsoever to do with the "wall." Such mistakes include videotaping a meeting when videotaping was not allowed under the relevant FISA Court order, continuing to intercept a person's email after there was no authorization to do so, and continuing a wiretap on a cell phone even after the phone number had changed to a new subscriber who spoke a different language from the target.

This document highlights the fact apart from the problems with applications made to the FISC, that the FBI was experiencing more systemic problems related to the implementation of FISA orders. These issues were unrelated to the legal questions surrounding the "wall," which was in effect long before 1999. The document notes that the number of inaccuracies grew by three-and-one-half times from 1999 to 2000. We recommend that additional efforts to correct the procedural, structural, and training problems in the FISA process would go further toward ensuring accuracy in the FISA process than simply criticizing the state of the law.

One legitimate question is whether the problems inside the FBI and between the FBI and the FISA Court either caused FBI Headquarters to be unduly cautious in proposing FISA warrants or eroded the FISA Court's confidence in the DOJ and the FBI to the point that it affected the FBI's ability to conduct terrorism and intelligence investigations effectively.[21] SA Rowley opines in her letter that in the year before "the September 11th acts of terrorism, numerous alleged IOB [Intelligence Oversight Board] violations on

[21] We did hear testimony indicating that there may have been a "chilling effect." Special Agent G (of the Minneapolis office) testified that "it seemed to [Special Agent G] that the changes [the SSA] had made" to the facts supplied by Minneapolis in a memorandum "were designated to undersell what we had seen Moussaoui preparing to do." Additionally, at an earlier closed briefing for committee staff, a senior headquarters FBI agent stated that he had advised his subordinates to be particularly careful with the handling of FISA applications. However, we also heard testimony from senior FBI and Justice Department attorneys that they did not perceive a "chilling effect" or drop in the number of FISA applications. We believe further inquiry as to this issue is warranted.

the part of FBI personnel had to be submitted to the FBI's office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists." (Rowley letter, pp. 7–8, fn. 7). Although the belated release of the FISA Court's opinion of May 17, 2002, provided additional insight into this issue, further inquiry is needed.

Fifth, the FBI's inability to properly analyze and disseminate information (even from and between its own agents) rendered key information that it collected relatively useless. Had the FBI put together the disparate strands of information that agents from around the country had furnished to Headquarters before September 11, 2001, additional steps could certainly have been taken to prevent the 9/11 attacks. So, while no one can say with certainty that the 9/11 attacks could have been prevented, in our view, it is also beyond reasonable dispute that more could have been done in the weeks before the attacks to try to prevent them.

Certain of our findings merit additional discussion, and such discussion follows.

3. FBI's Misunderstanding of Legal Standards Applicable to the FISA

a. The FISA Statutory Standard: "Agent of a Foreign Power"

In order to obtain either a search warrant or an authorization to conduct electronic surveillance pursuant to FISA, the FBI and Justice Department must establish before the FISA Court ("FISC") probable cause that the targeted person is an "agent of a foreign power."[22] An agent of a foreign power is defined as "any person who * * * knowingly aids or abets any person in the conduct of [certain] activities."[23] Those certain activities include "international terrorism," and one definition of "foreign power" includes groups that engage in international terrorism.[24]

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[22] "[O]n the basis of the facts submitted by the applicant there is probable cause to believe that—* * * the target of the [electronic surveillance or physical search] is a foreign power or an agent of a foreign power * * *" 50 U.S.C. Section 1805 (electronic surveillance); Section 1824 (physical search).

[23] (b) "Agent of a foreign power" means—

(2) *any person who*—

(C) knowingly engages in sabotage or *international terrorism*, or activities that are in preparation therefore, or on behalf of a foreign power;

(E) *knowingly aids or abets any person in the conduct of activities described in subparagraph* (A), (B), or *(C)* or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).

50 U.S.C. App. Section 1801(b) (a "non-U.S. person" is, in effect, a non-resident alien) (emphasis added).

[24] (a) "Foreign power" means—* * *

(4) a group engaged in international terrorism or activities in preparation therefor;

(c) "International terrorism" means activities that—

(1) involve violent acts of acts dangerous to human life that are a violation of the criminal laws of the Untied States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

(2) appear to be intended—

(A) to intimidate or coerce a civilian population;

(B) to influence the policy of a government by intimidation or coercion; or

(C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Continued

Accordingly, in the Moussaoui case, to obtain a FISA warrant the FBI had to collect only enough evidence to establish that there was "probable cause" to believe that Moussaoui was the "agent" of an "international terrorist group" as defined by FISA.

However, even the FBI agents who dealt most with FISA did not correctly understand this requirement. During a briefing with Judiciary Committee staff in February 2002, the Headquarters counterterrorism Unit Chief of the unit responsible for handling the Moussaoui FISA application stated that with respect to international terrorism cases, FISA warrants could only be obtained for "recognized" terrorist groups (presumably those identified by the Department of State or by the FBI itself or some other government agency). The Unit Chief later admitted that he knew that this was an incorrect understanding of the law, but it was his understanding at the time the application was pending. Additionally, during a closed hearing on July 9, 2002, the Supervisory Special Agent ("SSA") who actually handled the Moussaoui FISA application at Headquarters also mentioned that he was trying to establish whether Moussaoui was an "agent of a *recognized* foreign power" (emphasis added).

Nowhere, however, does the statutory definition require that the terrorist group be an identified organization that is already recognized (such as by the United States Department of State) as engaging in terrorist activities. Indeed, even the FBI concedes this point. Thus, there was no support whatsoever for key FBI officials' incorrect understanding that the target of FISA surveillance must be linked to such an identified group in the time before 9/11. This misunderstanding colored the handling of requests from the field to conduct FISA surveillance in the crucial weeks before the 9/11 attacks. Instead of supporting such an application, key Headquarters personnel asked the field agents working on this investigation to develop additional evidence to prove a fact that was unnecessary to gain judicial approval under FISA. It is difficult to understand how the agents whose job included such a heavy FISA component could not have understood that statute. It is difficult to understand how the FBI could have so failed its own agents in such a crucial aspect of their training.

The Headquarters personnel misapplied the FISA requirements. In the context of this case, the foreign power would be an international terrorist group, that is, "a group engaged in international terrorism or activities in preparation therefore." A "group" is not defined in the FISA, but in common parlance, and using other legal principles, including criminal conspiracy, a group consists of two or more persons whether identified or not. It is our opinion that such a "group" may exist, even if not a group "recognized" by the Department of State.

The SSA's other task would be to help marshal evidence showing probable cause that Moussaoui was an agent of that group. In applying the "totality of the circumstances," as defined in the case of *Illinois* v. *Gates,* 462 U.S. 213 (1983), any information available about Moussaoui's "actual contacts" with the group should have

50 U.S.C. § App. 1801. The standard for obtaining FISA orders differs from the requirements in the criminal context. *See* Fed. R. Cr. P. 41 (criminal search warrant); 18 U.S.C. § 2518 (electronic surveillance).

been considered in light of other information the FBI had in order to understand and establish the true probable nature of those contacts.[25] It is only with consideration of all the information known to the FBI that Moussaoui's contacts with any group could be properly characterized in determining whether he was an agent of such a group.

In making this evaluation, the fact, as recited in the public indictment, that Moussaoui "paid $6,800 in cash" to the Minneapolis flight school, without adequate explanation for the source of this funding, would have been a highly probative fact bearing on his connections to foreign groups. Yet, it does not appear that this was a fact that the FBI Headquarters agents considered in analyzing the totality of the circumstances. The probable source of that cash should have been a factor that was considered in analyzing the totality of the circumstances. So too would the information in the Phoenix memorandum have been helpful. It also was not considered, as discussed further below. In our view, the FBI applied too cramped an interpretation of probable cause and "agent of a foreign power" in making the determination of whether Moussauoi was an agent of a foreign power. FBI Headquarters personnel in charge of reviewing this application focused too much on establishing a nexus between Moussaoui and a "recognized" group, which is not legally required.[26] Without going into the actual evidence in the Moussaoui case, there appears to have been sufficient evidence in the possession of the FBI which satisfied the FISA requirements for the Moussaoui application. Given this conclusion, our primary task is not to assess blame on particular agents, the overwhelming majority of whom are to be commended for devoting their lives to protecting the public, but to discuss the systemic problems at the FBI that contributed to their inability to succeed in that endeavor.

b. The Probable Cause Standard

i. Supreme Court's Definition of "Probable Cause"

During the course of our investigation, the evidence we have evaluated thus far indicates that both FBI agents and FBI attorneys do not have a clear understanding of the legal standard for probable cause, as defined by the Supreme Court in the case of *Illinois* v. *Gates,* 462 U.S. 213 (1983). This is such a basic legal principle that, again, it is impossible to justify the FBI's lack of complete and proper training on it. In *Gates,* then-Associate Justice Rehnquist wrote for the Court:

> As early as *Locke* v. *United States,* 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation * * * It imports a sei-

[25] The Supreme Court's leading case on probable cause; it is discussed in more detail in the next section of this report.

[26] Senator SPECTER. * * * [I]s an Islam fundamentalist who advocates "jihad" a terrorist?

[Attorney #1]. On that description alone, I would say I could not say so, Senator. I would have my suspicions, I would be concerned, but I need to see what a person is doing. I need to see some indicia that they are willing to commit violence and not just talk about it.

Question. But you would have your suspicions.

[Attorney #1]. Yes, sir.

> zure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* * * * of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal basis trials, have no place in the magistrate's decision*. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "*only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.*"[27]

The Court further stated:

> For all these reasons, we conclude that it is wiser to abandon the "two-pronged test" established by our decisions in *Aguilar* and *Spinelli*. In its place we reaffirm *the totality of the circumstances analysis* that traditionally has informed probable cause determinations. The task of the issuing magistrate is simply to make a practical, commonsense decision whether, *given all the circumstances* set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, *there is a fair probability* that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for * * * conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.[28]

Accordingly, it is clear that the Court rejected "preponderance of the evidence" as the standard for probable cause and established a standard of "probability" based on the "totality of the circumstances."

ii. The FBI's Unnecessarily High Standard for Probable Cause

Unfortunately, our review has revealed that many agents and lawyers at the FBI did not properly understand the definition of probable cause and that they also possessed inconsistent understandings of that term. In the portion of her letter to Director Mueller discussing the quantum of evidence needed to reach the standard of probable cause, SA Rowley wrote that "although I thought probable cause existed ('probable cause' meaning that the

[27] 462 U.S. at 236 (citations omitted; emphasis added).

[28] 462 U.S. at 238 (footnote and citations omitted) (emphasis added). The relevance of *Illinois* v. *Gates* to defining probable cause is implicit in the Senate's report when FISA was first enacted (albeit, when first enacted it covered only electronic surveillance): "In determining whether probable cause exists under this section, the court must consider the same requisite elements which govern such determinations in the criminal context." S. Rep. 95–604, p. 47. "The FISA statute does not define 'probable cause,' although it is clear from the legislative history that Congress intended for this term to have a meaning analogous to that typically used in criminal contexts." Final Report of the Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation (May 2000) ("The Bellows Report"), p. 494.

proposition has to be more likely than not, or if quantified, a 51 percent likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75 percent–80 percent probability and sometimes even higher), and depending upon the actual AUSA who would be assigned, might turn us down."[29] The *Gates* case and its progeny do not require an exacting standard of proof. Probable case does not mean more likely than not, but only a probability or substantial chance of the prohibited conduct taking place. Moreover, "[t]he fact that an innocent explanation may be consistent with the facts alleged * * * does not negate probable cause."[30]

On June 6, 2002, the Judiciary Committee held an open hearing on the FBI's conduct of counterterrorism investigations. The Committee heard from Director Mueller and DOJ Inspector General Glenn Fine on the first panel and from SA Rowley on the second panel. The issue of the probable cause standard was specifically raised with Director Mueller, citing the case of *Illinois* v. *Gates*, and Director Mueller was asked to comment in writing on the proper standard for establishing probable cause.[31] The FBI responded in an undated letter to Senator Specter and with the subsequent transmission of an electronic communication (E.C.) dated September 16, 2002.[32] In the E.C., the FBI's General Counsel reviewed the case law defining "probable cause," in order to clarify the definition of probable cause for FBI personnel handling both criminal investigations and FISA applications.

At the June 6th hearing, SA Rowley reviewed her discussion of the probable cause standard in her letter. During that testimony three issues arose. First, by focusing on the prosecution of a potential case, versus investigating a case, law enforcement personnel, both investigators and prosecutors, may impose on themselves a higher standard than necessary to secure a warrant.[33] This prosecution focus is one of the largest hurdles that the FBI is facing as it tries to change its focus from crime fighting to the prevention of terrorist attacks. It is symptomatic of a challenge facing the FBI and DOJ in nearly every aspect of their new mission in preventing terrorism. Secondly, prosecutors, in gauging what amount of evidence reaches the probable cause standard, may calibrate their decision to meet the de facto standard imposed by the judges, who may be imposing a higher standard than is required by law.[34] Finally, SA Rowley opined that some prosecutors and senior FBI officials may set a higher standard due to risk-averseness, which is caused by "careerism."[35]

SA Rowley's testimony was corroborated in our other hearings. During a closed hearing, in response to the following questions, a key Headquarters SSA assigned to terrorism matters stated that

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[29] Rowley Letter, pp. 4–5.
[30] *United States* v. *Fama*, 758 F.2d 834, 838 (2d Cir. 1985) (citations omitted).
[31] Judiciary Committee "Oversight Hearing on Counterterrorism," Transcript, June 6, 2002, pp. 78–79, 87 (hereinafter, Tr. 6/6/02). Sen. Specter's letter is at Exhibit B.
[32] These documents are attached as Exhibits C and D.
[33] Tr., 6/6/02, pp. 224.
[34] Tr., 6/6/02, pp. 226–27.
[35] Tr., 6/6/02, pp 226–27.

he did not know the legal standard for obtaining a warrant under FISA.

> Senator SPECTER.* * * [SSA], what is your understanding of the legal standard for a FISA warrant?
>
> [SSA]. I am not an attorney, so I would turn all of those types of questions over to one of the attorneys that I work with in the National Security Law Unit.
>
> *Question.* Well, did you make the preliminary determination that there was not sufficient facts to get a FISA warrant issued?
>
> [SSA]. That is the way I saw it.
>
> *Question.* Well, assuming you would have to prove there was an agent and there was a foreign power, do you have to prove it beyond a reasonable doubt? Do you have to have a suspicion? Where in between?
>
> [SSA]. I would ask my attorney in the National Security Law Unit that question.
>
> *Question.* Did anybody give you any instruction as to what the legal standard for probable cause was?
>
> [SSA]. In this particular instance, no.[36]

The SSA explained that he had instruction on probable cause in the past, but could not recall that training. It became clear to us that the SSA was collecting information without knowing when he had enough and, more importantly, making "preliminary" decisions and directing field agents to take investigating steps without knowing the applicable legal standards. While we agree that FBI agents and supervisory personnel should consult regularly with legal experts at the National Security Law Unit, and with the DOJ and U.S. Attorneys Offices, supervisory agents must also have sufficient facility for evaluating probable cause in order to provide support and guidance to the field.

Unfortunately, our oversight revealed a similar confusion as to the proper standard among other FBI officials. On July 9, 2002, the Committee held a closed session on this issue, and heard from the following FBI personnel: Special Agent "G," who had been a counterterrorism supervisor in the Minneapolis Division of the FBI and worked with SA Rowley; the Supervisory Special Agent ("the SSA") from FBI Headquarters referred to in SA Rowley's letter (and referred to in the discussion above); the SSA's Unit Chief ("the Unit Chief"); a very senior attorney from the FBI's Office of General Counsel with national security responsibilities ("Attorney #1"); and three attorneys assigned to the FBI's Office of General Counsel's National Security Law Unit ("Attorney #2," "Attorney #3," and "Attorney #4"). The purpose of the session was to determine how the Moussaoui FISA application had been processed by FBI Headquarters personnel. None of the personnel present, including the attorneys, appeared to be familiar with the standard for probable cause articulated in *Illinois* v. *Gates,* and none had reviewed the case prior to the hearing, despite its importance having been highlighted at the June 6th hearing with the FBI Director. To wit:

[36] Tr., 7/9/02, pp. 35–36.

Senator SPECTER. * * * [Attorney #1] what is the legal standard for probable cause for a warrant?

[Attorney #1]. A reasonable belief that the facts you are trying to prove are accurate.

Question. Reason to believe?

[Attorney #1]. Reasonable belief.

Question. Reasonable belief?

[Attorney #1]. More probable than not.

Question. More probable than not?

[Attorney #1]. Yes, sir. Not a preponderance of the evidence.

Question. Are you familiar with "Gates v. Illinois"?

[Attorney #1]. No, sir.

However, "more probable than not" is not the standard; rather, "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."[37]

Similarly, Attorneys #2, #3, and #4 were also not familiar with *Gates.*[38] Under further questioning, Attorney #1 conceded that the FBI, at that time, did not have written procedures concerning the definition of "probable cause" in FISA cases: "On the FISA side of the house I don't think we have any written guidelines on that. * * *"[39] Additionally, Attorney #1 stated that "[w]e need to have some kinds of facts that an agent can swear to a reasonable belief that they are true," to establish that a person is an agent of a foreign power. Giving a precise definition of probable cause is not an easy task, as whether probable cause exists rests on factual and practical considerations in a particular context. Yet, even with the inherent difficulty in this standard we are concerned that senior FBI officials offered definitions that imposed heightened proof requirements. The issue of what is required for "probable cause" is especially troubling because it is not the first time that the issue had arisen specifically in the FISA context. Indeed, the Judiciary Committee confronted the issue of "probable cause" in the FISA context in 1999, when the Committee initiated oversight hearings of the espionage investigation of Dr. Wen Ho Lee. Among the many issues examined was whether there was probable cause to obtain FISA surveillance of Dr. Lee. In that case, there was a disagreement as to whether probable cause existed between the FBI and the DOJ, within the DOJ, and among ourselves.

In 1999, Attorney General Janet Reno commissioned an internal DOJ review of the Wen Ho Lee investigation. The Attorney General's Review Team on the Handling of the Los Alamos National Laboratory Investigation was headed by Assistant United States Attorney Randy I. Bellows, a Senior Litigation Counsel in the Office of the United States Attorney for the Eastern District of Virginia. Mr. Bellows submitted his exhaustive report on May 12, 2000 (the "Bellows Report"), and made numerous findings of fact and recommendations. With respect to the issue of probable cause, Mr. Bellows concluded that:

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[37] *Gates,* 462 U.S. at 36 (citations omitted).
[38] Tr., 7/9/02, pp. 37–38, 53.
[39] Tr., 7/9/02, pp. 39–40.

> The final draft FISA application (Draft #3), on its face, established probable cause to believe that Wen Ho Lee was an agent of a foreign power, that is to say, a United States person currently engaged in clandestine intelligence gathering activities for or on behalf of the PRC which activities involved or might involve violations of the criminal laws of the United States. * * * Given what the FBI and OIPR knew at the time, it should have resulted in the submission of a FISA application, and the issuance of a FISA order.[40]

The Bellows team concluded that OIPR has been too conservative with the Wen Ho Lee FISA application, a conservatism that may continue to affect the FBI's and DOJ's handling of FISA applications. The team found that with respect to OIPR's near-"perfect record" before the FISA Court (only one FISA rejection), "[w]hile there is something almost unseemly in the use of such a remarkable track record as proof of error, rather than proof of excellence, it is nevertheless true that this record suggests the use of 'PC+,' an insistence on a bit more than the law requires."[41]

The Bellows team made another finding of particular pertinence to the instant issue. It found that "[t]he Attorney General should have been apprised of *any* rejection of a FISA request. * * *"[42] In effect, FBI Headquarters rejected the Minneapolis Division's request for a FISA application, a decision that was not reported to then Acting Director Thomas Pickard. Director Mueller has adopted a new policy, not formally recorded in writing, that he be informed of the denial within the FBI of any request for a FISA application.[43] However, in an informal briefing the weekend after this new policy was publicly announced, the FBI lawyer whom it most directly affected claimed to know nothing of the new "policy" beyond what he had read in the newspaper. From an oversight perspective, it is striking that the FBI and DOJ were effectively on no-

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[40] Bellows Report, p. 482.

[41] Bellows Report, p. 493. The Bellows team was not the only group to reach this conclusion. The National Commission on Terrorism, headed by former Ambassador L. Paul Bremer, III, found the following:

> The Commission heard testimony that, under ordinary circumstances, the FISA process can be slow and burdensome, requiring information beyond the minimum required by the statute. For example, to obtain a FISA order, the statute requires only probable cause to believe that someone who is not a citizen or legal permanent resident of the United States is a member of an international terrorist organization. In practice, however, OIPR requires evidence of wrongdoing or specific knowledge of the group's terrorist intentions in addition to the person's membership in the organization before forwarding the application to the FISA Court. Also, OIPR does not generally consider the past activities of the surveillance target relevant in determining whether the FISA probable cause test is met.
>
> During the period leading up to the millennium, the FISA application process was streamlined. Without lowering the FISA standards, applications were submitted to the FISA Court by DOJ promptly and with enough information to establish probable cause.
>
> Report of the National Commission on Terrorism at p. 11.

The Commission recommended that:

> —The Attorney General should direct that the Office of Intelligence Policy and Review not require information in excess of that actually mandated by the probable cause standard in the Foreign Intelligence Surveillance Act statute.
>
> —To ensure timely review of the Foreign Intelligence Surveillance Act applications, the Attorney General should substantially expand the Office of Intelligence Policy and Review staff and direct it to cooperate with the Federal Bureau of Investigation.

[42] Bellows Report, p. 484 (emphasis in original).

[43] Tr., 6/6/02, p. 91.

tice regarding precisely this issue: that the probable cause test being applied in FISA investigations was more stringent than legally required. We appreciate the carefulness and diligence with which the professionals at OIPR and the FBI exercise their duties in processing FISA applications, which normally remain secret and immune from the adversarial scrutiny to which criminal warrants are subject. Yet, this persistent problem has two serious repercussions. *First,* the FBI and DOJ appear to be failing to take decisive action to provide in-depth training to agents and lawyers on an issue of the utmost national importance. We simply cannot continue to deny or ignore such training flaws only to see them repeated in the future.

Second, when the DOJ and FBI do not apply or use the FISA as fully or comprehensively as the law allows, pressure is brought on the Congress to change the statute in ways that may not be at all necessary. From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law. The reaction on the part of the DOJ and FBI has been to call upon the Congress to relax FISA standards rather than engage in the more time-consuming remedial task of reforming the management and process to make it work better. Many times such "quick legislative fixes" are attractive on the surface, but only operate as an excuse to avoid correcting more fundamental problems.

4. The Working Relationship Between FBI Headquarters and Field Offices

Our oversight revealed that on more than one occasion FBI Headquarters was not sufficiently supportive of agents in the field who were exercising their initiative in an attempt to carry out the FBI's mission. While at least some of this is due to resource and staffing shortages, which the current Director is taking action to address, there are broader issues involved as well. Included in these is a deep-rooted culture at the FBI that makes an assignment to Headquarters unattractive to aggressive field agents and results in an attitude among many who do work at Headquarters that is not supportive of the field.

In addition to these cultural problems at the FBI, we conclude that there are also structural and management problems that contribute to the FBI's shortcomings as exemplified in the implementation of the FISA. Personnel are transferred in and out of key Headquarters jobs too quickly, so that they do not possess the expertise necessary to carry out their vital functions. In addition, the multiple layers of supervision at Headquarters have created a bureaucratic FBI that either will not or cannot respond quickly enough to time-sensitive initiatives from the field. We appreciate that the FBI has taken steps to cut through some of this bureaucracy by requiring OIPR attorneys to have direct contact with field agents working on particular cases.

In addition to hampering the implementation of FISA, there are problems that the Judiciary Committee has witnessed replayed in other contexts within the FBI. These root causes must be ad-

dressed head on, so that Headquarters personnel at the FBI view their jobs as supporting talented and aggressive field agents.

The FBI has a key role in the FISA process. Under the system designed by the FBI, a field agent and his field supervisors must negotiate a series of bureaucratic levels in order to even ask for a FISA warrant. The initial consideration of a FISA application and evaluation of whether statutory requirements are met is made by Supervisory Special Agents who staff the numerous Headquarters investigative units. These positions are critical and sensitive by their very nature. No application can move forward to the attorneys in the FBI's National Security Law Unit (NSLU) for further consideration unless the unit SSA says so. In addition, no matter may be forwarded to the DOJ lawyers at the OIPR without the approval of the NSLU. These multiple layers of review are necessary and prudent but take time.

The purpose of having SSAs in the various counterterrorism units is so that those personnel may bring their experience and skill to bear to bolster and enhance the substance of applications sent by field offices. A responsible SSA will provide strategic guidance to the requesting field division and coordinate the investigative activities and efforts between FBI Headquarters and that office, in addition to the other field divisions and outside agencies involved in the investigation. This process did not work well in the Moussaoui case.

Under the FBI's system, an effective SSA should thoroughly brief the NSLU and solicit its determination on the adequacy of any application within a reasonable time after receipt. In "close call" investigations, we would expect the NSLU attorneys to seek to review all written information forwarded by the field office rather than rely on brief oral briefings. In the case of the Moussaoui application forwarded from Minneapolis, the RFU SSA merely provided brief, oral briefings to NSLU attorneys and did not once provide that office with a copy of the extensive written application for their review. An SSA should also facilitate communication between the OIPR, the NSLU, and those in the field doing the investigation and constructing the application. That also did not occur in this case.

By its very nature, having so many players involved in the process allows internal FBI finger-pointing with little or no accountability for mistakes. the NSLU can claim, as it does here, to have acquiesced to the factual judgment of the SSAs in the investigative unit. The SSAs, in turn, claim that they have received no legal training or guidance and rely on the lawyers at the NSLU to make what they term as legal decisions. The judgment of the agents in the field, who are closest to the facts of the case, is almost completely disregarded.

Stuck in this confusing, bureaucratic maze, the seemingly simple and routine business practices within key Headquarters units were flawed. As we note above, even routine renewals on already existing FISA warrants were delayed or not obtained due to the lengthy delays in processing FISA applications.

5. The Mishandling of the Phoenix Electronic Communication

The handling of the Phoenix EC represents another prime example of the problems with the FBI's FISA system as well as its

faulty use of information technology. The EC contained information that was material to the decision whether or not to seek a FISA warrant in the Moussaoui case, but it was never considered by the proper people.[44] Even though the RFU Unit Chief himself was listed as a direct addressee on the Phoenix EC (in addition to others within the RFU and other counterterrorism Units at FBI Headquarters), he claims that he never even knew of the existence of such an EC until the FBI's Office of Professional Responsibility (OPR) contacted him months after the 9/11 attacks. Even after this revelation, the Unit Chief never made any attempt to notify the Phoenix Division (or any other field Division) that he had not read the EC addressed to him. He issued no clarifying instructions from his Unit to the field, which very naturally must believe to this day that this Unit Chief is actually reading and assessing the reports that are submitted to his attention and for his consideration. The Unit Chief in question here has claimed to be "at a loss" as to why he did not receive a copy of the Phoenix EC at the time it was assigned, as was the practice in the Unit at that time.

Apparently, it was routine in the Unit for analytic support personnel to assess and close leads assigned to them without any supervisory agent personnel reviewing their activities. In the RFU, the two individuals in the support capacity entered into service at the FBI in 1996 and 1998. The Phoenix memo was assigned to one of these analysts as a "lead" by the Unit's Investigative Assistant (IA) on or about July 30th, 2001. The IA would then accordingly give the Unit Chief a copy of each EC assigned to personnel in the Unit for investigation. The RFU Unit Chief claims to have never seen this one. In short, the crucial information being collected by FBI agents in the field was disappearing into a black hole at Headquarters. To the extent the information was reviewed, it was not reviewed by the appropriate people.

More disturbing, this is a recurrent problem at the FBI. The handling of the Minneapolis LHM and the Phoenix memo, neither of which were reviewed by the correct people in the FBI, are not the first times that the FBI has experienced such a problem in a major case. The delayed production of documents in the Oklahoma City bombing trial, for example, resulted in significant embarrassment for the FBI in a case of national importance. The Judiciary Committee held a hearing during which the DOJ's own Inspector General testified that the inability of the FBI to access its own information base did and will have serious negative consequences.[45] Although the FBI is undertaking to update its information technology to assist in addressing this problem, the Oklahoma City case demonstrates that the issue is broader than antiquated computer systems. As the report concluded, "human error, not the inadequate computer system, was the chief cause of the failure * * *"[46] The report concluded that problems of training and FBI culture were the primary causes of the embarrassing mishaps in that case. Once

[44] The Joint Inquiry similarly concluded that "the FBI headquarters personnel did not take the action requested by the Phoenix agent prior to September 11, 2001. The communication generated little or no interest at either FBI Headquarters or the FBI's New York field office." (Final Report, Findings, p. 3).

[45] *An Investigation of the Belated Production of Documents in the Oklahoma City Bombing Case,* Office of the Inspector General, March 19, 2002 (*Oklahoma City Report*).

[46] Oklahoma City Report, p.2.

again, the FBI's and DOJ's failures to address such broad based problems seem to have caused their recurrence in another context.

6. The FBI's Poor Information Technology Capabilities

On June 6, 2002, Director Mueller and SA Rowley testified before the Senate Judiciary Committee on the search capabilities of the FBI's Automated Case Support (ACS) system. ACS is the FBI's centralized case management system, and serves as the central electronic repository for the FBI's official investigative textual documents. Director Mueller, who was presumably briefed by senior FBI officials regarding the abilities of the FBI's computers, testified that, although Phoenix memorandum had been uploaded to the ACS, it was not used by agents who were investigating the Moussaoui case in Minnesota or at Headquarters. According to Director Mueller, the Phoenix memorandum was not accessible to the Minneapolis field office or any other offices around the country; it was only accessible to the places where it had been sent; Headquarters and perhaps two other offices. Director Mueller also testified that no one in the FBI had searched the ACS for relevant terms such as "aviation schools" or "pilot training." According to Director Mueller, he hoped to have in the future the technology in the computer system to do that type of search (e.g., to pull out any electronic communication relating to aviation), as it was very cumbersome to do that type of search as of June 6, 2002. SA Rowley testified that FBI personnel could only perform one-word searches in the ACS system, which results in too many results to review.

Within two weeks of the hearing, on June 14, 2002, both Director Mueller (through John E. Collingwood, AD Office of Public and Congressional Affairs) and SA Rowley submitted to the Committee written corrections of their June 6, 2002, testimony. The FBI corrected the record by stating that ACS was implemented in all FBI field offices, resident agencies, legal attache offices, and Headquarters on October 16, 1995. In addition, it was, in fact, possible to search for multiple terms in the ACS system, using Boolean connectors (e.g., hijacker or terrorist and flight adj school), and to refine searches with other fields (e.g., document type). Rowley confirmed the multiple search-term capabilities of ACS and added that the specifics of ACS's search capabilities are not widely known within the FBI.

We commend Director Mueller and SA Rowley for promptly correcting their testimony as they became aware of the incorrect description of the FBI's ACS system during the hearing. Nevertheless, their corrections and statements regarding FBI personnel's lack of knowledge of the ACS system highlights a longstanding problem within the Bureau. An OIG report, issued in July 1999, states that FBI personnel were not well-versed in the ACS system or other FBI databases. An OIG report of March 2002, which analyzed the causes for the belated production of many documents in the Oklahoma City bombing case, also concluded that the inefficient and complex ACS system was a contributing factor in the FBI's failure to provide hundreds of investigative documents to the defendants in the Oklahoma City Bombing Case. In short, this Committee's oversight has confirmed, yet again, that not only are

the FBI's computer systems inadequate but that the FBI does not adequately train its own personnel in how to use their technology.

7. The "Revolving Door" at FBI Headquarters

Compounding information technology problems at the FBI are both the inexperience and attitude of "careerist" senior FBI agents who rapidly move through sensitive supervisory positions at FBI Headquarters. This "ticket punching" is routinely allowed to take place with the acquiescence of senior FBI management at the expense of maintaining critical institutional knowledge in key investigative and analytical units. FBI agents occupying key Headquarters positions have complained to members of the Senate Judiciary Committee that relocating to Washington, DC, is akin to a "hardship" transfer in the minds of many field agents. More often than not, however, the move is a career enhancement, as the agent is almost always promoted to a higher pay grade during or upon the completion of the assignment. The tour at Headquarters is usually relatively short in duration and the agent is allowed to leave and return to the field.

To his credit, Director Mueller tasked the Executive Board of the Special Agents Advisory Committee (SAAC) to report to him on disincentives for Special Agents seeking administrative advancement. They reported on July 1, 2002, with the following results of an earlier survey:

> **Less than 5% of the Agents surveyed indicated an interest in promotion if relocation to FBIHQ was required. Of 35 field supervisors queried, 31 said they would "step down" rather than accept an assignment in Washington, D.C. All groups of Agents (those with and without FBIHQ experience) viewed as assignment at FBIHQ as very negative. Only 6% of those who had previously been assigned there believed that the experience was positive—the work was clerical, void of supervisory responsibility critical to future field or other assignments. Additionally, the FBIHQ supervisors were generally powerless to make decisions while working in an environment which was full of negativity, intimidation, fear and anxiousness to leave. (bold emphasis in original).**

The SAAC report also contained serious criticism of FBI management, stating:

> **Agents across the board expressed reluctance to become involved in a management system which they believe to [be] hypocritical, lacking ethics, and one in which we lead by what we say and not by example. Most subordinates believe and most managers agreed that the FBI is too often concerned with appearance over substance. Agents believed that management decisions are often based on promoting one's self interest versus the best interests of the FBI. (bold emphasis in original).**

There is a dire need for the FBI to reconsider and reform a personnel system and a management structure that do not create the proper incentives for its most capable and talented agents to occupy its most important posts. The SAAC recommended a number of steps to reduce or eliminate "disincentives for attaining leadership within the Bureau." Congress must also step up to the plate and assess the location pay differential for Headquarters transfers compared to other transfers and other financial rewards for administrative advancement to ensure that those agents with relevant field experience and accomplishment are in critical Headquarters positions.

Indeed, in the time period both before and after the Moussaoui application was processed at Headquarters (and continuing for months after the 9/11 attacks), most of the agents in the pertinent Headquarters terrorism unit had less than two years of experience working on such cases. In the spring and summer of 2001, when Administration officials have publicly acknowledged increased "chatter" internationally about potential terrorist attacks, the Radical Fundamentalist Unit at FBI Headquarters experienced the routinely high rate of turnover in agent personnel as others units regularly did. Not only was the Unit Chief replaced, but also one or more of the four SSAs who reported to the Unit Chief was a recent transfer into the Unit. These key personnel were to have immediate and direct control over the fate of the "Phoenix memo" and the Minneapolis Division's submission of a FISA application for the personal belongings of Moussaoui. While these supervisory agents certainly had distinguished and even outstanding professional experience within the FBI before being assigned to Headquarters, their short tours in the specialized counterterrorism units raises questions about the depth and scope of their training and experience to handle these requests properly and, more importantly, about the FBI's decision to allow such a key unit to be staffed in such a manner.

Rather than staffing counterterrorism units with Supervisory Special Agents on a revolving door basis, these positions should be filled with a cadre of senior agents who can provide continuity in investigations and guidance to the field.

A related deficiency in FBI management practices was that those SSAs making the decisions on whether any FISA application moved out of an operational unit were not given adequate training, guidance, or instruction on the practical application of key elements of the FISA statute. As we stated earlier, it seems incomprehensible that those very individuals responsible for taking a FISA application past the first step were allowed to apply their own individual interpretations of critical elements of the law relating to what constitutes a "foreign power," "acting as a agent of a foreign power," "probable cause," and the meaning of "totality of the circumstances," before presenting an application to the attorneys in the NSLU. We learned at the Committee's hearing this past September 10th, a full year after the terrorist attacks, that the FBI drafted administrative guidelines that will provide for Unit Chiefs and SSAs at Headquarters a uniform interpretation of how—and just as importantly—when to apply probable cause or other standards in FISA warrant applications.

All of these problems demonstrate that there is a dire need for a thorough review of procedural and substantive practices regarding FISA at the FBI and the DOJ. The Senate Judiciary Committee needs to be even more vigilant in its oversight responsibilities regarding the entire FISA process and the FISA Court itself. The FISA process is not fatally flawed, but rather its administration and coordination needs shift review and improvement if it is to continue to be an effective tool in America's war on terrorism.

IV. The Importance of Enhanced Congressional Oversight

An undeniable and distinguishing feature of the flawed FISA implementation system that has developed at the DOJ and FBI over the last 23 years in its secrecy. Both at the legal and operational level, the most generalized aspects of the DOJ's FISA activities have not only been kept secret from the general public but from the Congress as well. As we stated above, much of this secrecy has been due to a lack of diligence on the part of Congress exercising its oversight responsibility. Equally disturbing, however, is the difficulty that a properly constituted Senate Committee, including a bipartisan group of senior senators, had in conducting effective oversight of the FISA process when we did attempt to perform our constitutional duties.

The Judiciary Committee's ability to conduct its inquiry was seriously hampered by the initial failure of the DOJ and the Administrative Office of the United States Courts to provide to the Committee an unclassified opinion of the FISA Court relevant to these matters. As noted above, we only received this opinion on August 22, 2002, in the middle of the August recess.

Under current law there is no requirement that FISA Court opinions be made available to Congressional committees or the public. The only statutory FISA reporting requirement is for an unclassified annual report of the Attorney General to the Administrative Office of the United States Court and to Congress setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under Title I, and (b) the total number of such orders and extensions either granted, modified, or denied.[47] These reports do not disclose or identify unclassified FISA Court opinions or disclose the number of individuals or entities targeted for surveillance, nor do they cover FISA Court orders for physical searches, pen registers, or records access.

Current law also requires various reports from the Attorney General to the Intelligence and Judiciary Committees that are not made public.[48] These reports are used for Congressional oversight purposes, but do not include FISA Court opinions. When the Act was passed in 1978, it required the Intelligence Committees for the first five years after enactment to report respectively to the House of Representatives and the Senate concerning the implementation of the Act and whether the Act should be amended, repealed, or permitted to continue in effect without amendment. Those public reports were issued in 1979–1984 and discussed one FISA Court

[47] 50 U.S.C. 1807.
[48] 50 U.S.C. Sections 1808, 1826, 1846, 1863.

opinion issued in 1981, which related to the Court's authority to issue search warrants without express statutory jurisdiction.

The USA PATRIOT Act of 2001 made substantial amendments to FISA, and those changes are subject to a sunset clause under which they shall generally cease to have effect on December 31, 2005. That Act did not provide for any additional reporting to the Congress or the public regarding implementation of these amendments or FISA Court opinions interpreting them.

Oversight of the entire FISA process is hampered not just because the Committee was initially denied access to a single unclassified opinion but because the Congress and the public get no access to any work of the FISA Court, even work that is unclassified. This secrecy is unnecessary, and allows problems in applying the law to fester. There needs to be a healthy dialogue on unclassified FISA issues within Congress and the Executive branch and among informed professionals and interested groups. Even classified legal memoranda submitted by the DOJ to, and classified opinions by, the FISA Court can reasonably be redacted to allow some scrutiny of the issues that are being considered. This highly important body of FISA law is being developed in secret, and, because they are ex parte proceedings, without the benefit of opposing sides fleshing out the arguments as in other judicial contexts, and without even the scrutiny of the public or the Congress. Resolution of this problem requires considering legislation that would mandate that the Attorney General submit annual public reports on the number of targets of FISA surveillance, search, and investigative measures who are United States persons, the number of criminal prosecutions where FISA information is used and approved for use, and the unclassified opinions and legal reasoning adopted by the FISA Court and submitted by the DOJ.

As the recent litigation before the FISA Court of Review demonstrated, oversight also bears directly on the protection of important civil liberties. Due process means that the justice system has to be fair and accountable when the system breaks down.

Many things are different now since the tragic events of last September, but one thing that has not changed is the United States Constitution. Congress must work to guarantee the civil liberties of our people while at the same time meet our obligations to America's national security. Excessive secrecy and unilateral decision making by a single branch of government is not the proper method of striking that all important balance. We hope that, joining together, the Congress and the Executive Branch can work in a bipartisan manner to best serve the American people on these important issues. The stakes are too high for any other approach.

PATRICK LEAHY.
ARLEN SPECTER.
CHUCK GRASSLEY.

Exhibits

05/05/02 WED 19:18 FAX 001

S = secret
SW = sealed
P = protective order

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No.

Suite 1100
111 Washington Avenue South
Minneapolis, MN 55401

May 21, 2002

FBI Director Robert Mueller
FBI Headquarters
Washington D.C.

Dear Director Mueller:

I feel at this point that I have to put my concerns in writing concerning the important topic of the FBI's response to evidence of terrorist activity in the United States prior to September 11th. The issues are fundamentally ones of INTEGRITY and go to the heart of the FBI's law enforcement mission and mandate. Moreover, at this critical juncture in fashioning future policy to promote the most effective handling of ongoing and future threats to United States citizens' security, it is of absolute importance that an unbiased, completely accurate picture emerge of the FBI's current investigative and management strengths and failures.

To get to the point, I have deep concerns that a delicate and subtle shading/skewing of facts by you and others at the highest levels of FBI management has occurred and is occurring. The term "cover up" would be too strong a characterization which is why I am attempting to carefully (and perhaps over laboriously) choose my words here. I base my concerns on my relatively small, peripheral but unique role in the Moussaoui investigation in the Minneapolis Division prior to, during and after September 11th and my analysis of the comments I have heard both inside the FBI (originating, I believe, from you and other high levels of management) as well as your Congressional testimony and public comments.

I feel that certain facts, including the following, have, up to now, been omitted, downplayed, glossed over and/or mis-characterized in an effort to avoid or minimize personal and/or institutional embarrassment on the part of the FBI and/or perhaps even for improper political reasons:

1) The Minneapolis agents who responded to the call about Moussaoui's flight training identified him as a terrorist threat from a very early point. The decision to take him into custody on August 15, 2001, on the INS "overstay" charge was a

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deliberate one to counter that threat and was based on the agents' reasonable suspicions. While it can be said that Moussaoui's overstay status was fortuitous, because it allowed for him to be taken into immediate custody and prevented him receiving any more flight training, it was certainly not something the INS coincidentally undertook of their own volition. I base this on the conversation I had when the agents called me at home late on the evening Moussaoui was taken into custody to confer and ask for legal advice about their next course of action. The INS agent was assigned to the FBI's Joint Terrorism Task Force and was therefore working in tandem with FBI agents.

2) As the Minneapolis agents' reasonable suspicions quickly ripened into probable cause, which, at the latest, occurred within days of Moussaoui's arrest [redacted] they became desperate to search the computer lap top that had been taken from Moussaoui as well as conduct a more thorough search of his personal effects. The agents in particular believed that [redacted]

3) The Minneapolis agents' initial thought was to obtain a criminal search warrant, but in order to do so, they needed to get FBI Headquarters' (FBIHQ's) approval in order to ask for DOJ OIPR's approval to contact the United States Attorney's Office in Minnesota. Prior to and even after receipt of information provided by the French, FBIHQ personnel disputed with the Minneapolis agents the existence of probable cause to believe that a criminal violation had occurred/was occurring. As such, FBIHQ personnel refused to contact OIPR to attempt to get the authority. While reasonable minds may differ as to whether probable cause existed prior to [redacted] it was certainly established after that point and became even greater with successive, more detailed information from [redacted] intelligence sources. The two possible criminal violations initially identified by Minneapolis Agents were violations of Title 18 United States Code Section 2332b (Acts of terrorism transcending national boundaries, which, notably, includes "creating a substantial risk of serious bodily injury to any other person by destroying or damaging any structure, conveyance, or other real or personal property within the United States or by attempting or conspiring to destroy or damage any structure, conveyance, or other real or personal property within the United States") and Section 32 (Destruction of aircraft or aircraft facilities). It is important to note that the actual search warrant obtained on September 11th was based on probable cause of a violation of

[redacted][1] Notably also, the actual search warrant obtained on September 11th did not include [redacted] Therefore, the only main difference between the information being submitted to FBIHQ from an early date which HQ personnel continued to deem insufficient and [redacted] September 11th, was the fact that [redacted] suspected terrorists were known to have hijacked planes which they then deliberately crashed into the World Trade Center and the Pentagon. To say then, as has been iterated numerous times, that probable cause did not exist until after the disastrous event occurred, is really to acknowledge that the missing piece of probable cause was only the FBI's (FBIHQ's) failure to appreciate that such an event could occur. The probable cause did not otherwise improve or change. When we went to the United States Attorney's Office that morning of September 11th, in the first hour after the attack, [redacted] The problem with chalking this all up to the "20-20 hindsight is perfect" problem, (which I, as all attorneys who have been involved in deadly force training or the defense of various lawsuits are fully appreciative of), is that this is not a case of everyone in the FBI failing to appreciate the potential consequences. It is obvious, from my firsthand knowledge of the events and the detailed documentation that exists, that the agents in Minneapolis who were closest to the action and in the best position to gauge the situation locally, did fully appreciate the terrorist risk/danger posed by Moussaoui and his possible co-conspirators even prior to September 11th. Even without the knowledge of the Phoenix communication (and any number of other additional intelligence communications that FBIHQ personnel were privy to in their central coordination roles), the Minneapolis agents appreciated the risk. So I think it's very hard for the FBI to offer the "20-20 hindsight" justification for its failure to act! Also intertwined with my reluctance in this case to accept the "20-20 hindsight" rationale is first-hand knowledge that I have of statements made on September 11th, after the first attacks on the World Trade Center had already occurred, made telephonically by the FBI Supervisory Special Agent (SSA) who was the one most involved in the Moussaoui matter and who, up to that point, seemed to have been consistently, almost deliberately thwarting the Minneapolis FBI agents' efforts (see number 5). Even after the attacks had begun, the SSA in question

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[1] And both of the violations originally cited in vain by the Minneapolis agents disputing the issue with FBIHQ personnel are among those on which Moussaoui is currently indicted.

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was still attempting to block the search of Moussaoui's computer, characterizing the World Trade Center attacks as a mere coincidence with Minneapolis' prior suspicions about Moussaoui.[2]

4) In one of my peripheral roles on the Moussaoui matter, I answered an e-mail message on August 22, 2001, from an attorney at the National Security Law Unit (NSLU). Of course, with (ever important) 20-20 hindsight, I now wish I had taken more time and care to compose my response. When asked by NSLU for my "assessment of (our) chances of getting a criminal warrant to search Moussaoui's computer", I answered, "Although I think there's a decent chance of being able to get a judge to sign a criminal search warrant, our USAO seems to have an even higher standard much of the time, so rather than risk it, I advised that they should try the other route." Leaked news accounts which said the Minneapolis Legal Counsel (referring to me) concurred with FBIHQ that probable cause was lacking to search Moussaoui's computer are in error. (Or possibly the leak was deliberately skewed in this fashion?) What I meant by this pithy e-mail response, was that although I thought probable cause existed ("probable cause" meaning that the proposition has to be more likely than not, or if quantified, a 51% likelihood), I thought our United States Attorney's Office, (for a lot of reasons including just to play it safe), in regularly requiring much more than probable cause before approving affidavits, (maybe, if quantified, 75%-80% probability and sometimes even higher), and

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[2] Just minutes after I saw the first news of the World Trade Center attack(s), I was standing outside the office of Minneapolis ASAC M. Chris Briese waiting for him to finish with a phone call, when he received a call on another line from this SSA. Since I figured I knew what the call may be about and wanted to ask, in light of the unfolding events and the apparent urgency of the situation, if we should now immediately attempt to obtain a criminal search warrant for Moussaoui's laptop and personal property, I took the call. I said something to the effect that, in light of what had just happened in New York, it would have to be the "hugest coincidence" at this point if Moussaoui was not involved with the terrorists. The SSA stated something to the effect that I had used the right term "coincidence" and that this was probably all just a coincidence and we were to do nothing in Minneapolis until we got their (HQ's) permission because we might "screw up" something else going on elsewhere in the country.

[3] For instance, last week during the mailbox pipe bomb investigation, when the main suspect was determined to be college student Lucas Helder, of Minnesota, we sought to search his bedroom in his parents' home which his parents had already consented to, but for which we needed a search warrant due to some locked areas in the room not within the parents' authority. Despite significant evidence that Helder was responsible for making and planting the pipe bombs, much of it emanating from his own family and roommate(s), including the fact [redacted]

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depending upon the actual AUSA who would be assigned, might turn us down. As a tactical choice, I therefore thought it would be better to pursue the "other route" (the FISA search warrant) first, the reason being that there is a common perception, which for lack of a better term, I'll call the "smell test" which has arisen that if the FBI can't do something through straight-up criminal methods, it will then resort to using less-demanding intelligence methods. Of course this isn't true, but I think the perception still exists. So, by this line of reasoning, I was afraid that if we first attempted to go criminal and failed to convince an AUSA, we wouldn't pass the "smell test" in subsequently seeking a FISA. I thought our best chances therefore lay in first seeking the FISA. Both of the factors that influenced my thinking are areas arguably in need of improvement: requiring an excessively high standard of probable cause in terrorism cases and getting rid of the "smell test" perception. It could even be argued that FBI agents, especially in terrorism cases where time is of the essence, should be allowed to go directly to federal judges to have their probable cause reviewed for arrests or searches without having to gain the USAO's approval.[4]

5) The fact is that the key FBIHQ personnel whose jobs it was to assist and coordinate with field division agents on terrorism investigations and the obtaining and use of FISA searches (and who theoretically were privy to many more sources of intelligence information than field division agents), continued to, almost inexplicably,[5] throw up roadblocks and

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[redacted] (SW) an Assistant U.S. Attorney declined permission to seek a search warrant unless we could show that we knew that the room had the exact same type of batteries and wire used in the pipe bombs- (this from an AUSA who has no bomb training!).

[4]Certainly Rule 41 of the Federal Rules of Criminal Procedure which begins. "Upon the request of a federal law enforcement officer or an attorney for the government" does not contain this requirement. Although the practice that has evolved is that FBI agents must secure prior approval for any search or arrest from the United States Attorneys Office, the Federal Rule governing Search and Seizure clearly envisions law enforcement officers applying, on their own, for search warrants.

[5]During the early aftermath of September 11th, when I happened to be recounting the pre-September 11th events concerning the Moussaoui investigation to other FBI personnel in other divisions or at FBIHQ, almost everyone's first question was "Why? - Why would an FBI agent(s) deliberately sabotage a case? (I know I shouldn't be flippant about this, but jokes were actually made that the key FBIHQ personnel had to be spies or moles, like Robert Hansen, who were actually working for Osama Bin Laden to have so undercut Minneapolis' effort.) Our best

undermine Minneapolis' by-now desperate efforts to obtain a FISA search warrant, long after [redacted] and probable cause became clear. HQ personnel brought up almost ridiculous questions in their apparent efforts to undermine the probable cause.[6] In all of their conversations and correspondence, HQ personnel never

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real guess, however, is that, in most cases, avoidance of all "unnecessary" actions/decisions by FBIHQ managers (and maybe to some extent field managers as well) has, in recent years, been seen as the safest FBI career course. Numerous high-ranking FBI officials who have made decisions or have taken actions which, in hindsight, turned out to be mistaken or just turned out badly (i.e. Ruby Ridge, Waco, etc.), have seen their careers plummet and end. This has in turn resulted in a climate of fear which has chilled aggressive FBI law enforcement action/decisions. In a large hierarchal bureaucracy such as the FBI, with the requirement for numerous superiors' approvals/oversight, the premium on career-enhancement, and interjecting a chilling factor brought on by recent extreme public and congressional criticism/oversight, and I think you will see at least the makings of the most likely explanation. Another factor not to be underestimated probably explains the SSA and other FBIHQ personnel's reluctance to act. And so far, I have heard no FBI official even allude to this problem- which is that FBI Headquarters is staffed with a number of short term careerists* who, like the SSA in question, must only serve an 18 month-just-time-to-get-your-ticket-punched minimum. It's no wonder why very little expertise can be acquired by a Headquarters unit! (And no wonder why FBIHQ is mired in mediocrity!- that may be a little strong, but it would definitely be fair to say that there is unevenness in competency among Headquarters personnel.) (It's also a well known fact that the FBI Agents Association has complained for years about the disincentives facing those entering the FBI management career path which results in very few of the FBI's best and brightest choosing to go into management. Instead the ranks of FBI management are filled with many who were failures as street agents. Along these lines, let me ask the question, why has it suddenly become necessary for the Director to "handpick" the FBI's management?) **It's quite conceivable that many of the HQ personnel who so vigorously disputed Moussaoui's ability/predisposition to fly a plane into a building were simply unaware of all the various incidents and reports worldwide of Al Qaeda terrorists attempting or plotting to do so.**

*By the way, just in the event you did not know, let me furnish you the Webster's definition of "careerism,- the policy or practice of advancing one's career often at the cost of one's integrity". Maybe that sums up the whole problem!

[6] For example, at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacarias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed in the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.

disclosed to the Minneapolis agents that the Phoenix Division had, only approximately three weeks earlier, warned of Al Qaeda operatives in flight schools seeking flight training for terrorist purposes!
Nor did FBIHQ personnel do much to disseminate the information about Moussaoui to other appropriate intelligence/law enforcement authorities. When, in a desperate 11th hour measure to bypass the FBIHQ roadblock, the Minneapolis Division undertook to directly notify [redacted] FBIHQ personnel actually chastised the Minneapolis agents for making the direct notification without their approval!

6) Eventually on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis Agent, the Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted] Obviously verbal presentations are far more susceptible to mis-characterization and error. The e-mail communications between Minneapolis and FBIHQ, however, speak for themselves and there are far better witnesses than me who can provide their first hand knowledge of these events characterized in one Minneapolis agent's e-mail as FBIHQ is "setting this up for failure". My only comment is that the process of allowing the FBI supervisors to make changes in affidavits is itself fundamentally wrong, just as, in the follow-up to FBI Laboratory Whistleblower Frederic Whitehurst's allegations, this process was revealed to be wrong in the context of writing up laboratory results. With the Whitehurst allegations, this process of allowing supervisors to re-write portions of laboratory reports, was found to provide opportunities for over-zealous supervisors to skew the results in favor of the prosecution. In the Moussaoui case, it was the opposite- the process allowed the Headquarters Supervisor to downplay the significance of the information thus far collected in order to get out of the work of having to see the FISA application through or possibly to avoid taking what he may have perceived as an unnecessary career risk.

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[7] Another factor that cannot be underestimated as to the HQ Supervisor's apparent reluctance to do anything was/is the ever present risk of being "written up" for an Intelligence Oversight Board (IOB) "error". In the year(s) preceding the September 11th acts of terrorism.

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I understand that the failures of the FBIHQ personnel involved in the Moussaoui matter are also being officially excused because they were too busy with other investigations, the Cole bombing and other important terrorism matters, but the Supervisor's taking of the time to read each word of the information submitted by Minneapolis and then substitute his own choice of wording belies to some extent the notion that he was too busy. As an FBI division legal advisor for 12 years (and an FBI agent for over 21 years), I can state that an affidavit is better and will tend to be more accurate when the affiant has first hand information of all the information he/she must attest to. Of necessity, agents must continually rely upon information from confidential sources, third parties and other law enforcement officers in drafting affidavits, but the repeating of information from others greatly adds to the opportunities for factual discrepancies and errors to arise. To the extent that we can minimize the opportunity for

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numerous alleged IOB violations on the part of FBI personnel had to be submitted to the FBI's Office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists. Since one generally only runs the risk of IOB violations when one does something, the safer course is to do nothing. Ironically, in this case, a potentially huge IOB violation arguably occurred due to FBIHQ's failure to act, that is, FBIHQ's failure to inform the Department of Justice Criminal Division of Moussaoui's potential criminal violations (which, as I've already said, were quickly identified in Minneapolis as violations of Title 18 United States Code Sections Section 2332b [Acts of terrorism transcending national boundaries] and Section 32 [Destruction of aircraft or aircraft facilities]). This failure would seem to run clearly afoul of the Attorney General directive contained in the "1995 Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" which mandatorily require the FBI to notify the Criminal Division when "facts or circumstances are developed" in an FI or FCI investigation "that reasonably indicate that a significant federal crime has been, is being, or may be committed." I believe that Minneapolis agents actually brought this point to FBIHQ's attention on August 22, 2001, but HQ personnel apparently ignored the directive, ostensibly due to their opinion of the lack of probable cause. But the issue of whether HQ personnel deliberately undercut the probable cause can be sidestepped at this point because the Directive does not require probable cause. It requires only a "reasonable indication" which is defined as "substantially lower than probable cause". Given that the Minneapolis Division had accumulated far more than "a mere hunch" (which the directive would deem as insufficient), the information ought to have, at least, been passed on to the "Core Group" created to assess whether the information needed to be further disseminated to the Criminal Division. However, (and I don't know for sure), but to date, I have never heard that any potential violation of this directive has been submitted to the IOB or to the FBI's OPR. It should be also noted that when making determinations of whether items need to be submitted to the IOB, it is my understanding that NSLU normally used/uses a broad approach, erring, when in doubt, on the side of submitting potential violations.

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this type of error to arise by simply not allowing unnecessary re-writes by supervisory staff, it ought to be done. (I'm not talking, of course, about mere grammatical corrections, but changes of some substance as apparently occurred with the Moussaoui information which had to be, for lack of a better term, "filtered" through FBIHQ before any action, whether to seek a criminal or a FISA warrant, could be taken.) Even after September 11th, the fear was great on the part of Minneapolis Division personnel that the same FBIHQ personnel would continue their "filtering" with respect to the Moussaoui investigation, and now with the added incentive of preventing their prior mistakes from coming to light. For this reason, for weeks, Minneapolis prefaced all outgoing communications (ECs) in the PENTTBOM investigation with a summary of the information about Moussaoui. We just wanted to make sure the information got to the proper prosecutive authorities and was not further suppressed! This fear was probably irrational but was nonetheless understandable in light of the Minneapolis agents' prior experiences and frustrations involving FBIHQ. (The redundant preface information regarding Moussaoui on otherwise unrelated PENTTBOM communications has ended up adding to criminal discovery issues, but this is the reason it was done.)

7) Although the last thing the FBI or the country needs now is a witch hunt, I do find it odd that (to my knowledge) no inquiry whatsoever was launched of the relevant FBIHQ personnel's actions a long time ago. Despite FBI leaders' full knowledge of all the items mentioned herein (and probably more that I'm unaware of), the SSA, his unit chief, and other involved HQ personnel were allowed to stay in their positions and, what's worse, occupy critical positions in the FBI's SIOC Command Center post September 11th. (The SSA in question actually received a promotion some months afterward!) It's true we all make mistakes and I'm not suggesting that the HQ personnel in question ought to be burned at the stake, but, we all need to be held accountable for serious mistakes. I'm relatively certain that if it appeared that a lowly field office agent had committed such errors of judgment, the FBI's OPR would have been notified to investigate and the agent would have, at the least, been quickly reassigned. I'm afraid the FBI's failure to submit this matter to OPR (and to the IOB) gives further impetus to the notion (raised previously by many in the FBI) of a double standard which results in those of lower rank being investigated more aggressively and dealt with more harshly for misconduct while the misconduct of those at the top is often overlooked or results in minor disciplinary action. From all appearances, this double standard may also apply between those at FBIHQ and those in the field.

8) The last official "fact" that I take issue with is not really a fact, but an opinion, and a completely unsupported opinion at that. In the day or two following September 11th,

you, Director Mueller, made the statement to the effect that if the FBI had only had any advance warning of the attacks, we (meaning the FBI), may have been able to take some action to prevent the tragedy. Fearing that this statement could easily come back to haunt the FBI upon revelation of the information that had been developed pre-September 11th about Moussaoui, I and others in the Minneapolis Office, immediately sought to reach your office through an assortment of higher level FBIHQ contacts, in order to quickly make you aware of the background of the Moussaoui investigation and forewarn you so that your public statements could be accordingly modified. When such statements from you and other FBI officials continued, we thought that somehow you had not received the message and we made further efforts. Finally when similar comments were made weeks later, in Assistant Director Caruso's congressional testimony in response to the first public leaks about Moussaoui, we faced the sad realization that the remarks indicated someone, possibly with your approval, had decided to circle the wagons at FBIHQ in an apparent effort to protect the FBI from embarrassment and the relevant FBI officials from scrutiny. Everything I have seen and heard about the FBI's official stance and the FBI's internal preparations in anticipation of further congressional inquiry, has, unfortunately, confirmed my worst suspicions in this regard. After the details began to emerge concerning the pre-September 11th investigation of Moussaoui, and subsequently with the recent release of the information about the Phoenix EC, your statement has changed. A 100 degree metamorphosis, the official statement is now to the effect that even if the FBI had followed up on the Phoenix lead to conduct checks of flight schools and the Minneapolis request to search Moussaoui's personal effects and laptop, nothing would have changed and such actions certainly could not have prevented the terrorist attacks and resulting loss of life. With all due respect, this statement is as bad as the first! It is also quite at odds with the earlier statement (which I'm surprised has not already been pointed out by those in the media!) I don't know how you or anyone at FBI Headquarters, no matter how much genius or prescience you may possess, could so blithely make this affirmation without anything to back the opinion up than your stature as FBI Director. The truth is, as with most predictions into the future, no one will ever know what impact, if any, the FBI's following up on those requests, would have had. Although I agree that it's very doubtful that the full scope of the tragedy could have been prevented, it's at least possible we could have gotten lucky and uncovered one or two more of the terrorists in flight training prior to September 11th, just as Moussaoui was discovered, after making contact with his flight instructors. It is certainly not beyond the realm of imagination to hypothesize that Moussaoui's fortuitous arrest alone, even if he merely was the 20th hijacker, allowed the hero passengers of Flight 93 to overcome their terrorist hijackers and thus spare more lives on the ground. And even greater

casualties, possibly of our Nation's highest government officials, may have been prevented if Al Qaeda intended for Moussaoui to pilot an entirely different aircraft. There is, therefore, at least some chance that discovery of other terrorist pilots prior to September 11th may have limited the September 11th attacks and resulting loss of life. Although your conclusion otherwise has to be very reassuring for some in the FBI to hear being repeated so often (as if saying it's so may make it be so), I think both of your statements demonstrate a rush to judgment to protect the FBI at all costs. I think the only fair response to this type of question would be that no one can pretend to know one way or the other.

Mr. Director, I hope my observations can be taken in a constructive vein. They are from the heart and intended to be completely apolitical. Hopefully, with our nation's security on the line, you and our nation's other elected and appointed officials can rise above the petty politics that often plague other discussions and do the right thing. You do have some good ideas for change in the FBI but I think you have also not been completely honest about some of the true reasons for the FBI's pre-September 11th failures. Until we come clean and deal with the root causes, the Department of Justice will continue to experience problems fighting terrorism and fighting crime in general.

I have used the "we" term repeatedly herein to indicate facts about others in the Minneapolis Office at critical times, but none of the opinions expressed herein can be attributed to anyone but myself. I know that those who know me would probably describe me as, by nature, overly opinionated and sometimes not as discreet as I should be. Certainly some of the above remarks may be interpreted as falling into that category, but I really do not intend anything as a personal criticism of you or anyone else in the FBI, to include the FBIHQ personnel who I believe were remiss and mishandled their duties with regard to the Moussaoui investigation. **Truly my only purpose is to try to provide the facts within my purview so that an accurate assessment can be obtained and we can learn from our mistakes.** I have pointed out a few of the things that I think should be looked at but there are many, many more.[8] An honest acknowledgment of the FBI's mistakes in this and other cases should not lead to increasing

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[8] For starters, if prevention rather than prosecution is to be our new main goal, (an objective I totally agree with), we need more guidance on when we can apply the Quarles "public safety" exception to Miranda's 5th Amendment requirements. **We were prevented from even attempting to question Moussaoui on the day of the attacks when, in theory, he could have possessed further information about other co-conspirators.** (Apparently no government attorney believes there is a "public safety" exception in a situation like this?!)

the Headquarters' bureaucracy and approval levels of investigative actions as the answer. Most often, field office agents and field office management on the scene will be better suited to the timely and effective solution of crimes and, in some lucky instances, to the effective prevention of crimes, including terrorism incidents. The relatively quick solving of the recent mailbox pipe-bombing incidents which resulted in no serious injuries to anyone are a good example of effective field office work (actually several field offices working together) and there are hundreds of other examples. Although FBIHQ personnel have, no doubt, been of immeasurable assistance to the field over the years,[9] I'm hard pressed to think of any case which has been solved by FBIHQ personnel and I can name several that have been screwed up! **Decision-making is inherently more effective and timely when decentralized instead of concentrated.**

Your plans for an FBI Headquarters' "Super Squad" simply fly in the face of an honest appraisal of the FBI's pre-September 11th failures. The Phoenix, Minneapolis and Paris Legal Attache Offices reacted remarkably exhibiting keen perception and prioritization skills regarding the terrorist threats they uncovered or were made aware of pre-September 11th.[10] **The same cannot be said for the FBI Headquarters' bureaucracy and you want to expand on that?!!** Should we put the counterterrorism unit chief and SSA who previously handled the Moussaoui matter in charge of the new "Super Squad"?! You are also apparently disregarding the fact that Joint Terrorism Task Forces (JTTFs), operating out of field divisions for years, (the first and chief one being New York City's JTTF), have successfully handled numerous terrorism investigations and, in some instances, successfully prevented acts of terrorism. There's no denying the need for more and better intelligence and intelligence management, but you should think carefully about how much gate keeping power should be entrusted with any HQ entity. If we are indeed in a "war", shouldn't the Generals be on the battlefield instead of sitting in a spot removed from the action while still attempting to call the shots?

I have been an FBI agent for over 21 years and, for what it's worth, have never received any form of disciplinary

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[9] For example, as a Chief Division Counsel, I am in contact with and receive valuable assistance from the FBI's Office of General Counsel and other FBIHQ entities on a daily basis. Almost all FBI employees assigned to Headquarters are good, decent people and are effectively doing their jobs. But all bureaucracies have their problems and their limitations.

[10] I should detail here the night and weekend hours worked by the Minneapolis agents who, uncovered Moussaoui and who immediately recognized the need to stay on the job with the critical task.

action throughout my career. From the 5th grade, when I first wrote the FBI and received the "100 Facts about the FBI" pamphlet, this job has been my dream. I feel that my career in the FBI has been somewhat exemplary, having entered on duty at a time when there was only a small percentage of female Special Agents. I have also been lucky to have had four children during my time in the FBI and am the sole breadwinner of a family of six. Due to the frankness with which I have expressed myself and my deep feelings on these issues, (which is only because I feel I have a somewhat unique, inside perspective of the Moussaoui matter, the gravity of the events of September 11th and the current seriousness of the FBI's and United States' ongoing efforts in the "war against terrorism"), I hope my continued employment with the FBI is not somehow placed in jeopardy. I have never written to an FBI Director in my life before on any topic. Although I would hope it is not necessary, I would therefore wish to take advantage of the federal "Whistleblower Protection" provisions by so characterizing my remarks.

Sincerely,

Coleen Rowley

Coleen M. Rowley
Special Agent and
Minneapolis Chief Division Counsel

copies to: U.S. Congressional Special Staff looking into this matter
FBI Office of Professional Responsibility (re Whistleblow
data);
U.S. Senator Dianne Feinstein; and
U.S. Senator Richard Shelby

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PENNSYLVANIA

COMMITTEES:
JUDICIARY
APPROPRIATIONS
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United States Senate

WASHINGTON, DC 20510-3802

July 10, 2002

Hon. Robert Mueller
Director,
Federal Bureau of Investigation
9th Street and Pennsylvania Ave.
Washington, DC 20535

Dear Director Mueller:

In a hearing before the Judiciary Committee on June 6, 2002, I called your attention to the standard on probable cause in the opinion of then-Associate Justice Rehnquist in Illinois v. Gates, 462 U.S. 213, 236 (1983) (citations omitted) as follows:

> As early as *Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely-tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."

In a closed door hearing yesterday, seven FBI personnel handling FISA warrant applications were questioned, including four attorneys.

A fair summary of their testimony demonstrated that no one was familiar with Justice Rehnquist's definition from Gates and no one articulated an accurate standard for probable cause.

I would have thought that the FBI personnel handling FISA applications would have noted this issue from the June 6th hearing; or, in the alternative, that you or other supervisory personnel would have called it to their attention.

It is obvious that these applications, which are frequently made, are of the utmost importance to our national security and your personnel should not be applying such a high standard that precludes submission of FISA applications to the Foreign Intelligence Surveillance Court.

PRINTED ON RECYCLED PAPER

I believe the Judiciary Committee will have more to say on this subject but I wanted to call this to your attention immediately so that you could personally take appropriate corrective action.

Sincerely,

Arlen Specter

AS/ph

Via Facsimile

U.S. Department of Justice

Federal Bureau of Investigation

Washington, D.C. 20535

Honorable Arlen Specter
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Specter:

I am writing in response to your letter to Director Mueller dated July 10, 2002 regarding the standards applied to applications under the Foreign Intelligence Surveillance Act (FISA).

As you know, the events of September 11, 2001 caused the entire Government to review all of its programs to identify any revisions which may help to prevent another terrorist attack. The FISA review process is critical to our counterterrorism mission and, even before September 11th, we were working with the Department of Justice (DOJ), as well as the FISA Court, to simplify and expedite the FISA procedures. We have made significant progress including implementation of the FISA procedures to ensure accuracy (known as the "Woods Procedures"), a copy of which has been provided to the Committee.

In addition, we have been crafting new guidance, in consultation with DOJ, to address the FISA process as modified by the USA PATRIOT Act. This guidance will also address the concerns raised in your letter and your meeting with FBI personnel on July 9, 2002. We anticipate approval of the guidance shortly and will immediately disseminate it to field offices for implementation. A copy will be provided to the Committee as well.

I appreciate your concerns and your support in these critical matters. Please contact me if you have any questions.

Sincerely,

John E. Collingwood
Assistant Director
Office of Public and
Congressional Affairs

(Rev. 08-28-2000)

FEDERAL BUREAU OF INVESTIGATION

Precedence: PRIORITY Date: 09/16/2002

To: All Divisions Attn: AD
SAC
CDC

All Legats Attn: Legal Attache

From: Office of the General Counsel
Contact: DGC M.E. Bowman (202)324-9358
DGC Charles M. Steele (202)324-8089

Approved By: Wainstein Kenneth L

Drafted By: Wainstein Kenneth L

Case ID #: 66F-HQ-1085161-31 (Pending)

Title: PROBABLE CAUSE

Synopsis: The purpose of this Electronic Communication is to clarify the meaning of probable cause.

Details: In recent legislative hearings, questions have been raised about the concept of probable cause as it applies to the Foreign Intelligence Surveillance Act (FISA). While FBI Agents receive substantial legal training and have ample experience applying the concept in their daily work, it is nonetheless helpful to review the case law defining probable cause. Accordingly, the Office of the General Counsel prepared the following summary for the benefit of all FBI Agents.

In Illinois v. Gates, 462 U.S. 213 (1983), the Supreme Court explained that the probable cause standard is a practical, nontechnical concept which deals with probabilities -- not hard certainties -- derived from the totality of the circumstances in a factual situation. Probable cause to believe a particular contention is determined by evaluating "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act;" it is "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules." 462 U.S. at 231-32.

The courts have broadly defined the parameters of probable cause. While it requires more than an unfounded suspicion, courts have repeatedly explained that probable cause requires a lesser showing than the rigorous evidentiary standards employed in trial proceedings. In Gates, 462 U.S. at 235, the

Supreme Court explained that probable cause is less demanding than the evidentiary standards of beyond a reasonable doubt, preponderance of the evidence or even a prima facie case -- all that is required to establish probable cause is a "fair probability" that the asserted contention is true. It is particularly important to note that probable cause is a lower standard than "preponderance of the evidence," which is defined as the amount of evidence that makes a contention more likely true than not true. See, e.g., United States v. Bapack, 129 F.3d 1320, 1324 (D.C. Cir. 1997) (preponderance standard means "more likely than not"); United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994) ("more probable than not"), BLACK'S LAW DICTIONARY 1064 (5th ed. 1979) ("[e]vidence which is of greater weight or more convincing than the evidence which is offered in opposition to it"). Since probable cause is a lower standard than preponderance of the evidence, an Agent can demonstrate probable cause to believe a factual contention without proving that contention even to a 51% certainty, as required under the preponderance of the evidence standard. See, e.g., United States v. Cruz, 834 F.2d 47, 50 (2d Cir. 1987) (probable cause does not require a showing that it is more probable than not that a crime has been committed); Paff v. Kaltenbach, 204 F.3d 425, 436 (3d Cir. 2000) (probable cause is a lesser showing than preponderance of the evidence); United States v. Limares, 269 F.3d 794, 798 (7th Cir. 2001) (same); United States v. Mounts, 248 F.3d 712, 715 (7th Cir. 2001) (probable cause does not require a showing that it is more likely than not that the suspected committed a crime).

Courts have instructed judges to apply no higher standard when they review warrants for probable cause. The magistrate reviewing an application for a criminal search warrant "is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." Gates, 462 U.S. at 238. As to arrest warrants, the question for the magistrate is whether the totality of the facts and circumstances set forth in the affidavit are "sufficient to warrant a prudent man in believing that the [suspect] had committed" the alleged offense -- an evaluation that "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands." Gerstein v. Pugh, 420 U.S. 103, 111-12, 121 (1975).

Similarly, a judge of the Foreign Intelligence Surveillance Court reviewing an application for a FISA electronic surveillance order or search warrant must make a probable cause determination based on a practical, common-sense assessment of

the circumstances set forth in the declaration. The judge must first find probable cause that the target of the surveillance or search is a foreign power or an agent of a foreign power. While certain non-U.S. persons can qualify as agents of a foreign power merely by acting in the United States as an officer or employee of a foreign power, a U.S. person can be found to be an agent of a foreign power only if the judge finds probable cause to believe that he or she is engaged in activities that involve (or in the case of clandestine intelligence gathering activities "may involve") certain criminal conduct. 50 U.S.C. 1801(b). For an electronic surveillance order to issue under FISA, the judge must additionally find that there is probable cause to believe that each of the facilities or places to be electronically surveilled is being used, or is about to be used, by a foreign power or an agent of a foreign power. 50 U.S.C. 1805(a)(3). For a FISA search warrant, the judge must find probable cause to believe that the premises or property to be searched is owned, used, possessed by or in transit to or from a foreign power or an agent of a foreign power. 50 U.S.C. 1824(a)(3).

We hope this summary clarifies the meaning of probable cause. Agents with questions about probable cause in a case should consult with their Chief Division Counsel, the Office of the General Counsel, or the Assistant United States Attorney or Justice Department attorney assigned to the case.

To: All Divisions From: Office of the General Counsel
Re: 66F-HQ-1085161, 09/16/2002

LEAD(s):

Set Lead 1: (Adm)

ALL RECEIVING OFFICES

Each receiving office is to ensure that a copy of this communication is provided to all Special Agents and other appropriate personnel within the office.

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SECRET

SECRET

FEDERAL BUREAU OF INVESTIGATION

Precedence: IMMEDIATE

Date: 04/21/2000

To: All Field Offices

Attn: ADIC
SAC
ASAC/CTD
CDC

From: Counterterrorism Division
International Terrorism Operations Section

Office of the General Counsel

b2
b7c

Contact: [redacted]

Approved By: Pickard Thomas J
Gallagher Neil J
Watson Dale L
Horan Sheila
Rolince Michael E

b7c

[redacted]

Bowman Spike

[redacted]

Drafted By: [redacted] b7c

Case ID # (S) [redacted] (S) b1

Title: (U)(S) Caution on FISA Issues

Synopsis: (U) (S) FBIHQ cautions all field offices on the handling of [illegible] surveillance and physical searches under the Foreign Intelligence Surveillance Act (FISA).

(S)(U) Classified By: ITOS/CTD
Reason: 1.5(c)
Declassify On: X1

CLASSIFIED BY: 62267 NLS/Dcm
REASON: 1.5 (c)
DECLASSIFY ON: X1
(RHD) (6/13/03)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED EXCEPT WHERE SHOWN OTHERWISE

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To: All Field Offices From: Counterterrorism Division
Re: (U) [redacted] (S) b1 04/14/2000

Details: (U) In the first quarter of the year 2000, different field offices have encountered difficulties in their management of electronic surveillances and physical searches authorized under FISA. After one quarter of reporting we are aware of potential violations numbering three and one-half times those reported in 1999. Examples of problems encountered follow:

(U) In one case, a field office secured a FISA which had to be implemented by a second field office. The second field office implemented the FISA order incorrectly, and videotaped a meeting even though videotaping was not authorized in the FISA order.

(U) In another investigation, a field office secured a FISA order which authorized the coverage of a target's cell phone. Unknown to the field office, some time after the FISA order, the target gave up his cell phone, and the target's cell phone number was assigned by the cell phone carrier to a new person. The new owner of the cell phone spoke a language other than the language spoken by the target of the FISA. When the language specialist listened to the FISA tape, and heard a new language, the specialist reported it to the agent working the case. Nothing was done for a substantial period of time, and timely reportedly was not made to FBIHQ. The new owner of the cell phone number was therefore the target of unauthorized electronic surveillance for a substantial period of time.

(U) In a third example, a target's E-Mail was correctly intercepted under a FISA order. When time came to renew the FISA, the field office decided to omit E-Mail coverage since the coverage was not productive. Thus, the FISA renewal order did not cover E-Mail. The field office then continued to cover the target's E-Mail even though there was no authorization for E-Mail coverage in the FISA renewal order.

(U) All events have been reported to the Office of Intelligence Policy and Review (OIPR) at the Department of Justice (DOJ) and to the Inspection Division, FBIHQ. OIPR, will report these incidents to Congress. If, after thorough analysis, one or more of these incidents is considered to be of sufficient gravity, the incidents will be reported to the Intelligence Oversight Board and/or to the Office of Professional Responsibility. Thus, the increase in violations of FISA court orders has the attention of the highest levels of management at the Department of Justice and the FBI.

(U) Other examples include unauthorized searches, incorrect addresses, incorrect interpretation of a FISA order and overruns of ELSUR.

(U) It is important that field offices read carefully every FISA package and not assume that the FISA packages are similar, have the same authorities, or, have the same rules for passing FISA material to DOJ, U.S. Attorneys offices, or even to FBI SAs working parallel criminal investigations. Every FISA

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To: All Field Offices From: Counterterrorism Division
Re: (S) [redacted] (S) 04/14/2000

package must be assumed to be unique and read in its entirety by agents responsible for the investigation. All technical squads must share copies of all FISAs, and minimization procedures thereunder, with the substantive squads and CDC and vice versa. In addition, field offices should be advised that there is a 14-day reporting requirement for the field on these incidents.

(U) Any and all significant occurrences should be reported to FBIHQ to determine whether the FISA may continue, be shut down, or additional authorities sought.

(U) All CDCs have been trained in FISA and should be consulted on all FISAs. CDCs should familiarize themselves with all FISA Court orders in their field office, and advise their technical and operational squads accordingly.

(U) FBIHQ is in the process of a more in-depth review of FISA issues and will issue additional guidance to the field once that review is completed.

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ADDITIONAL VIEWS OF SENATOR RUSSELL FEINGOLD

As the title states, the purpose of S. 113 is to amend "the Foreign Intelligence Surveillance Act of 1978 to allow surveillance of non-United States persons who engage in or prepare for international terrorism without affiliation with a foreign government or international terrorist group." In other words, as the Majority describes it, the intent of S. 113 is to permit FISA warrants to be obtained against the so-called "lone wolf" foreign terrorist. The lone-wolf terrorist is envisioned as an individual who has no identifiable ties to any foreign power, including any terrorist group.

I voted for this bill in committee because I want to engage in further discussions concerning proposed amendments to the bill and help improve it before it is taken up on the floor. I have doubts, however, about the constitutionality and the wisdom of the bill as reported by the Committee.

The approach taken in S. 113 would eliminate the current requirement in FISA that the individual who is the target of a warrant must be an agent of a foreign power. This means that S. 113 may very well result in FISA serving as a substitute for some of our most important criminal laws. I am concerned that S. 113 goes further than necessary to address the concern over the ability of law enforcement to identify, investigate and apprehend the true lone-wolf terrorist.

Like all Senators, I am extremely committed to taking every step necessary to protect our nation against terrorist attacks. But, I am troubled with the approach S. 113 takes to expand the use of Foreign Intelligence Surveillance Act. FISA represents an important exception to traditional constitutional restraints on criminal investigations, allowing the government to gather foreign intelligence information without having probable cause that a crime has been or is going to be committed. The courts have permitted the government to proceed with surveillance in this country under FISA's lesser standard of suspicion because the power is limited to investigations of foreign powers and their agents. S. 113 writes out of the statute a key requirement necessary to the lawfulness of intrusive surveillance powers that would otherwise be unconstitutional. See In re Sealed Case No. 02–001, slip op. at 42 (Foreign Intelligence Surveillance Ct. of Rev. Nov. 18, 2002) (while FISA requires no showing of probable cause of criminal activity, it is constitutional in part because it provides "another safeguard * * * that is, the requirement that there be probable cause to believe the target is acting 'for or on behalf of a foreign power.' ")

Even if S. 113 survives constitutional challenge, it would mean that non-U.S. persons could have electronic surveillance authorized against them using the lesser standards of FISA even though there is no conceivable foreign intelligence aspect to their cases. Judges would not even be able to use their discretion in reviewing a FISA

warrant application to determine if a non-U.S. person is connected to any foreign power or terrorist group. This elimination of a foreign intelligence element of the warrant is contrary to the very purpose of FISA and the justification for its reduced standards.

We should all recall the last time that Congress attempted to fix the rules for the use of FISA warrants in the USA PATRIOT Act. At that time, the expectation of most Senators was that the changes they were making to FISA would be used in a limited and reasonable manner. One change Congress authorized made it easier for FISA to be used in cases where the purpose of the investigation was primarily criminal prosecution rather than foreign intelligence gathering. Under USA PATRIOT Act, foreign intelligence gathering need only be a "significant" purpose of obtaining the warrant rather than the "primary" purpose.

The decision of the Attorney General to use FISA warrants more aggressively in criminal cases after the USA PATRIOT Act was passed demonstrates the impact that changing a single word in the statute can have. Not surprisingly, there has been a significant increase in the use of FISA warrants in criminal cases since enactment of the USA PATRIOT Act. We could very well be looking at a similar result if S. 113 passes in its current form. Eliminating the agent of a foreign power requirement could lead to an even more dramatic increase in the use of FISA warrants in situations that do not justify such extraordinary government power.

We are told that one of the inspirations for this bill was the case of Zacharias Moussaoui, the alleged 20th hijacker. One of the FBI's excuses for not seeking a warrant to search Mr. Moussaoui's computer prior to September 11th was that because it could not identify a foreign power or group with which Moussaoui was associated, it could not meet the "agent of a foreign power" requirement to get a FISA warrant. In the case of Moussaoui, a warrant application was never even submitted to the FISA court. As Senator Specter has pointed out, many legal observers believe that the FBI simply misread the law and that it could and should have obtained a FISA warrant against Mr. Moussaoui if it had tried.

It is somewhat difficult to envision a foreigner in the U.S. planning an international terrorist attack who is not an agent of a foreign power, which includes a terrorist organization. But it is certainly possible that at a time a FISA warrant is sought good evidence of that connection might not be available. I support the effort to make sure that a request for a warrant in such cases is not denied. On the other hand, it is also very possible that at the time a request for a reauthorization of the FISA warrant is made, the government will have determined that the suspect is truly not an agent of a foreign power. In those situations, FISA should not apply, and the government should be required to use the investigative tools available under our criminal laws. The foreign intelligence rationale for FISA's lesser standard no longer exists. I believe that the bill should include safeguards to make sure that the new powers included in this bill are not abused. Without such safeguards, we risk having this bill thrown out by the courts.

FISA must not be allowed to become the exception that swallowed the Fourth Amendment. There are ways to address the lone wolf terrorist that do not write the concept of "foreign intelligence"

out of the Foreign Intelligence Surveillance Act. I hope that the full Senate will reduce the dangers that this bill poses to our constitutional freedoms.

RUSS FEINGOLD.

X. APPENDIX A—EXCERPTS FROM JOINT INQUIRY BRIEFING BY STAFF ON UNITED STATES GOVERNMENT COUNTERTERRORISM ORGANIZATIONS AND ON THE EVOLUTION OF THE TERRORIST THREAT AND UNITED STATES RESPONSE: 1986–2001, SEPTEMBER 24, 2002

The committees met, pursuant to notice, at 10:10 a.m., in Room 216, Hart Senate Office Building, the Honorable Porter Goss, Chairman of the House Permanent Select Committee on Intelligence, presiding.

Senate Select Committee on Intelligence Members Present: Senators Graham, Shelby, Levin, Rockefeller, Feinstein, Bayh, Edwards, Mikulski, Kyl, Inhofe, Hatch, Roberts, and DeWine.

House Permanent Select Committee on Intelligence Members Present: Representatives Goss, Bereuter, Castle, Boehlert, Gibbons, Hoekstra, Burr, Chambliss, Pelosi, Harman, Roemer, Boswell, Peterson, and Cramer.

Senate Select Committee Staff Members Present: Alfred Cumming, Staff Director; William Duhnke, Minority Staff Director; Vicki Divoll, General Counsel; Kathleen McGhee, Chief Clerk; James Barnett, Randy Bookout, Steve Cash, Pete Dorn, Melvin Dubee, Bob Filippone, Chris Ford, Lorenzo Goco, James Hensler, Chris Jackson, Andrew Johnson, Ken Johnson, Hyon Kim, Don Mitchell, Matt Pollard, Don Stone, Tawanda Sullivan, Linda Taylor, Tracye Winfrey, and Jim Wolfe.

House Permanent Select Committee on Intelligence Staff Members Present: Timothy R. Sample, Staff Director; Chrisopher Barton, Acting Chief Counsel; Michael W. Sheehy, Minority Counsel; Michael Meermans, James Lewis, L. Christine Healey, Carolyn Bartholomew, T. Kirk McConnell, Wyndee Parker, Bob Emmett, and William P. McFarland.

Joint Inquiry Staff Members Present: Rick Cinquegrana, Michael Davidson, Eleanor Hill, Kay Holt, Michael Jacobson, Everett Jordan, Miles Kara, Thomas Kelley, Dana Lesemann, Lewis Moon, Patricia and Ravalgi.

Also Present: Mr. Bowman, Deputy General Counsel, FBI; Mr. Rolince, Special Agent in Charge, FBI Washington Field Office; and David Nahmias, Department of Justice.

FBI HEADQUARTERS AGENT. A foreign power with regard to a FISA in a terrorism case would be a terrorist organization.

Senator LEVIN. Exactly right. You don't need a foreign power. The terrorist organization is enough. Yet, this was not pursued because you were told that you had to prove that there was a foreign power connection.

FBI HEADQUARTERS AGENT. No, that is not true.

Senator LEVIN. If that is not correct, fine, I will let Senator Edward's Q and A answer that.

My question is this: Apparently there was an acknowledgment that there was a misinterpretation of the law. Okay. How much FISA requests were not made based on that misinterpretation of law, in addition to the one that we are talking about here? That is a very specific, numerical question. How many requests were not made based on the misinterpretation which was acknowledged or explored by Senator Edwards?

Mr. BOWMAN. May I briefly answer that, if I may, Mr. Chairman? I don't know of any other instance in which something like this came up. But I don't think, Senator, that Senator Edwards' questions got quite to what you were focused on there. The fact of the matter is, that the agent of a foreign power is something that is not defined in the statute, but is addressed in the legislative history, which we have to follow, because that is where we get an explanation of it.

An agent of a foreign power in the legislative history describes a knowing member of a group or organization, and puts an onus on the government to prove that there is a nexus which exists between that individual and the organization which would make it likely that that individual would do the bidding of the foreign power. That is the stretch that we weren't able to get to.

Mr. ROLINCE. Mr. Chairman, I think that is absolutely essential, because there seems to be a disconnect between whether or not we did not get the FISA because we could not connect him to a foreign power.

We did not get the FISA because the decision came out, in consultation with OGC, that we could not plead him as an agent of that foreign power.

Senator LEVIN. If I could put in the record the definitions of foreign power in 50 U.S. Code Section 1801(A). And foreign power is defined as, including in Subsection 4, a group engaged in international terrorism, or activities in preparation therefore.

Mr. ROLINCE. No disagreement, but we have to prove that he is an agent of that foreign power.

Senator LEVIN. Of that group?

Mr. ROLINCE. Right. That is where we were lacking. That he was an agent of that group.

FBI HEADQUARTERS AGENT. If I could, this is a very significant issue, and one that we should probably take up a closed session. And it needs to be explored, because this is a problem that we are going to face many times now in the future. And this issue of how to get at these so-called lone wolves needs to be addressed.

But I wanted to ask you, Mr. Bowman, if I might, this question: Just quickly following up on Senator Levin's as I understand it, then, the FBI's national security lawyers essentially used the wrong standard of designated group, ergo Chechen, not on the list, ergo not designated, rather than any group. And some 3 weeks was taken in that endeavor.

Then I think Senator Levin asked the question: Well, how much other FISA requests went through the same thing? Is the answer there was no other FISA—this was the only FISA request that happened to encounter that kind of false standard?

Mr. BOWMAN. Two different parts of your question, Senator. First of all, no one in the national security law arena said that the

Chechens were not a power that could be—that could qualify as a foreign power under the FISA statute.

The issue that came to us was whether there was any foreign power to which you could attach Moussaoui. And we did not see that.

The second part of your question was whether there are others who have been given an erroneous standard, whether there were other FISAS that did not come to us because there was an erroneous standard. I don't know what I don't know.

This is the only time that I have heard that advice was actually given that you don't have—you don't have a foreign power, because there isn't a recognized one. That is certainly not what we train them to.

XI. Appendix B—Letter from Judiciary Committee Chairman Hatch to Senators Leahy, Grassley and Specter, Dated February 27, 2003

U.S. Senate,
Committee on the Judiciary,
Washington, DC, February 27, 2003.

Senator Patrick J. Leahy,
Ranking Minority Member, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Senator Charles E. Grassley,
U.S. Senate, Washington, DC.

Senator Arlen Specter,
U.S. Senate, Washington, DC.

Dear Senators Leahy, Grassley and Specter: I have reviewed your Interim Report on FISA Implementation Failures which you released Tuesday. Examining the performance of the FBI, and specifically, the FBI's investigative efforts prior to the September 11th attack is an important function of the Committee and I commend your interest and efforts in assisting with this matter.

At the outset, I am deeply concerned about the manner in which the Interim Report was issued as a report of the Committee's investigation at your press conference. This report does not represent my view as Chairman of the Judiciary Committee, nor does it represent the views of the Judiciary Committee. Rather, the Interim Report represents the views of you as three Senators on the Judiciary Committee. Indeed, you have a right to express your individual views as provided in the Interim Report, however, as described below, there is much in the report that I, and probably other Members, find objectionable, stale or incomplete. For these reasons, I object to any suggestion in the Interim Report that it is a Judiciary Committee report and advise that you ensure that the public does not mistakenly view this as such.

Like each of you, I am committed to ensuring that the FBI performs its functions in the highest manner to protect the safety of Americans and the Judiciary Committee has an important role in conducting appropriate oversight of the Bureau. I have not refrained from pointing out FBI deficiencies in the past, and will do so again, if warranted. Given the obvious dangers in the world today, it is even more important that the Committee continue oversight of the FBI to ensure that it fulfills its important mission of investigating, detecting and preventing further terrorist attacks on our country, without threatening or undermining our country's cherished freedoms. But, as I have said before, I will not support oversight efforts, which could be viewed by the public as misleading or incomplete, rather than objectively addressing real problems and identifying solutions to those problems. Congressional oversight

must have an eye towards reforming the FBI, protecting the American public, and making sure that our country never again has to suffer a devastating attack on its soil.

I fully understand that many so-called "civil liberties" groups have complained to the Committee in the past, and will continue to complain in the future, that our law enforcement communities must perform under additional super-constitutional constraints. Despite court cases to the contrary, many continue to argue for requirements beyond what our Constitution demands. I do believe that they have the right to express their positions to Congress. I also agree that we must ensure that our law enforcement authorities do not violate any provisions of the Constitution, whether under the 4th Amendment, the 1st Amendment or any other provisions of our laws. However, I simply don't share their views, especially since September 11, 2001, that we limit out intelligence and law enforcement abilities with requirements that go above and beyond those required by our Constitution, which will tend to have the effect of protecting terrorists and criminals while endangering the lives of Americans.

It is important that we remember the events surrounding the September 11th attack. FBI Director Robert Mueller was sworn in as Director one week before the September 11th attack. When he took over the FBI, he took the reins of an organization which had been subjected to intense criticism and media coverage due to the handling of the McVeigh documents, the Hanssen spy case, and the Wen Ho Lee investigation. All of us worked together in a bi-partisan manner and conducted meaningful oversight to each of these important issues. Director Mueller accepted the difficult task of leading the FBI during this turbulent time as the agency. On September 11th, his challenge increased by several orders of magnitude.

The Senate Judiciary Committee and the bi-cameral Joint Intelligence Inquiry raised significant issues concerning the FBI's pre-9/11 investigation, particularly in Minneapolis and Phoenix. The Joint Intelligence Inquiry reviewed these issues in great detail. Moreover, Congress created the bipartisan National Commission to Prevent Terrorist Attacks, which is conducting yet another review of this issue. Given these numerous inquiries, our focus today, however, should not be on identifying miscues with 20–20 hindsight in order to simply embarrass the FBI. Rather, our inquiry should be tailored to reforming the FBI with a forward-looking approach aimed at giving Director Mueller the support and resources he needs to change the direction of the FBI, where needed. The FBI needs to be ready to meet the challenges of the future, and in my opinion, based on my recent experience both on this Committee and on the Intelligence Committee, on which I also serve, I believe FBI Director Mueller is willing, able and meeting this challenge.

Director Mueller's recent reforms which he initiated after a full review, including those that Congress required are being implemented. As we have been briefed, Director Mueller's reorganization plan at FBI headquarters and in the field will improve the FBI's analytic capability; enhance its ability to gather, analyze and disseminate intelligence concerning terrorists and racketeers; further its ability to share information internally and with other law en-

forcement and intelligence agencies; and decentralize those functions that need to be reallocated to the field while centralizing critical intelligence functions.

Much of the criticism you cite relates to some of the previous administration's shortcomings as well as problems caused by our laws which the PATRIOT Act that the Senate passed with only one dissenting vote last year have resolved. Moreover, President Bush's recent order instructing the Directors of the Federal Bureau of Investigation, and the Central Intelligence Agency, the Secretary of Homeland Security and the Secretary of Defense to develop a Terrorist Threat Integration Center builds on the FBI reforms, and will ensure that the FBI is fully integrated into the analysis and dissemination of all terrorist-related information. As you well know, the Terrorist Threat Integration Center will ensure that law enforcement and intelligence agencies work together to share information, to make sure that connections are made, and identify and assess all significant threats to our country.

It is in this context that I now turn to the Interim Report. While I appreciate your oversight efforts and the preparation of the Interim Report, I have several significant concerns which are outlined below. In my view, the Interim Report contains several errors and omissions. I will identify what I consider to be some of the more significant issues. I offer these observations in the hope that you may re-examine your analysis of your reported "oversight," as well as some of the more significant conclusions contained in the Interim Report. Again, it is my hope that working together we can find objective and responsible common ground for a proper oversight.

A. IMPROVEMENTS IN THE FISA PROCESS

I would hope you agree with me on the importance of the FISA process to the intelligence community and law enforcement agencies in order to conduct critical intelligence gathering needed to protect our country and prevent further terrorist attacks. Importantly, contrary to the suggestions contained in the Interim Report, over the last 18 months the Department and the FBI have made great progress in improving the FISA process. Your Interim Report does not discuss any of these improvements, and offers only a restatement of complaints that were fully analyzed and, I believe, corrected by the Justice Department and the FBI. I suggest this only to correct the record so that the public is not left with the impression that the FBI has not corrected past problems, which I believe your Report might well do in parts.

In addition, the Interim Report significantly omits any discussion of perhaps the most significant improvement in the FISA process—which was the direct result of the Justice Department's successful appeal to the Foreign Intelligence Surveillance Review Court. On November 18, 2002, the Review Court issued a unanimous decision which largely adopted the Justice Department's interpretation of FISA that: (1) the use of foreign intelligence electronic surveillance for criminal purposes is appropriate, particularly in light of Congress' passage of the PATRIOT Act in 2001, which passed with only one dissenting vote in the Senate and which relaxed the prior restrictions on the government's use of foreign intelligence electronic

surveillance; and (2) the restrictions imposed by the Clinton Administration on the sharing of information between intelligence and law enforcement agencies were unnecessary and not required by a 1978 statute authorizing such electronic surveillance nor mandated by the Constitution. This was a very significant point, in my opinion.

1. FISA Application Inaccuracies. Instead of focusing on issues arising from implementation of the November 18, 2002 Review Court decision, the interim Report repeats and re-hashes issues relating to inaccuracies in past-filed FISA applications, occurring nearly two years ago. This issue was addressed fully in prior hearings and oversight inquiries and correspondence. While the FBI has acknowledged that there were accuracy problems with the submission of two sets of FISA applications submitted in late 2000 and early 2001,[1] the Interim Report ignores the fact that the FBI and the Justice Department instituted procedural changes to make sure that such errors do not occur again. Specifically, as you know, on April 5, 2001, the FBI adopted the so-called "Woods Procedures" to ensure the accuracy of FISA applications. Among other things, the procedures require FBI field offices to review draft FISA applications for accuracy. On May 18, 2001, the Attorney General issued a memorandum, copies of which were submitted to the Committee, that requires, among other things, direct contact between the Justice Department's Office of Intelligence and Policy Review and FBI field offices and additional FISA training for FBI agents.

It is also significant to note—which is nowhere mentioned in the Interim Report—that since September 11th, the Justice Department has filed more than twice as many emergency FISA applications as it did in the previous 22 years, and it has done so without a significant accuracy problem. In April 2002, Judge Royce Lamberth, who was then the Presiding Judge of the FISA Court, publicly stated, "we consistently find the [FISA] applications 'well scrubbed' by the Attorney general and his staff before they are presented to us." He also stated that "the process is working. It is working in part because the Attorney General is conscientiously doing his job, as is his staff."

2. FISA Application Processing Time. The Interim Report suggests that processing of FISA applications is slow. In my opinion, the Interim Report omits, however, any mention of one vital index of timeliness—the number of emergency FISAs (cases in which there is an emergency requiring a search of surveillance to be conducted before a court order "can with due diligence be obtained")—has increased dramatically. As the Justice department reported in an October 7, 2002 letter to Senator Biden, it conducted 113 emergency FISA searches and surveillances in the one-year period between September 11, 2001, and September 19, 2002, compared to a total of only 46 emergency FISAs in the preceding 23 years of the statute's existence. This information, which reflects truly commendable efforts by FBI and Justice Department personnel, is a necessary part of any balanced account of the timeliness of the FISA process, and is not acknowledged in the Interim Report.

[1] These incidents are under review by the FBI's and Justice Department's Offices of Professional Responsibility. The Justice Department briefed the Senate Judiciary Committee staff and the Intelligence Committees of these accuracy issues.

3. Training. The Interim Report suggests that there is a need for increased training of FBI and Justice Department personnel, but does not acknowledge existing training programs which were established in the latter part of 2002. The Interim report correctly identifies deficiencies in the legal training of FBI personnel handling FISA applications prior to the September 11th attack, and specifically outlines how these deficiencies may have contributed to the mishandling of a possible FISA search warrant for Zacarias Moussaoui's personal effects before the September 11th attack. On this issue, I agree with your analysis and concern, and we have heard about this. These allegations were fully discussed and vetted during Judiciary Committee and Intelligence Joint Inquiry Hearings in 2002, and I believe have now been addressed by Attorney General Ashcroft and FBI Director Mueller.

Moreover, the Interim Report completely ignores recent and significant steps taken by the Justice Department and the FBI to ensure proper training of FBI personnel. This training program is even more critical given the FISC decision of November 18, 2002. Specifically, on December 24, 2002, the deputy Attorney General instructed the Counsel for Intelligence Policy, the Assistant Attorney General for the Criminal Division, and the Director of the FBI to "jointly establish and implement a training curriculum for all Department lawyers and FBI agents who work on foreign intelligence or counterintelligence investigations, both in Washington, DC and in the field, including Assistant United States Attorneys designated under the Department's March 6, 2002 Intelligence Sharing Procedures. At a minimum, the training shall address the FISA process, the importance of accuracy in FISA applications, the legal standards (including probable cause) set by FISA, coordination with law enforcement and with the Intelligence Community, and the proper storing and handling of classified information."

B. COOPERATION OF THE JUSTICE DEPARTMENT

Throughout the Interim Report, you have suggested that the Department of Justice has not cooperated with the Committee's oversight requests for information. As Chairman of the Committee, I disagree with this criticism for the following reasons stated below.

I am aware of the Justice Department's letter to you dated September 13, 2002, which describes in detail all of the information made available to you in response to specific oversight requests. As noted in the letter, the Justice Department provided access to: (1) FBI supervisors, including a Supervisory Special Agent, a Headquarters Unit Chief, and a Deputy General Counsel, who briefed Judiciary Committee staff on 7 separate occasions (February 24, April 17, April 24, June 3, June 4, June 27 and July 9, 2002); (2) senior Justice Department officials, including the Counsel for Intelligence Policy and Associate Deputy Attorney General, who briefed Judiciary Committee staff on 8 separate occasions (June 3, June 27, July 27, August 23, August 28, August 29, September 3 and September 6, 2002), and testified at open hearings on September 10, 2002; (3) numerous documents which were submitted in response to requests from your staff; and (4) written responses to over 300 questions for the record, with hundreds of additional ques-

tions set forth in sub-parts, totaling over 300 pages, in response to oversight requests from the House and Senate Judiciary.

In addressing this issue, you ignore the extensive and vigorous oversight which occurred with the full cooperation of the Justice Department. In particular, the Interim Report describes, and even quotes from, a number of full Committee hearings with senior Justice Department and FBI officials on July 31, 2001; November 28, 2001; December 6, 2001; March 21, 2002; April 9, 2002; May 8, 2002; June 6, 2002; July 25, 2002; and September 10, 2002. Further, as the Interim Report acknowledges (page 16), "these are only the full Judiciary Committee hearings related to the FBI oversight issues in the 107th Congress. The Judiciary Committee's subcommittees also convened numerous, bipartisan oversight hearings relating to the FBI's performance both before and after 9/11." The Interim Report also notes that members and staff "conducted a series of closed hearings, briefings and made numerous written inquiries" on FISA issues, and submitted "written inquiries, written hearing questions and other informal requests," including letters to the Attorney General and the FBI Director dated November 1, 2001; May 23, 2002; June 4, 2002; June 13, 2002; July 3, 2002; and July 31, 2002. Thus, contrary to your general claims of lack of cooperation, your Interim Report demonstrates unequivocally that the Justice Department has cooperated by providing access to numerous senior officials, responsible personnel, and volumes of documents. This cooperation should be commended not condemned if we are to have constructive oversight.

The Interim Report also criticizes, and in my opinion unfairly, the Justice Department for refusing to release the May 17, 2002 opinion of the Foreign Intelligence Surveillance Court—the Department informed the Committee of the existence of the opinion in early June 2002—without the permission of the FISC. As the Justice Department explained, however, it generally must respect the prerogative of courts to control the release of their own opinions, particularly where, as here, the opinion in question was unprecedented. The Justice Department, the FISA, concluded that it was the FISA's decision whether or not to release publicly the May 17 opinion; ultimately, the FISA's opinion and order was made available to Congress and the public by the FISA itself in response to a request from the Committee. The FISA also advised the Committee in writing of its intent to make public unclassified opinions in the future.

C. EXISTING CONGRESSIONAL FISA OVERSIGHT

The Interim Report calls for more oversight of the FISA process. However, the Interim Report fails to describe accurately existing Congressional oversight of the FISA process. The Justice Department already provides significant information—classified and unclassified—to the Intelligence Committees, consistent with long-established practices for the disclosure and handling of classified information. In reporting to the Intelligence Committees, the Justice Department is required to "fully inform" the Intelligence Committees concerning FISA electronic surveillance, physical searches, pen registers and trap and traces, and requests for records (50 U.S.C. Sections 1808(a)(1), 1826, 1846(a), and 1862(b)); while the FISA re-

porting obligations to the Judiciary Committees are much more generic. 50 U.S.C. Sections 1826, 1846(b), 1862(b).

As you may be aware, the "fully inform" standard that governs FISA oversight is the same standard that governs Congressional oversight of the intelligence community in general. See S. Rep. No. 95–604, 95th Cong., 1st Sess. 60–61 (1977); S. Rep. No. 95–701, 95th Cong., 2d Sess. 67–68 (1978); see also, H.R. Rep. No. 95–1283, pt. 1, 95th Cong., 2d Sess. 96 (1978). Such a requirement reflects a careful balance between the need for meaningful oversight and the need for secrecy and information security in the government's efforts to protect this country from foreign enemies. Under the "fully inform" standard, the Justice Department submits lengthy and detailed classified semi-annual reports to the Intelligence Committees, including specific information on "each criminal case in which information acquired [from a FISA electronic surveillance] has been authorized for use at trial, 1150 U.S.C. Section 1808(a)(2)(B), and "the number of physical searches which involved searches of the residences, offices or personal property of United States persons," 50 U.S.C. Section 1826(3). Moreover, under current law, the Attorney General makes public "the total number of applications made for orders and extensions of orders" approving electronic surveillance and physical searches under FISA, and "the total number of such orders and extensions either granted, modified or denied." 50 U.S.C. Section 1807, 1826.

In addition to my service on the Senate Judiciary Committee, I have served for the past six years on the Senate Select Committee on Intelligence, where I have participated in vigorous oversight of the FISA process. Based on my experience, I can assure you that the Congress exercises appropriate, vigorous, robust and detailed oversight of the FISA process. Again, I thought that this is important to note, as I did not want your Report to leave the impression with the public that the FISA process is somehow unchecked by Congress.

I want to reiterate my hope and insistence that we engage in proper and constructive oversight to provide the American public the most important check on the most important functions of our government, our law enforcement and intelligence functions. Meaningful oversight requires a fair and balanced approach if we are to be obtain useful reforms where needed. As you fully appreciate, after September 11, 2001, we are in a new era as Congress realized in passing the Patriot Act with near unanimous approval, and with only one dissenting Senate vote. The security of our country is at stake, and we owe American people our full cooperation in discharging our Constitutional functions in addressing these critical issues.

Sincerely,

ORRIN G. HATCH,
Chairman.

XII. Appendix C—Letter From the Department of Justice to Senate Select Committee on Intelligence Chairman Graham and Vice-Chairman Shelby, Dated August 6, 2002

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, DC, August 6, 2002.

Hon. Bob Graham,
Chairman,
Hon. Richard C. Shelby,
Vice-Chairman,
Select Committee on Intelligence, U.S. Senate, Washington, DC

Dear Chairman Graham and Vice-Chairman Shelby: We appreciate the care shown by Senator Edwards and the staff of the Senate Select Committee on Intelligence ("SSCI") in the drafting of the proposed bill to require additional public disclosures regarding the use of the Foreign Intelligence Surveillance Act of 1978 ("FISA"), 50 U.S.C. § 1801 et seq. We also appreciate the underlying concern of Senator Edwards that data on the use of FISA, to the extent prudent, be made available to the public.

We must nonetheless state our opposition, on policy grounds, to the draft bill. Section 107 of FISA, 50 U.S.C. § 1807, already requires that the Attorney General provide, on an annual basis, data on the use of FISA to the Administrative Office of the United States Courts and to Congress. Under this section, the Attorney General must report the total number of applications made for orders and extensions of orders approving electronic surveillance under FISA, and the total number of such orders and extensions either granted, modified, or denied. Though not required under the Act, the Attorney General also reports such data on physical searches applied for under FISA. These data and reports are made in unclassified form and are therefore available to the public.

Under section 108 of FISA, 50 U.S.C. § 1808, the Attorney General also provides the SSCI and the House Permanent Select Committee on Intelligence ("HPSCI") with classified semi-annual reports containing much more extensive data on the use of FISA and a review of any significant legal and operational developments that have occurred during the previous 6 months. These are long and detailed reports that are painstakingly prepared in the Justice Department and are obviously, from the questions and comments they generate, closely scrutinized by the intelligence committees. We have appreciated the engagement of the Members and staff of SSCI and HPSCI in responding to these reports and in helping to make them a better tool for congressional oversight of the Justice Department's use of FISA. Under FISA, 50 U.S.C. § 1826, the Attorney General also makes a separate, semi-annual classified report to SSCI and HPSCI and to the Judiciary Committee of each House on

the use of physical searches under FISA and, in particular, on the use of physical searches under the Act against United States persons. In addition to these reports, the Attorney General and the Department of Justice have responded informally and formally, at all times during the year, to questions and issues that arise in these committees on the use of FISA.

Senator Edwards' draft legislation would amend sections 1807 and 1826 to require additional public disclosures of:

(1) the number of U.S. persons targeted for electronic surveillance and physical search under FISA; and

(2) in a manner consistent with the protection of national security, "significant interpretations" of FISA by the Foreign Intelligence Surveillance Court ("FISC"), including, as appropriate, redacted portions of opinions and orders of the FISC.

Under sections 1808 and 1826, the Justice Department currently provides the SSCI and HPSCI with these numbers and with a summary of significant legal and operational developments in FISA in its classified semi-annual reports. The FISC also has, on a very few occasions, issued procedural rules or rulings that are unclassified and therefore available at the Court's initiative to Congress and the public.

However, except for those few rules and rulings, there is very little in the decisions of the FISC that does not discuss the facts, the techniques, or the pleading of specific and highly classified operations under FISA. There is even less in those decisions and in the numbers that would be disclosed in the proposed legislation that would not reveal patterns of practice under FISA that would help our adversaries elude the eyes and ears of United States intelligence. For example, the numbers of United States persons targeted under FISA might reveal the extent to which status as a United States person, as a practical or operational matter, provides refuge from scrutiny under FISA. An interpretation by the FISC of the applicability of FISA to a technique or circumstance, no matter how conceptually drawn, could provide our adversaries with clues to relative safe harbors from the reach of FISA. The terrorists who remain at large in the United States (and likely the ones who will follow) are sophisticated in their communications tradecraft and sensitive to the possible use of FISA against them. They, more than may be apparent to Congress or to the public, may learn from any further disclosures of FISA practice and interpretations how better to defeat the tools of scrutiny under that Act.

Section 107 of FISA and 50 U.S.C. § 1826, which this bill would alter, have not been amended since their original enactments in 1978 and 1994, respectively. This suggests to us that Congress and its constituents believe, as we do, that the proper forum for the disclosure of FISA operations remains in the secure rooms of the intelligence committees and not, any more than is currently provided for in section 107, in the public domain, which is available to our adversaries. In our view, the centrality and sensitivity of FISA to our ongoing national effort against terrorism makes this a particularly inappropriate time to provide our adversaries with any more data on the tools we are using so effectively against them.

The Administration strongly believes that our use of the necessarily secret tool of FISA must, as set forth by the framers of the

Act, be made subject to the keen and diligent scrutiny of the intelligence committees. But we believe just as strongly that it is there, rather than in any forum accessible to our adversaries, that the data on FISA operations described in this proposed legislation should be disclosed.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

XIII. APPENDIX D—LETTER FROM THE DEPARTMENT OF JUSTICE TO JUDICIARY COMMITTEE CHAIRMAN LEAHY, DATED DECEMBER 23, 2002

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, December 23, 2002.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed please find a response to your written question submitted to the Deputy Attorney General at the hearing before the Senate Judiciary Committee on May 8, 2002. We are providing a response to question 19 relating to the changes section 215 of the USA PATRIOT Act made to provisions of the Foreign Intelligence Surveillance Act (FISA). The Department is continuing to gather information to answer the remaining questions posed to the Deputy Attorney General and the Director of the Federal Bureau of Investigation, and we will forward those responses as soon as possible.

Please note that the response to question 19 requires the Department to provide information that is classified at the SECRET level. That classified information is being delivered to the Committee under separate cover and in accordance with the longstanding Executive branch practices on the sharing of operational intelligence information with Congress.

We appreciate your oversight interest in the Department's activities pursuant to the USA PATRIOT Act. We look forward to continuing to work with the Committee as the Department implements these important new tools for law enforcement in the fight against terrorism. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

Enclosure.

QUESTIONS SUBMITTED BY CHAIRMAN LEAHY

Questions for Director Mueller and Deputy Attorney General Thompson

19. Section 215 of the Patriot Act allows all FBI Special Agents in Charge to obtain court orders requiring the production of "any tangible things (including books, records, papers, documents, and other items)" in connection with terrorism investigations. There have been reports that this authority is being used to obtain records, without showing probable cause that a crime has been

committed, from a library or bookstore about what books a person has signed our or purchased.

(a) Has the FBI, in fact, requested such records in any investigation of terrorism?

Answer. Section 215 amended the business records authority found in Title V of the Foreign Intelligence Surveillance Act (FISA). Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance and gives the FISA Court the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

The classified semi-annual report discussing the use of sections 1861–1863 of FISA for the period June 30, 2001 through December 31, 2001 was provided to the Intelligence and Judiciary committees of both houses of Congress on April 29, 2002. That report was provided under cover letter to each committee chairman. Although not specified in the statute, the Department's practice has been to submit the reports covering January 1 through June 30 of a given year, by the end of December of that year. The Department of Justice is currently preparing the semi-annual report covering the period January 1, 2002 through June 30, 2002.

The Department is able at this time to provide information pertaining to the implementation of section 215 of the USA PATRIOT Act from January 1, 2002 to the present (December 23, 2002). That information is classified at the SECRET level and, accordingly, is being delivered to the Committee under separate cover.

(b) Can such an order be served on a public library to require the library to produce records about where a library patron has surfed on the Internet? Has such an order been sought by the Department or the FBI?

Answer. Such an order could conceivably be served on a public library although it is unlikely that public libraries maintain those types of records. If the FBI were authorized to obtain the information the more appropriate tool for requesting electronic communication transactional records would be a National Security Letter (NSL). NSLs can be served on Internet Service Providers to obtain information such as subscriber name, screen name or other on-line names, records identifying addresses of electronic mail sent to and from the account, records relating to merchandise orders/shipping information, and so on but not including message content and/or subject fields.

(c) Do you think that library and bookstore patrons have a "reasonable expectation of privacy" in the titles of the books they have purchased from a bookstore or borrowed from a library?

Answer. Any right of privacy possessed by library and bookstore patrons in such information is necessarily and inherently limited since, by the nature of these transactions, the patron is reposing that information in the library or bookstore and assumes the risk

that the entity may disclose it to another. Whatever privacy interests a patron may have are outweighed by the Government's interest in obtaining the information in cases where the FBI can show the patron's relevance to an authorized full investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, December 23, 2002.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed please find responses to written questions to the Attorney General at the hearing before the Committee on the Judiciary entitled "Oversight Hearing of the Department of Justice" on July 25, 2002. We are providing responses to questions 14, 15, 31, 32, 33 and 34, all of which relate to the implementation of the USA PATRIOT Act, the changes the Act made to provisions of the Foreign Intelligence Surveillance Act (FISA), and the FISA process itself. The Department is continuing to gather information to answer the remaining questions posed to the Attorney General and we will forward those responses as soon as possible.

Please note that the response to question 14(b) requires the Department to provide information that is classified at the SECRET level. That classified information is being delivered to the Committee under separate cover and under the longstanding Executive branch practices on the sharing of operational intelligence information with Congress.

We appreciate your oversight interest in the Department's activities pursuant to the USA PATRIOT Act. We look forward to continuing to work with the Committee as the Department implements these important new tools for law enforcement in the fight against terrorism. If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

Enclosure.

WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY, CHAIRMAN OF THE SENATE JUDICIARY COMMITTEE TO THE HONORABLE JOHN ASHCROFT

USA PATRIOT Act and Libraries

14. The Committee has learned of growing concern among professional librarians that the USA PATRIOT Act is leading to a greater number of federal law enforcement demands for records of the use of library services, as well as orders to librarians to keep those requests secret. There is confusion over whether the orders allow the librarians to disclose the fact of a request, without disclosing any

substance such as the name of the person involved. It is also not clear whether these secrecy orders are being issued for general law enforcement purposes beyond the scope of the Foreign Intelligence Surveillance Act.

(A) Please clarify what the Department is doing to impose secrecy on its demands for information from libraries.

A Court order issued pursuant to section 1861 of FISA (amended by section 215 of the USA PATRIOT Act) to compel the production of certain defined categories of business records would contain language which prohibits officers, employees or agents of companies or institutions receiving such an order from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to those defined categories of business records.

An FBI National Security Letter served upon an establishment, such as a library, for the purpose of obtaining electronic communications transactional records, contains language invoking Title 18, United States Code, Section 2709(c), which prohibits any officer, employee, or agent of the establishment from disclosing to any person that the FBI has sought or obtained access to that information or records.

(B) How many demands for library information has the Department made since enactment of the USA PATRIOT Act, as well as the legal authority that was used to require secrecy?

Section 215 of the USA PATRIOT Act amended the business records authority found in Title V of the Foreign Intelligence Surveillance Act (FISA). This authority can be used to obtain certain types of records from libraries that relate to FBI foreign intelligence investigations. Under the old language, the Foreign Intelligence Surveillance Court (FISC) would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standards to simple relevance and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

The classified semi-annual report discussing the use of sections 1861–1863 of FISA for the period June 30, 2001 through December 31, 2001 was provided to the Intelligence and Judiciary committees of both houses of Congress on April 29, 2002. That report was provided under cover letter to each committee chairman. Although not specified in the statute, the Department's practice has been to submit the reports covering January 1 through June 30 of a given year, by the end of December of that year. The Department of Justice is currently preparing the semi-annual report covering the period January 1, 2002 through June 30, 2002.

The Department is able at this time to provide information pertaining to the implementation of section 215 of the USA PATRIOT Act from January 1, 2002 to the present (December 23, 2002). That

information is classified at the SECRET level and, accordingly, is being delivered to the Committee under separate cover.

(C) How many libraries has the FBI visited (as opposed to presented with court orders) since passage of USA Patriot Act?

Information has been sought from libraries on a voluntary basis and under traditional law enforcement authorities not related to the Foreign Intelligence Survelliance Act or the changes brought about by the USA PATRIOT Act. While the FBI does not maintain statistics on the number of libraries visited by FBI Agents in the course of its investigations, an informal survey conducted by the FBI indicated that field offices had sought information from libraries. For example, various offices followed up on leads concerning e-mail and Internet use information about specific hijackers from computers in public libraries.

(D) Is the decision to engage in such surveillance subject to any determination that the surveillance is essential to gather evidence on a suspect which the Attorney General has reason to believe may be engaged in terrorism-related activities and that it could not be obtained through any other means?

The authority to compel the production of business records from libraries does not permit any type of "surveillance." Under the Foreign Intelligence Surveillance Act (FISA), electronic surveillance authority is permissible upon a showing of probable cause that the target of the surveillance is a foreign power or any agent of a foreign power and each of the facilities or places at which the surveillance is being directed is being used or is about to be used by a foreign power or an agent of a foreign power.

As stated above, section 215 of the USA PATRIOT Act amended the business records authority found in Title V of FISA. This authority can be used for obtaining certain types of records from libraries that relate to FBI foreign intelligence investigations. Under the old language, the FISC would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The PATRIOT Act changed the standards to simple relevance and gives the FISC the authority to compel production in relation to an authorized investigation to protect against international terrorism or clandestine intelligence activities, provide that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

15. Sec. 215 of the Act expands the range of records that can be requested from a library or educational institution to include "business records" which may include information about individuals beyond the target of an investigation. What precautions is the Attorney General taking to isolate out only those records related to a specific target? How is the Attorney General ensuring the security and confidentiality of the records of others? How promptly have those records been returned to the institutions from which they were obtained?

The current standard for obtaining business records is "relevance" but it requires more than just the Special Agent's belief that the records may be related to an ongoing investigation. Use

of this technique is authorized only in full investigations properly opened in accordance with the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations (FCIG). The FISA business records authority stipulates that no investigation of a U.S. person may be conducted solely on the basis of activities protected by the First Amendment to the Constitution. The FISA Court will not order the production of business records unless it can be shown that the individual for whom the records are being sought is related to an authorized investigation.

The security and confidentiality of records is guaranteed by the FISA law which prohibits officers, employees or agents of companies or institutions receiving orders from disclosing to the target or to persons outside the company or institution the fact that the FBI has sought or obtained access to information or records. The FBI obtains copies, not originals, of records from companies and institutions. Thus, there is no need to return records.

FBI Headquarters has charged field offices with the responsibility for establishing and enforcing appropriate review and approval processes for use of these expanded authorities. Compliance with these and other requirements is monitored through inspections and audits conducted by the FBI Inspection Division, the Intelligence Oversight Board, and the Department's Office of Intelligence Policy and Review.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AFFAIRS,
Washington, DC, December 23, 2002.

Hon. RUSSELL D. FEINGOLD,
Chairman, Subcommittee on the Constitution,
Committee on the Judiciary, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: Enclosed please find responses to two questions posed to the Attorney General on implementation of the USA PATRIOT Act in your letter of July 24, 2002. We are providing responses to questions 2 and 4 relating to the changes the USA PATRIOT Act made to provisions of the Foreign Intelligence Surveillance Act.

Please note that the responses to both questions 2 and 4 require the Department to provide information classified at the SECRET level. That classified information is being delivered under separate cover and under the longstanding Executive branch practices on the sharing of operational intelligence information with Congress.

The Department is continuing to gather information responsive to the remaining questions posed in your letter and we will forward the responses to you as soon as possible. We note that in response to question 7 of your letter, copies of the Department's responses to the House Judiciary Committee's letter of June 13, 2002 on USA PATRIOT Act implementation were forwarded to your staff on July 29, 2002 and August 26, 2002.

We appreciate your oversight interest in the Department's activities pursuant to the USA PATRIOT Act. We look forward to continuing to work with the Committee as the Department imple-

ments these important new tools for law enforcement in the fight against terrorism.

If we can be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

DANIEL J. BRYANT,
Assistant Attorney General.

Enclosure.

Feingold PATRIOT Act Question #2 and #4 (from letter dtd July 24, 2002)

2. Section 215 of the Act grants the FBI broad new power to subpoena business records for investigations to protect against international terrorism.

a. Please (i) provide the number of instances in which the FBI or other federal agencies have invoked this subpoena power and (ii) indicate the type of businesses served with the subpoena (*e.g.,* libraries, bookstores, internet booksellers, etc.).

b. How many entities have challenged the subpoena and the information sought? If any institutions have objected to or challenged the validity or scope of the subpoena, what has been the nature of the objection?

c. How many of these subpoenas have resulted in the collection of information that would otherwise be protected by state or federal privacy protection laws (*e.g.,* medical, financial, educational or library records)?

d. How many of these subpoenas have directly led to the prosecution of terrorists or the prevention of acts of terrorism? For each subpoena that has led to the prosecution of terrorists or the prevention of acts of terrorism, please describe the prosecution or act of terrorism that was prevented.

e. How many subpoenas have been sought and granted to obtain the records of persons not the target of an investigation? For each such subpoena, please explain why the Department sought the subpoena.

f. Please provide copies of all policy directives or guidance issued to law enforcement officials about requesting subpoenas pursuant to Section 215.

Answer. Section 215 of the USA PATRIOT ACT amended FISA (50 U.S.C. §§ 1861–1862) (access to certain business records for foreign intelligence and international terrorism investigations), and repeals section 1863. This provision of FISA concerns the ability of the FBI to make an application to the Court "for an order requiring the production of any tangible things (including books, records, papers, documents, and other items)" as long as the information is requested for the appropriate reasons as defined in that section of FISA. Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance and gives the FISA Court the authority to compel production in relation to an authorized investigation to obtain foreign intelligence information to

protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not the conducted solely upon the basis of activities protected by the First Amendment to the Constitution.

The classified semi-annual report discussing the use of sections 1861–1863 of FISA for the period June 30, 2001 through December 31, 2001 was provided to the Intelligence and Judiciary committees of both houses of Congress on April 29, 2002. That report was provided under cover letter to each committee chairman. Although not specified in the statute, the Department's practice has been to submit the reports covering January 1 through June 30 of a given year, by the end of December of that year. The Department of Justice is currently preparing the semi-annual report covering the period January 1, 2002 through June 30, 2002.

The Department is able at this time to provide information pertaining to the implementation of section 215 of the USA PATRIOT Act from January 1, 2002 to the present (December 23, 2002). That information is classified at the SECRET level and, accordingly, is being delivered to the Committee under separate cover.

It should be noted that information has been sought from libraries on a voluntary basis and under traditional law enforcement authorities not related to the Foreign Intelligence Surveillance Act or the changes brought about by the USA PATRIOT Act. While the FBI does not maintain statistics on the number of libraries visited by FBI Agents in the course of its investigations, an informal survey conducted by the FBI indicated that field offices have sought information from libraries. For example, various offices followed up on leads concerning e-mail and Internet use information about specific hijackers from computers in public libraries.

Policy guidance or directives to law enforcement on Section 215: On October 26, 2001, the FBI's Office of General Counsel, National Security Law Unit, issued guidance to all FBI Divisions, including all FBI Headquarters and field offices, that summarized the changes made by the USA PATRIOT Act, including the changes made by section 215 of the Act. A copy of that memorandum is provided herewith.

4. Section 206 of the Act provides federal law enforcement with authority to conduct roving surveillance of targets.

a. How many FISA warrants have been issued pursuant to Section 206?

The number of times the Department has obtained authority for the "roving" surveillance provided under section 206 of the USA PATRIOT Act is classified at the SECRET level. Pursuant to the longstanding Executive Branch practice on sharing operational intelligence information with Congress, the Department will provide that number to the Senate Select Committee on Intelligence ("SSCI"), which is the committee responsible for receiving and handling sensitive intelligence information. This number will be provided to the SSCI under separate cover and with the expectation that it will be handled in a manner deemed appropriate under longstanding applicable Senate procedures.

We can, in this unclassified format, make the assurance that the Department's request for use of such authority, based upon a determination by the Foreign Intelligence Surveillance Court that there

is probable cause to believe that the actions of the target of surveillance may have the effect of thwarting the identification of those carriers whose assistance will be necessary to carrying out the Court's orders, has been limited to those cases where the surveillance ordered by the Court would otherwise be, or would otherwise likely be, in jeopardy.

b. What percentage of surveillance conducted pursuant to Section 206 has included surveillance of persons other than the target individual against whom the warrant was issued?

The intercepted communications of individuals other than the targets of Court-authorized surveillance are minimized according to procedures established in Attorney General guidelines and approved by the Foreign Intelligence Surveillance Court. The same standard minimization procedures apply to the communications intercepted under the surveillance authority granted pursuant to section 206 of the USA PATRIOT Act as apply to communications intercepted under any other Court-authorized surveillance under FISA. The percentage of the minimized communications of individuals other than the target individual conducted pursuant to section 206 of the USA PATRIOT Act is a statistic that is not maintained by the FBI and is therefore not readily retrievable.

c. For each surveillance conducted under this section, how many non-target persons were included in the surveillance?

As stated above, the intercepted communications of individuals other than the targets of Court-authorized surveillance are minimized according to procedures established in Attorney General guidelines and approved by the Foreign Intelligence Surveillance Court. The same standard minimization procedures apply to the communications intercepted under the surveillance authority granted pursuant to section 206 of the USA PATRIOT Act as apply to communications intercepted under any other Court-authorized surveillance under FISA. The number of minimized communications of non-target individuals for each surveillance conducted pursuant to section 206 of the USA PATRIOT Act is a statistic that is not maintained by the FBI and is therefore not readily retrievable.

d. Please disclose all policy directives or guidelines issued to law enforcement officials who request and conduct this type of surveillance authority.

On October 26, 2001, the FBI's Office of General Counsel, National Security Law Unit, issued guidance to all FBI Divisions, including all FBI Headquarters and field offices, that summarized the changes made by the USA PATRIOT Act, including the changes made by section 206 of the Act. A copy of that memorandum is provided herewith.

XIV. Appendix E—Letter From the Department of Justice to Senate Select Committee on Intelligence Chairman Graham and Vice-Chairman Shelby, Dated July 31, 2002

U.S. Department of Justice,
Office of Legislative Affairs,
Washington, DC, July 31, 2002.

Hon. Bob Graham,
Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, DC.

Hon. Richard C. Shelby,
Vice-Chairman, Select Committee on Intelligence,
U.S. Senate, Washington, DC.

Dear Mr. Chairman and Mr. Vice Chairman: The letter presents the views of the Justice Department on S. 2586, a bill "[t]o exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." The bill would extend the coverage of the Foreign Intelligence Surveillance Act ("FISA") to individuals who engage in international terrorism or activities in preparation therefor without a showing of membership in or affiliation with an international terrorist group. The bill would limit this type of coverage to non-United States persons. The Department of Justice supports S. 2586.

We note that the proposed title of the bill is potentially misleading. The current title is "To exclude United States persons from the definition of 'foreign power' under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism." A better title, in keeping with the function of the bill, would be something along the following lines: "To expand the Foreign Intelligence Surveillance Act of 1978 ('FISA') to reach individuals other than United States persons who engage in international terrorism without affiliation with an international terrorist group."

Additionally, we understand that a question has arisen as to whether S. 2586 would satisfy constitutional requirements. We believe that it would.

FISA allows a specially designated court to issue an order approving an electronic surveillance or physical search, where a significant purpose of the surveillance or search is "to obtain foreign intelligence information." *Id.* §§ 1804(a)(7)(B), 1805(a). Given this purpose, the court makes a determination about probable cause that differs in some respects from the determination ordinarily underlying a search warrant. The court need not find that there is probable cause to believe that the surveillance or search, in fact, will lead to foreign intelligence information, let alone evidence of a crime, and in many instances need not find probable cause to believe that the target has committed a criminal act. The court in-

stead determines, in the case of electronic surveillance, whether there is probable cause to believe that "the target of the electronic surveillance is a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(A), and that each of the places at which the surveillance is directed "is being used, or about to be used, by a foreign power or an agent of a foreign power," *id.* § 1805(a)(3)(B). The court makes parallel determinations in the case of a physical search. *Id.* § 1842(a)(3)(A), (B).

The terms "foreign power" and "agent of a foreign power" are defined at some length, *id.* § 1801(a), (b), and specific parts of the definitions are especially applicable to surveillances or searches aimed at collecting intelligence about terrorism. As currently defined, "foreign power" includes "a *group* engaged in international terrorism or activities in preparation therefor," *id.* § 1801(a)(4) (emphasis added), and an "agent of a foreign power" includes any person who "knowingly engages in sabotage or international terrorism or activities that are in preparation therefor, for or on behalf of a foreign power," *id.* § 1801(b)(2)(C). "International terrorism" is defined to mean activities that

> (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;
>
> (2) appear to be intended—
>
> (A) to intimidate or coerce a civilian population;
>
> (B) to influence the policy of a government by intimidation or coercion; or
>
> (C) to affect the conduct of a government by assassination or kidnapping; and
>
> (3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.

Id. § 1801(c).

S. 2586 would expand the definition of "foreign power" to reach persons who are involved in activities defined as "international terrorism," even if these persons cannot be shown to be agents of a "group" engaged in international terrorism. To achieve this expansion, the bill would add the following italicized words to the current definition of "foreign power": "*any person other than a United States person who is,* or a group *that is,* engaged in international terrorism or activities in preparation therefor."

The courts repeatedly have upheld the constitutionality, under the Fourth Amendment, of the FISA provisions that permit issuance of an order based on probable cause to believe that the target of a surveillance or search is a foreign power or agent of a foreign power. The question posed by S. 2586 would be whether the reasoning of those cases precludes expansion of the term "foreign power" to include individual international terrorists who are unconnected to a terrorist group.

The Second Circuit's decision in *United States* v. *Duggan,* 743 F.2d 59 (2d Cir. 1984), sets out the fullest explanation of the "governmental concerns" that had led to the enactment of the proce-

dures in FISA. To identify these concerns, the court first quoted from the Supreme Court's decision in *United States* v. *United States District Court,* 407 U.S. 297, 308 (1972) ("*Keith*"), which addressed "domestic national security surveillance" rather than surveillance of foreign powers and their agents, but which specified the particular difficulties in gathering security intelligence" that might justify departures from the usual standards for warrants: "[Such intelligence gathering] is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III [dealing with electronic surveillance in ordinary criminal cases]. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency. Thus the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." *Duggan,* 743 F.2d at 72 (*quoting Keith,* 407 U.S. at 322). The Second Circuit then quoted a portion of the Senate Committee Report on FISA. "[The] reasonableness [of FISA procedures] depends, in part, upon an assessment of the difficulties of investigating activities planned, directed, and supported from abroad by foreign intelligence services and foreign-based terrorist groups. * * * Other factors include the international responsibilities of the United States, the duties of the Federal Government to the States in matters involving foreign terrorism, and the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting* S. Rep. No. 95–701, at 14–15, *reprinted in* 1978 U.S.C.C.A.N. 3973, 3983) ("Senate Report"). The court concluded:

> Against this background, [FISA] requires that the FISA Judge find probable cause to believe that the target is a foreign power or an agent of a foreign power, and that the place at which the surveillance is to be directed is being used or is about to be used by a foreign power or an agent of a foreign power; and it requires him to find that the application meets the requirements of [FISA]. These requirements make it reasonable to dispense with a requirement that the FISA Judge find probable cause to believe that surveillance will in fact lead to the gathering of foreign intelligence information.

Id. at 73. The court added that, *a fortiori*, it "reject[ed] defendants' argument that a FISA order may not be issued consistent with the requirements of the Fourth Amendment unless there is a showing of probable cause to believe the target *has committed a crime.*" *Id.* at n.5. *See also, e.g., United States* v. *Pelton*, 835 F.2d 1067, 1075 (4th Cir. 1987); *United States* v. *Cavanagh*, 807 F.2d 787, 790–91 (9th Cir. 1987) (per then-Circuit Judge Kennedy); *United States* v. *Nicholson*, 955 F. Supp. 588, 590–91 (E.D. Va. 1997).

We can conceive of a possible argument for distinguishing, under the Fourth Amendment, the proposed definition of "foreign power" from the definition approved by the courts as the basis for a determination of probable cause under FISA as now written. According to this argument, because the proposed definition would require no

tie to a terrorist group, it would improperly allow the use of FISA where an ordinary probable cause determination would be feasible and appropriate—where a court could look at the activities of a single individual without having to assess "the interrelation of various sources and types of information," *see Keith*, 407 U.S. at 322, or relationships with foreign-based groups, *see Duggan*, 743 F.2d at 73; where there need be no inexactitude in the target or focus of the surveillance, *see Keith*, 407 U.S. at 322; and where the international activities of the United States are less likely to be implicated, *see Duggan*, 743 F.2d at 73. However, we believe that this argument would not be well-founded.

The expanded definition still would be limited to collecting foreign intelligence for the "international responsibilities of the United States, [and] the duties of the Federal Government to the States in matters involving foreign terrorism." *Id.* at 73 (*quoting* Senate Report at 14). The individuals covered by S. 2586 would not be United States persons, and the "international terrorism" in which they would be involved would continue to "occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum." 50 U.S.C. § 1801(c)(3). These circumstances would implicate the "difficulties of investigating activities planned, directed, and supported from abroad," just as current law implicates such difficulties in the case of foreign intelligence services and foreign-based terrorist groups. *Duggan*, 743 F.2d at 73 (*quoting* Senate Report at 14). To overcome those difficulties, a foreign intelligence investigation "often [will be] long range and involve[ ] the interrelation of various sources and types of information." *Id.* at 72 (*quoting Keith*, 407 U.S. at 322). This information frequently will require special handling, as under the procedures of the FISA court, because of "the need to maintain the secrecy of lawful counterintelligence sources and methods." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Furthermore, because in foreign intelligence investigations under the expanded definition "[o]ften * * * the emphasis * * * [will be] on the prevention of unlawful activity or the enhancement of the government's preparedness for some possible future crisis or emergency," the "focus of * * * surveillance may be less precise than that directed against more conventional types of crime." *Id.* at 73 (*quoting Keith*, 407 U.S. at 322). Therefore, the same interests and considerations that support the constitutionality of FISA as it now stands would provide the constitutional justification for the S. 2586.

Indeed, S. 2586 would add only a modest increment to the existing coverage of the statute. As the House Committee Report on FISA suggested, a "group" of terrorists covered by current law might be as small as two or three persons. H.R. Rep. No. 95–1283, at pt. 1, 74 and n.38 (1978). The interests that the courts have found to justify the procedures of FISA are not likely to differ appreciably as between a case involving such a group of two or three persons and a case involving a single terrorist.

The events of the past few months point to one other consideration on which courts have not relied previously in upholding FISA procedures—the extraordinary level of harm that an international

terrorist can do to our Nation. The touchstone for the constitutionality of searches under the Fourth Amendment is whether they are "reasonable." As the Supreme Court has discussed in the context of "special needs cases," whether a search is reasonable depends on whether the government's interests outweigh any intrusion into individual privacy interests. In light of the efforts of international terrorists to obtain weapons of mass destruction, it does not seem debatable that we could suffer terrible injury at the hands of a terrorist whose ties to an identified "group" remained obscure. Even in the criminal context, the Court has recognized the need for flexibility in cases of terrorism. *See Indianapolis* v. *Edmond,* 531 U.S. 32, 44 (2000) ("the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). Congress could legitimately judge that even a single international terrorist, who intends "to intimidate or coerce a civilian population" or "to influence the policy of a government by intimidation or coercion" or "to affect the conduct of a government by assassination or kidnapping," 50 U.S.C. § 1801(c)(2), acts with the power of a full terrorist group or foreign nation and should be treated as a "foreign power" subject to the procedures of FISA rather than those applicable to warrants in criminal cases.

Thank you for the opportunity to present our views. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

PATRICK M. O'BRIEN
(For Daniel J. Bryant, Assistant Attorney General).

XV. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 113, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978

* * * * * * *

TITLE I—ELECTRONIC SURVEILLANCE WITHIN THE UNITED STATES FOR FOREIGN INTELLIGENCE PURPOSES

DEFINITIONS

SEC. 101. As used in this title:

(a) "Foreign power" means—

(1) a foreign government or any component thereof, whether or not recognized by the United States;

* * * * * * *

(6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means—

(1) any person other than a United States person, who—

(A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4);

(B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; [or]

(C) engages in international terrorism or activities in preparation therefor; or

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