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RESPONDING TO THE INSPECTOR GENERAL'S FINDINGS OF IMPROPER USE OF NATIONAL SECURITY LETTERS BY THE FBI

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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RESPONDING TO THE INSPECTOR GENERAL'S FINDINGS OF IMPROPER USE OF NATIONAL SECURITY LETTERS BY THE FBI

WEDNESDAY, APRIL 11, 2007

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 3 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I will call the Committee to order. Good afternoon. Welcome to this hearing of the Constitution Subcommittee entitled "Responding to the Inspector General's Findings of Improper Use of National Security Letters by the FBI."

We are honored to have with us this afternoon a distinguished panel of witnesses to share their views on this very important and timely issue. Let me start by making a few opening remarks, and if a member of the minority comes, we will certainly take an opening statement there, and then we will go to our witnesses.

One month ago, the Inspector General of the Justice Department issued the results of a Congressionally mandated audit, an audit that examined the FBI's implementation of its dramatically expanded authority under the USA PATRIOT Act to issue National Security Letters, or NSLs. The Inspector General found, as he put it, "widespread and serious misuse of the FBI's National Security Letter authorities. In many instances the FBI's misuse of National Security Letters violated NSL statutes, Attorney General guidelines, or the FBI's own internal policies."

The Inspector General's findings are of grave concern to me and this Committee. Chairman Leahy has called hearings in recent weeks to hear from the Inspector General himself, who described his conclusions in detail, and also from the FBI Director, who talked about some steps the FBI is planning to take in response to the report.

I appreciate that the FBI agrees with the IG's conclusions and recognizes that it needs to change the way it does business when it comes to NSLs. But in my view, simply leaving it to the FBI to fix this problem is not enough. Unfortunately, the FBI's apparently lax attitude and in some cases grave misuse of these potentially

very intrusive authorities is attributable in no small part to the USA PATRIOT Act. That flawed legislation greatly expanded the NSL authorities, essentially granting the FBI a blank check to obtain some very sensitive records about Americans, including people not under any suspicion of wrongdoing, without judicial approval.

Congress gave the FBI very few rules to follow and, therefore, Congress has to share some responsibility for the FBI's troubling implementation of these broad authorities. This Inspector General report proves that "trust us" does not cut it when it comes to the Government's power to obtain Americans' sensitive business records without a court order and without any suspicion that they are tied to terrorism or espionage. It was a significant mistake for Congress to grant the Government broad authorities and just keep its fingers crossed that they would not be misused.

Congress has the responsibility to put appropriate limits on Government authorities—limits that allow agents to actively pursue criminals and terrorists, but also that protect the privacy of innocent Americans. And we did not do that with regard to the NSL authorities. Had it not been for the independent audit conducted carefully and thoughtfully by the Inspector General's office, Congress and the American public might never have known how the NSL authorities were being abused by the FBI. The NSL authorities operate in secret. The Justice Department's classified reporting on the use of NSLs was admittedly inaccurate. And when during the reauthorization process Congress asked questions about how these authorities were being used, we got nothing but empty assurances and platitudes that we now know were mistaken.

Congress needs to exercise extensive and searching oversight of those powers, but oversight alone is not enough. Congress must also take corrective action. The Inspector General report has shown both that the executive branch cannot be trusted to exercise those powers without oversight and that current statutory safeguards are inadequate.

Today we will hear from experts about steps that Congress should take to respond to the IG's report. How should we change the law to make sure these kinds of abuses never occur again? Today's witnesses come at the issue from an array of perspectives, and I look forward to their ideas and insights.

We will also hear from an individual who we should have heard from when we were considering reauthorization of the PATRIOT Act in 2005: one of the Connecticut librarians who received a National Security Letter and challenged it in court. George Christian wanted to be heard in Congress in 2005, but was prevented from speaking out because of the blanket gag order imposed on all NSL recipients. He has now been released from the gag order, and I am very pleased that he is here with us today.

We will now turn to our panel of witnesses. We will proceed from left to right, and I would ask the witnesses to limit their oral testimony to 5 minutes. Your complete statements will be included in the record. Will the witnesses please stand and raise your right hands to be sworn.

Do you swear or affirm that the testimony that you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. BARR. I do.
Mr. CHRISTIAN. I do.
Mr. SWIRE. I do.
Ms. SPAULDING. I do.
Chairman FEINGOLD. Thank you and you may be seated.

Our first witness, I am pleased to say, will be the Honorable Bob Barr, who is no stranger to this Committee. He served four terms in the House of Representatives where he was a member of the House Judiciary Committee. Mr. Barr is the CEO of Liberty Strategies LLC and Chair of Patriots to Restore Checks and Balances, an alliance of conservative and progressive organizations committed to protecting the Constitution. New York Times columnist Bill Safire has called him "Mr. Privacy." Mr. Barr has a wealth of experience relevant to today's hearing. He has served as U.S. Attorney for the Northern District of Georgia and was an official in the CIA.

Mr. Barr, thank you for making the time to be here today, and you may proceed.

STATEMENT OF BOB BARR, FORMER MEMBER OF CONGRESS, AND CHAIRMAN, PATRIOTS TO RESTORE CHECKS AND BALANCES, ATLANTA, GEORGIA

Mr. BARR. Senator, Mr. Chairman, it is a tremendous honor as always to appear at a hearing before you. It is a special honor and great pleasure to appear before you not just as Senator Feingold but as Chairman Feingold of this very, very important Committee. I very much appreciate the honor extended to me of being invited to appear here today, especially in the company of such a very distinguished panel, as you have already noted. And I look forward to hearing their testimony and learning from it, as I am sure you do.

I would like to also offer a very special word of thanks, Senator, to your staff for the outstanding work, not just in preparation for this hearing; but every other time we have had a hearing or called on them, they are absolutely tremendous in terms of providing support and assistance, answering questions, and working out the logistics. And I very much appreciate that.

The report to which this hearing today is concerned, the IG Report, really is nothing short of a constitutional wake-up call for this country, Senator, as I think you certainly more than perhaps any of your other colleagues realize, having had, I suspect, many of the concerns reflected in this report foremost in your mind before probably many of your other colleagues in your prescient vote against the USA PATRIOT Act back in 2001. So I suspect that as with yourself and with myself and many others, the abuses that are chronicled in the IG Report come as, unfortunately, no surprise.

I think it is important also, Mr. Chairman, to recognize that the remedies for the problems chronicled in the IG Report cannot, absolutely cannot, be remedied by simply tweaking the regulations, tweaking the procedures, issuing new guidelines, having another training session for FBI officials. The problems that we see chronicled in the IG Report and its sister report, the report on the Section 215 abuses, reflect and derive from the fundamental nature of the unaccountability built into the powers expanded and granted in the USA PATRIOT Act. Those powers were granted and expanded by statute, and the only way to assure ourselves or really to afford

ourselves any assurance at all that these problems can be remedied has to be by statute. And if we look at the statute and the statutory remedies—and in my written remarks, which we have submitted, I identified a number of specific statutory measures that we believe, I believe, and many others believe need to be addressed. Most importantly, a meaningful standard for the issuance of National Security Letters based on more than simply happenstance that a U.S. person or another person protected under the Fourth Amendment to the Bill of Rights, for example, finds himself or herself all of a sudden a part of a database based on an NSL that was issued on absolutely nothing more than they happen to be in a certain place at a certain time. Or perhaps they were not even in that certain place at a certain time, but their records may have something in somebody's mind to do with a terrorist, a suspected terrorist, or even a suspected associate of a terrorist. And even after the National Security Letter is issued, even after the data is accumulated, oftentimes, as the IG Report indicates, it just sort of sits somewhere or goes into some database. Tens of thousands of people have access to it. Foreign governments and foreign entities may have access to it. And even if, in fact, information on a particular individual, such as a U.S. person, that we now know that the majority, strangely—perhaps not so strange—of these National Security Letters are being issued regarding U.S. persons not foreign persons. The U.S. person finds himself or herself—basically, unless statutory limitations are placed on the retention of the information, they are in there for the duration. There is no way that they would know or have any way, or even the Congress would have any way of extracting information on a person who was roped up in one of these National Security Letter investigations and the information or the very thin reason for putting their name in there in the first place turned out to be not so.

So we need to address, I believe the Congress needs to address meaningful standards for issuance: constitutional nondisclosure orders, court review, mandatory court review, verifiable reporting regimes, limitations on data retention, and limitations on the data sharing.

Even if all of these measures, and others that I know the Senator is considering, are enacted by statute, the National Security Letters will remain a very robust mechanism for the FBI and, indeed, indirectly other Federal agencies to employ. The sky is not going to fall if these measures are put in place. While some have characterized the National Security Letter expanded powers as the "bread and butter" of the FBI's antiterrorism and counterintelligence effort, the fact of the matter is that that bread and that butter still needs to be utilized, spread, and eaten within the confines of the Constitution. It still has to meet constitutional muster. And we believe it has to be done by statute.

Mr. Chairman, we appreciate, I appreciate very much your holding this hearing, which I suspect will be one of a series that you will be holding on these issues and stand ready either today or in the future to answer any questions that you might have.

[The prepared statement of Mr. Barr appears as a submission for the record.]

Chairman FEINGOLD. Thank you very much, Representative. I appreciate your comments and certainly the message very much. Thank you.

Our next witness will be George Christian. Mr. Christian is Executive Director of Library Connection, Inc., a consortium of 27 Connecticut libraries. Library Connection received an NSL from the FBI in 2005 and brought a court challenge against the constitutionality of the statute. But throughout the litigation and throughout Congress' consideration of the reauthorization of the PATRIOT Act, Mr. Christian and his colleagues were subject to a strict gag order and could not reveal that they had received an NSL.

The Government finally fully lifted the gag on Library Connection last summer after the reauthorization process was over, and Mr. Christian is now free to discuss his experience. He received his MBA and Master's degree from the University of Bridgeport and has also worked at JP Morgan.

Mr. Christian, I look forward to your testimony and you may proceed.

STATEMENT OF GEORGE CHRISTIAN, EXECUTIVE DIRECTOR, LIBRARY CONNECTION, INC., WINDSOR, CONNECTICUT

Mr. CHRISTIAN. Thank you Mr. Chairman. Thank you for this opportunity to share my experience as an NSL recipient. My three colleagues, who were equally involved, and I very much wanted to do this, as you have said, while Congress was considering the renewal of the PATRIOT Act. But we were prevented from doing so by a gag order that was later ruled unconstitutional. We are the only recipients of a National Security Letter that can legally discuss this experience. The recipients of several hundred thousand other NSLs must carry the secret of their experiences with them to their graves.

As librarians, we share a deep commitment to patron confidentiality that assures that libraries are places of free inquiry. Connecticut is one of 48 States that have laws protecting the privacy of library patrons and charging librarians with the responsibility of guarding that privacy. However, we also fully accept our civic obligation to cooperate with law enforcement agencies when they can provide warrants or other court orders that indicate that an independent judiciary has approved their inquiry.

In July 2005, we were served with a 2-month-old NSL requesting all of the subscriber information of any person or entity related to a specific IP address for a 45-minute period back in February. Since there was no way of determining who was using the computers in the library 5 months after the fact, this meant that our NSL was a request for the information we had on all of the patrons at that library. We were very disturbed by the sweeping nature of this request, by the fact that it showed no sign of judicial review, and by the fact that it came with a perpetual gag. We were shocked to learn that the NSL statute was part of the PATRIOT Act, because Attorneys General Ashcroft and Gonzales had both declared that the PATRIOT Act had not been and would be used against libraries.

When we learned that a district court in New York had judged the NSL statute to be unconstitutional, we decided to contest com-

pliance with our letter. Fortunately, the American Civil Liberties Union agreed to represent us. Our gag was removed by a Federal district court, but the decision was appealed by the Justice Department. Meanwhile, because the Government failed to redact all our names, two of our names appeared in many articles in the New York Times, the Washington Post, and other papers. This created many professional and personal difficulties for us. However, in appellate court, the Government maintained that we should remain gagged because no one in Connecticut reads the New York Times.

We also sought immediate relief from the gag order in order to be able to tell Congress that the NSL statute was being used against libraries and library patrons while Congress was debating the PATRIOT Act. And although the Government failed to redact our names, they did redact our claim that 48 States had statutes protecting the privacy of library patrons. We could not understand how these laws threatened national security, but we did note that Attorney General Gonzales claimed to Congress that there was no statutory justification for the concept of privacy.

On March 9, 2006, President Bush signed into law the revised PATRIOT Act. A few weeks after that, the Justice Department decided that we no longer needed to be gagged. And a few weeks beyond that, they declared that they no longer needed the information sought by the NSL they had served us with. We ended up being silenced until after the PATRIOT Act was renewed, and by dropping our case altogether, the Government made sure that the NSL statute would be removed from the threat of court review.

Based on our experience, we urge Congress to require judicial reviews of NSL requests, especially in libraries and bookstores, where a higher First Amendment standard of review should be considered. We believe that you can make changes to the law that do not compromise law enforcement's abilities to pursue terrorists, yet maintain the civil liberties guaranteed by the United States Constitution. Terrorists win when fear of them induces us to destroy the rights that make us free.

Again, I thank you for this opportunity to testify, and I ask that you please submit my full written testimony to the record.

[The prepared statement of Mr. Christian appears as a submission for the record.]

Chairman FEINGOLD. Well, thank you for that useful testimony. It is very important. It would have been useful a while back, as you well indicated, but it is certainly going to help us as we, I hope, try to reform the law, as Representative Barr suggested we need to do. Thank you.

Our next witness will be Professor Peter Swire, an expert in the field of privacy law. Professor Swire currently teaches law at Ohio State University and is a senior fellow at the Center for American Progress. From 1999 to 2001, he served as chief counsel for privacy in the Executive Office of the President. Professor Swire has also taught law at the University of Virginia and George Washington University and has spent time in private practice. He graduated from Yale School.

Professor Swire, thank you for being here today, and I want you to know I rooted for Ohio State, even though we are still licking our wounds from not making it farther in the tournament.

Mr. SWIRE. Well, the Badgers should have made it much further, Senator.

Chairman FEINGOLD. Thank you. That is a good answer.

[Laughter.]

Chairman FEINGOLD. You may proceed.

STATEMENT OF PETER P. SWIRE, C. WILLIAM O'NEILL PROFESSOR OF LAW, MORITZ COLLEGE OF LAW, OHIO STATE UNIVERSITY, AND SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS, WASHINGTON, D.C.

Mr. SWIRE. Thank you very much, and, Mr. Chairman, thank you for the invitation to testify here today.

The biggest point in my written testimony is that the Congress has never agreed to anything like the program that the Inspector General's report has revealed. Here is one way to see how different the public understanding has been from what, in fact, was going on.

In March 2003, the Washington Post ran a front-page story, and here is a quote from it: "The FBI, for example, has issued scores of National Security Letters that require businesses to turn over electronic records about finances, telephone calls, e-mail, and other personal information, according to officials and documents."

Scores of letters—that was the best we knew in the Washington Post and in public in 2003. The actual number, we now find out, was over 39,000 in 2003 alone. That is quite a difference. That could even be considered misleading, perhaps, if officials were saying scores of times, when it is 39,000.

So there is a difference between what Congress thought and the American people thought was going on and what we know now was going on.

In my written testimony, I offer four main conclusions.

First, the PATRIOT Act fundamentally changed the nature of NSLs in ways that create unprecedented legal powers in the executive branch and pose serious risk to privacy and civil liberties.

Second, as I have said, Congress has never agreed to anything like the current scale and scope of NSLs.

Third, the gag rule under NSLs is an especially serious departure from good law and past precedent.

And, fourth, legislative change is needed, such as the SAFE Act or H.R. 1739, and a group of public interest organizations today has a statement, a joint statement, that suggests ways to go on legislation.

And so in my testimony I suggest a new meaning for the acronym of NSLs. I think we should call it "Never seen the like." This is really out of bounds from the way our checks and balances, our three branches operate.

The Inspector General's recent report has put NSLs on the front page and prompted today's hearing, but as given in more detail in my written testimony, this has been an area clouded by secrecy and in many cases by misleading statements about what is going on, and now we have pulled back the veil just a little bit.

I think then that the legislative discussion right now should be seen as one where there is no stare decisis, there is no precedent that the current law is really the right way to go. For the Judiciary

Committee, we can say this is sort of like an issue that has never been argued in previous cases. Now we are briefing the issue. We have got this IG's report. We are seeing a great big mess. We are seeing that secrecy with no one looking over the shoulders predictably leads to the mess, and it is time to write a statute that is based on what we know.

So this is really a greenfields project how to write about NSLs. There should be no presumption that the current law, where the FBI has now said they got an F in implementing it, there is no presumption that you award this F with basically the status quo.

In my written testimony, I emphasize the problems with the gag rules that we have and how far they depart from the way we do law ordinarily in the United States of America. There has long been a specialized rule for wiretaps, that it stay secret, and that is because it really undermines the effectiveness of a wiretap to say that so-and-so is being wiretapped. They just stop using the phone. But for record searches, the history of the United States has not been that it is a state secret and you cannot tell that you have had your records searched. Just like the landlord who gets asked about a tenant. There is no gag order on the landlord. The landlord or the record holder cannot tip off the criminal. That is obstruction of justice, and that is how we handle it. If you tip off the bad guys, then you are a bad guy yourself. But, ordinarily, we start with free speech. We start with the idea that librarians can say, hey, we have got this problem. We go to Congress; we go to the press. We say there is overreaching by Government. And that is the way that the law is written.

I wrote a long and probably excessively boring law review article in 2004 talking about gag rules and NSLs and saying why it is just out of bounds with precedent. And I do not think that has been addressed well by the administration. I think it is a big problem. And so I think the presumption of gag rules, the idea that we draft our librarians and our pawnbrokers and our travel agents into lifelong secrecy—and that is just what we have to do because that what America is now—I think that is just a bizarre approach. It is bad law, and there are other ways to address the problems of preserving secrets.

In my testimony, I make various suggestions for legislative points, and some of those issues might come back in the question session. I would like to highlight one idea that has not been mentioned previously, at least not that I have seen. I suggest that issuing NSLs could be accompanied in the future by a statement of rights and responsibilities. You get the request for records, and then the person receiving it—a librarian, in our instance, who has never heard of this thing before—would say, You have a right to consult an attorney, you have a right to appeal this to court, you have an obligation not to tip off the target of the investigation—a balanced and legal set of authorities. That way the people who get it know what the rules are, and the people who are handing it out, the FBI, will see what their rules are. And this way, this sort of simple statement can lead to a much better chance at compliance with the law instead of the widespread violations we saw in the report.

So, with that, I thank you for the invitation to participate today. I look forward to helping your staff in answering questions today in any way I can.

[The prepared statement of Mr. Swire appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Swire, for that very clear testimony. Thank you.

Our next witness will be Suzanne Spaulding. Ms. Spaulding's expertise on national security issues comes from 20 years of experience in Congress and the executive branch. She has worked on both the House and Senate Intelligence Committees and has served as legislative director and senior counsel to Senator Specter. She has served as the Executive Director of two different Congressionally mandated commission focused on terrorism and weapons of mass destruction and has worked at the CIA. She is currently a principal at Bingham Consulting Group and is the immediate past Chair of the American Bar Association's Standing Committee on Law and National Security.

Ms. Spaulding, thank you for taking the time to be here, and you may proceed.

STATEMENT OF SUZANNE SPAULDING, PRINCIPAL, BINGHAM CONSULTING GROUP, OF COUNSEL, BINGHAM MCCUTCHEN LLP, WASHINGTON, D.C.

Ms. SPAULDING. Chairman Feingold, thank you for inviting me to participate in today's hearing. I would like to begin my testimony today by emphasizing the point you made in the introduction, which is that I have spent 20 years working on national security issues for the U.S. Government, starting in 1984 as senior counsel to Arlen Specter, and I developed over those two decades a strong sense of the seriousness of the national security challenge that we face and a deep respect for the men and women in our national security agencies, including the FBI, who work so hard to keep us safe.

We owe it to those professionals to ensure that they have the tools they need to do their job. Equally important, they deserve clear rules and careful oversight. Unfortunately, it appears both were lacking in the implementation of the National Security Letter authorities.

As important as it is to examine the lessons learned from the IG report, however, I would urge Congress not to stop there, but to take a broader approach. The various authorities for gathering information inside the United States, including the authorities in the Foreign Intelligence Surveillance Act, or FISA, should be considered and understood in relation to each other, not in isolation.

There are press reports today that the Director of National Intelligence is going to be seeking to expand the Government's surveillance authority by liberalizing FISA provisions on eavesdropping and on access to records held by phone companies and ISPs. Changes to FISA may indeed be appropriate, but I would urge Congress not to act without first getting all the facts, and not to act on one domestic intelligence collection tool in isolation. In fact, I would urge Congress to undertake a comprehensive review of all domestic intelligence collection—not just by FBI but also by other

national security agencies engaged in domestic intelligence collection, and that includes the Central Intelligence Agency, the Department of Defense, the National Security Agency, and others.

A joint inquiry or task force could be established by the Senate leadership with representation from the most relevant committees to carefully examine the nature of the threat inside the United States and the most effective strategies for countering it. Then Congress and the American public can consider whether we have the appropriate institutional and legal framework for implementing those strategies, with adequate safeguards and appropriate oversight. This would include a review of FISA, National Security Letters, the PATRIOT Act, the National Security Act of 1947, various Executive orders, et cetera.

In the meantime, as this Committee focuses on National Security Letters, I would urge a broader examination in that context as well, not just on the specific problems in the report but on National Security Letter authorities generally, especially the changes which were included in the PATRIOT Act.

The first of these changes was the change to the standard for issuing National Security Letters, which, as you know, moved from the need to show specific facts providing a reason to believe that the records were those of a foreign power or an agent of a foreign power, to the far broader standard that the records be merely relevant to an investigation to protect against international terrorism.

As the IG noted, this allows the Government to get information about individuals who are not themselves the subject of an investigation, "parties two or three steps removed from their subject, without determining if these contacts reveal suspicious connections."

For example, Congress should examine the facts surrounding the nine NSLs in one investigation that were, according to the IG report, used to obtain information regarding over 11,000 different phone numbers. NSLs should not become a mechanism for gathering vast amounts of information about individuals with no known connections to international terrorism for purposes of data mining. Some clear link to a known or suspected terrorist should be required.

At least as troubling is the provision in the PATRIOT Act that allows the Government to demand full credit reports and all other information that a credit bureau has on individuals. This intrusive authority was actually granted not just to the FBI, but to any agency authorized to conduct investigations or even engage in intelligence analysis regarding international terrorism. This again would include CIA, NSA, DOD, and a host of other agencies.

Given the problems uncovered in the FBI's use of NSL authorities, Congress needs to thoroughly examine how this authority is being used by these additional agencies and seriously consider restricting this authority to the FBI only, as with other NSL authorities.

The PATRIOT Act also moved the authority to approve NSLs from senior officials in Washington down to all 56 special agents in charge of the various field offices throughout the country. Thus, the legal review comes from attorneys in those offices who work for those special agents in charge, and the Inspector General found

that this chain of command has significantly undermined the independence of those lawyers and led some to believe that they cannot challenge the legal basis for the NSLs or their connection to investigations.

In order to ensure more independent and consistent oversight of the NSL process, Congress should consider transferring the FBI's authority to issue NSLs to DOJ attorneys in the National Security Division. This is a suggestion made by David Kris, who was the Associate Deputy Attorney General and Director of the Executive Office for National Security Issues at the Department of Justice from 2000 to 2003. He points out that in the criminal context, DOJ attorneys are involved with all of the most effective investigative techniques, including the issuance of subpoenas, searches, surveillance, and certain undercover operations. But DOJ has not had this close working relationship with the FBI intelligence investigators because of the legacy of "the wall." And yet in this area, careful oversight from DOJ attorneys may be most important.

In closing, Mr. Chairman, I want to emphasize that the FBI and DOJ are to be commended for having welcomed this report as an important wake-up call and initiating changes to address some of the problems identified, particularly with regard to the "exigent circumstances" letters. Other areas requiring clearer guidance, however, include data retention and the need to tag NSL information as it moves through the system and makes its way into intelligence products and criminal proceedings.

Mr. Chairman, I want to commend the Committee for holding this hearing and again urge that the lessons learned on NSLs lead to a broader examination of intelligence collection inside the United States. Nearly 6 years after 9/11, it is time to more carefully craft an effective and sustainable framework for this long-term challenge, rather than relying on a patchwork built on fear and in haste. We owe it to the men and women who undertake this vital and sensitive work on our behalf to make sure we get it right.

Thank you.

[The prepared statement of Ms. Spaulding appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Ms. Spaulding. I welcome your specific suggestion on NSLs and your very powerful point about the need to take a broader look. I also serve on the Intelligence Committee, and having experienced these different revelations, both here and there, and thinking about how these all interrelated, it is very complex. But it is just like the broader issue of fighting terrorism after 9/11. We can either choose to look at the whole picture and understand it or not. And your testimony is about getting the whole picture before us and making decisions on that basis. So I thank you, and all of you. This is exactly the kind of record we need. And although it may seem quiet in this room and not a lot of Senators here, these kinds of hearings are extremely valuable as we go down the road to be able to have authorities like you on the record saying this.

I will turn to questions. Before I begin, I would like to place the following items in the record of the hearing: a statement from Lisa Graves, Deputy Director of the Center for National Security Studies; and a statement from James Dempsey, Policy Director of the

Center for Democracy and Technology. Without objection, they will be included in the record.

Mr. Christian, again, thank you for being here. I think we can all agree that libraries should not be safe havens for criminals or terrorists, but also that the privacy of library records should be carefully protected. There has been some confusion over what types of library records the FBI can request under the NSL statute, and the NSL that you received was hardly a model of clarity. It admittedly covered only a specific and limited time period, but it was not at all clear exactly what the FBI was asking for. And you received it a full 5 months after the date in question.

For you to fully comply with the FBI's National Security Letter that you received in July 2006, as you understood it, exactly what records do you believe you would have had to turn over?

Mr. CHRISTIAN. At a minimum, Senator, we would have had to turn over the entire patron database for that particular library and perhaps some of the circulation records.

You are quite correct to say that we have learned through experience the NSL statute is really only about electronic records. However, these days in libraries, all records are electronic. And libraries are working to provide patrons the maximum use of the electronic records that are available. Not only is the card catalogue not a card catalogue, it is an electronic catalogue. But libraries are working to link searches in the catalogue with searches in electronic databases and with searches on the Internet, all automatically. It is called "federated searching."

So if I were looking for something in a card catalogue, I would see what my library had on the shelf. I would also see what resources were available from electronic databases that the library subscribed to. And I would see appropriate websites to my query on the Internet. So that is all one search. If you are turning over to the FBI what the patron was looking for, how can you divide that up?

The address that the FBI was looking for led to a router at the building. Routers use address translation to mask the identity of the computers behind them to prevent hacking or to make hacking more difficult.

Every time a computer is turned on, the router randomly assigns it a different address. Five months after the fact, we would have had to tell the FBI, well, it is one of all of the computers in the library, an there is no record of which patron was using what. So I guess they would have wanted to know about all the patrons. And if they were looking for electronic records, they may have wanted to know everything that we have, which includes the circulation records.

Chairman FEINGOLD. Thank you so much.

Professor Swire, you have studied these statutes for a long time. Did it surprise you to learn that the FBI has issued an NSL to a library entity and that the NSL was worded in this confusing way?

Mr. SWIRE. I think in the last several years, libraries have become famous in many ways in the PATRIOT Act debates partly because librarians have been so courageous about speaking up about these issues and have been very organized and understand what is at stake. And what we have heard here is essentially a sort of hay-

stack problem where to be able to figure out who the one person is, you would have to send the whole haystack over to the FBI. And that is because we do not want to have the far more intrusive rules that would require, for instance, every time somebody goes to the library to register what sites they are going to or register exactly to that computer, that would be a level of sort of intrusion and required surveillance that would be far worse.

So it is not a surprise that libraries have been targeted, and it is not a surprise that you would end up with this haystack and very little usable information.

Chairman FEINGOLD. Thank you, Professor.

Mr. Barr, a major concern that you raise in your testimony is the potential breadth of the relevance standard for the NSLs. When I pressed FBI Director Mueller on this issue a couple weeks ago, he basically acknowledged that the relevance standard would permit the FBI to use NSLs to obtain some records of innocent Americans that it probably should not.

Do you agree that the relevance standard would permit the FBI to obtain the records of individuals two or three times removed from a suspect?

Mr. BARR. The relevance standard, I think common sense tells us, as well as those of us such as yourself, Mr. Chairman, and members of this panel, including myself, with experience in Government, is an absolutely meaningless standard. It has no relevance to a standard.

Simply saying that the FBI can use a National Security Letter to obtain information on any person or persons that they want so long as it is relevant to an investigation that they have determined is an appropriate one, without any review, without any accountability, without any objective standard, has rendered it meaningless.

Therefore, as we saw in the IG report, obtaining vast amounts of data on individuals two or three or perhaps even more times removed, simply because an individual perhaps uses the same business establishment as a suspected or known terrorist or because an individual, a U.S. person, goes to the same medical facility as a suspected or known terrorist, the hypothetical—they are not really hypotheticals. The examples go on and on.

So there has to be a standard, and that standard needs to be based on a reasonable and articulable suspicion that there is suspicious activity that that person on whom the National Security Letter is directed to obtain information on that person above and beyond simply that they might have been in the same place at the same time or in the same place at a different time than the true target. That is why we see these vast amounts of data similar to what occurred as we found out after the crumbling of the Soviet bloc, STASI, for example, the East German intelligence service, once the government there fell, and we were able to gain access to vast warehouses of information, including physical evidence or suspected physical evidence on virtually everybody that lived in a certain area or that worked in a certain industry, not because they were suspected of having done anything in particular, but perhaps at some point in the future they might be.

That is what these NSLs are being used for, and the relevance standard is the vehicle that allows them to do that.

Chairman FEINGOLD. Thank you.

Ms. Spaulding, I think I explicitly heard you say that you thought this could go to people two or three times removed from a suspect, and I take it, Professor Swire, you would agree with that as well. Correct? You both would agree with that; is that right?

Ms. SPAULDING. And, in fact, the Inspector General said as much in his report.

Chairman FEINGOLD. Professor, do you agree?

Mr. SWIRE. Yes, and one idea about relevance, in the first year of law school people learn about the Federal Rules of Civil Procedure and discovery as to everything that is relevant to a case. And we know that that is just about as wide open as could be, and so everybody on Judiciary would sort of know that.

Ms. SPAULDING. The other point to be made there, Senator, is that it is relevant to what. It is not even relevant to an investigation into terrorist activities. It is relevant to an investigation to protect against international terrorism, which I think, you know, potentially is wide open.

Chairman FEINGOLD. That sort of relates to my next question. Proponents of the relevance standard often point to grand jury subpoenas and argue the standard should be the same for both NSLs and the grand jury subpoenas. For any of you, is that an apt analogy? Ms. Spaulding?

Ms. SPAULDING. I think it is not for a number of reasons, but one of the most important I think often gets lost in this argument that if we have this authority to go after ordinary criminals, we should have the exact same authority to go after international terrorists in an intelligence investigation.

What is lost is that intelligence investigations are looking for suspicious activity. When the grand jury subpoena has to be relevant to a criminal investigation, what people have to remember is that crimes, pursuant to our Constitution, have to be clearly defined so that every American knows which side of that line they are on and you do not accidentally wander into criminal territory where you would be subject to Government surveillance, et cetera.

In the intelligence context, when you now simply have to be relevant to an investigation to protect against international terrorism and you are looking for suspicious activity, we have not defined that. And how Americans can know whether they are on the right or wrong side of that suspicious activity line is a real challenge and it makes a significant difference between relevant to a criminal investigation and relevant to an intelligence investigation.

Chairman FEINGOLD. I recall this being one of the hardest parts of trying to persuade people that there needed to be changes in the PATRIOT Act, because the administration and others would always say, well, you know, in Medicaid fraud a person does not have these rights, why should a terrorist? You know, trying to get people to be able to hear the complexity of this but still the validity of these differences was really tough.

Professor?

Mr. SWIRE. So there are at least three differences right off the bat, in addition to crime versus everything that is national security related.

In a grand jury situation, when an FBI agent thinks there is a lead, first he or she has to convince the prosecutor: Look, Prosecutor, this is actually true. Then the prosecutor goes to the grand jury.

Second, the prosecutor has to convince the grand jury. If it is embarrassing, if it is a fishing expedition, if it is silly, the citizens are there, the prosecutor simply will not do it.

But the third and most important thing is there is no gag order. Right? So what happens is if I am a witness called for a grand jury, I am allowed to walk out afterwards and say here were the ten questions, here is what I said. But under NSLs, I am not. I am under the lifelong ban, and that changes everything. And one of the checks against abuse is if somebody is asking a question—I can go to the press, I can go to the Congress. If the FDA overreaches in an administrative subpoena, if they ask for too much from a drug company, you know those pharmaceutical companies will be—in a minute complaining about it. That is what cannot happen under NSLs. Our checks and balances based on openness is entirely lacking.

Chairman FEINGOLD. Professor Swire, as you point out, the NSL statutes have changed significantly since they were first enacted. NSLs are not only available at the lower threshold, but they also cover many more types of records. Based on the history of these statutory provisions, is it sensible to permit the Government to obtain what has become a vast range of records, all under the very same low standard, without a court order? And just to take an example, which is mentioned with the FBI Director, aren't the contents of full credit reports far more sensitive than the name of the subscriber associated with a particular phone number?

Mr. SWIRE. Well, when it comes to credit reports, the first U.S. Federal privacy law was the Fair Credit Reporting Act in 1970. So that came first. So we know credit reports are sensitive. That is what Congress acted on first. And then I think as Congressman Barr and others on the panel have said, these are the reasons we go to judges first because there is such a range of records and because they are held for so long and because there is no way to dispute them. And with that range of records being involved, we should have judges first.

Chairman FEINGOLD. I think Mr. Barr wanted to say something about the grand jury analogy, if you can do that now.

Mr. BARR. Thank you very much, Mr. Chairman. I would just add one additional point to the several points that my colleagues on the panel have noted as differences between the NSL and the grand jury subpoena, and that is, there is a judicial open mechanism that is available to the citizen, the U.S. person, or the recipient of a grand jury subpoena. There are established procedures that are known, that are provided for in law and in the Rules of Procedure to contest the overbreadth, for example, of a grand jury subpoena, a move to quash it.

These are not remedies that are available in any way shape or form either from a practical standpoint or a legal procedural stand-

point to a recipient of an NSL. So I would add that to the differences between the two for those who would say, well, the NSL is simply another form of a grand jury subpoena.

Chairman FEINGOLD. Thank you.

Mr. Christian, the NSL gag order had a significant effect on your professional and personal life and relationships. Your situation is very unusual in that, as you pointed out, your gag has been lifted. But we were recently reminded by an op-ed published in the Washington Post by the John Doe in the New York NSL lawsuit that for him and others the gag is permanent.

What would it be like for you and the other plaintiffs now if you were still subject to the gag order and still could not explain to your staff and family what you were going through?

Mr. CHRISTIAN. I think it would eventually become simply impossible. You are living at least a tacit lie with all these groups—with your family, with your professional colleagues, with your workers. My big concern, in addition to not being able to talk to librarians or even my staff, was that I pride myself on my integrity, and yet it was obvious to my entire board of directors and to the entire membership in our organization that I was concealing something that was really big.

I did not know whether I had their full support or most of their support or whether there was a significant minority opinion that I should consider. I could not ask. I could not discuss it. I had to outright lie to our auditors. I am supposed to testify to the auditors every year whether or not Library Connection is involved in any major lawsuits, and I could not say, "no", and add, in parentheses, except for the fact we are suing the Attorney General. I would not have wanted to do that year in and year out, especially if the press coverage continued. At some point the auditor would look me back in the eye and say, "I do not believe you." And then where would we be? It was just awful.

On the other hand, at least I had the sympathy of people, especially my colleagues, because it was in the press: These poor people, like the John Doe in New York, they really have to keep it bottled up within themselves; it must be awful.

Chairman FEINGOLD. Thank you.

Professor Swire, one statutory provision that the Inspector General report highlighted, which I do not think any of us have had a great opportunity to pay much attention to, is the emergency authority to obtain communication records under Section 2702 of Title 18. That is the authority that the FBI was apparently supposed to be invoking when it issued more than 700 illegal exigent letters.

In light of the IG report, should Congress consider changes to that emergency provision?

Mr. SWIRE. Congressman, I saw that in the IG's report, and it seems like a stretch to me on first reading. I have not had a chance to dive deeply into that. But I think it shows a general point, which is there are a lot of these different statutes that fit together, as Ms. Spaulding and others have said, and there may be all sorts of other emergency authorities that someone is claiming somewhere or other to do things that we never dreamed of, and this is one that has turned up through the IG's audit.

It might be useful to find out what the list of other emergency exceptions is that folks are using for electronic surveillance.

Chairman FEINGOLD. Thank you, Professor.

Mr. Christian, again, during reauthorization of the PATRIOT Act, Congress for the first time explicitly provided for judicial review of the gag order that comes along with receiving an NSL, but it made the standard for overcoming the gag order extremely difficult to actually meet. The Government simply asserts that lifting the gag would harm national security. That assertion is presumptively conclusive. To overcome it, recipients must prove the assertion was made in bad faith, which would be virtually impossible to do.

Having been on the receiving end of an NSL, do you think that is a fair standard for judicial review of the gag order?

Mr. CHRISTIAN. Absolutely not, Senator. I think that is horrible. In our case, which was heard by Judge Janet Hall in Bridgeport, Connecticut, in the district court, when she told the Justice Department that she would consider the arguments in the case but she was really leaning towards lifting the gag order, their response was that, well, it would jeopardize their case. And she said, "Well, what evidence do you have that it would jeopardize your case?" And they said, "We are sorry. It is a national security secret." She was able to say, "Well, before I was appointed to the bench, I had the highest national security clearance, so I would like to look at that evidence." And she made her ruling not only on the basis of a perpetual gag order being prior restraint, but having looked to see whether there was any mitigating evidence that really did entail national security, and she ruled that there was none. But that can no longer happen. It would not matter that Judge Hall had the appropriate security clearance to look at the FBI's evidence. She cannot. She just has to take their word for it.

I think we have seen clearly enough that "take my word for it" leads to abuse, but I don't know how this case could be argued in the future. Our case was plain and simple: A perpetual gag order is prior restraint. Technically, the gag order for NSLs in the renewed PATRIOT Act is not a perpetual gag order. It expires in a year and it has to be renewed. But I am quite sure that it will be perpetually renewed. It is a terrible change in the law.

Chairman FEINGOLD. For any of you, are there options that Congress should be considering beyond legislation? For example, should we be asking the Inspector General to do any follow-up work in addition to the report he is doing on the use of NSLs in 2006? Ms. Spaulding?

Ms. SPAULDING. Well, as I indicated in my testimony, I would urge Congress to perhaps direct the IGs of the other national security agencies and really virtually any agency that would fit within that definition of a Government agency involved in either an investigation or intelligence activities or analysis of international terrorism to look at what each of those agencies is doing in terms of implementing their National Security Letter authority.

These are agencies that typically are not used to dealing with collection of intelligence information inside the United States and the tremendous sensitivities that come into play in that context.

Chairman FEINGOLD. Mr. Barr?

Mr. BARR. Thank you, Mr. Chairman. The IG report, which is the subject or the base for our discussion here today, is not even comprehensive. It is based on a sampling that was conducted of a number of offices and only a number of files. It barely scratched the surface, and yet it uncovered very substantial abuses of the system.

I think that the Congress in both its oversight capacity as well as in its financial or appropriations capacity needs to ensure that these matters are gone into in much greater detail. There clearly are problems there, but based on a sampling we do not know even today the true extent of these problems, even before we have reached the statutory fixes that we are recommending and that I know the Chairman is considering.

Chairman FEINGOLD. Professor?

Mr. SWIRE. Thank you, Senator. In my testimony, I talk about an interesting sentence from FBI testimony in the House just a couple weeks ago, so that was in March. And the FBI stated in that testimony that it had found reporting problems on the numbers of NSLs, that they had seriously understated the number of NSLs to Congress. They found out on their own before the Inspector General went in, and the quote is, "We identified deficiencies in our system for generating data almost 1 year ago."

Now, that was March 2007. President Bush signed the reauthorization in March 2006. So they flagged it to Congress, it sounds like, immediately after the President signed the reauthorization that they had miscounted this.

Now, that is pretty interesting. And so the question is: When did the FBI know that it had significantly underreported to Congress on the number of NSLs? Apparently they flagged it in March or April, and so questions about what happened there seem appropriate just based on their own sworn testimony, because Congress was trying to rely on the FBI to decide what to do, and Congress might have been relying on known incorrect information.

Chairman FEINGOLD. Mr. Christian, you were able to secure free legal representation to challenge the NSL that you received. What would you have done if you were unable to find lawyers willing to bring your case without charge?

Mr. CHRISTIAN. I don't think we would have been able to pursue the case very far at all. We are nonprofit corporation. We receive no Federal, State, county, or even grant funding. We are entirely supported by our 27 member libraries, and it costs about $1 million a year for our operations. So that tapping into our libraries for pursuing this case as far as it went—and it did go briefly to the Supreme Court—would have just been too large a burden, and justice should not come with a burden like that.

Chairman FEINGOLD. Mr. Swire, how should we amend the gag rule for National Security Letters? And should we consider similar changes to the gag rule that is associated with Section 215?

Mr. SWIRE. Yes, 215 should be changed in the same way. I actually believe that the gag order should be repealed, and can be safely, and the reason is, if I am served with—and I go into this in detail in my long and boring law review article. The reason is that if I am served with an NSL and then I tip off the bad guys, we have material-support-for-terrorism statutes, we have obstruction-of-justice statutes, we have penalties that happen for that. And

those are serious criminal penalties, and are criminal penalties that are similar to the NSL criminal penalties, except probably longer times, and that is the way we have handled investigations for the last 200 and however many years in the United States of America. The cops are investigating somebody, and they go knock on the door or ask for records, and the people who are subject to search can talk about it, but they are not allowed to conspire with the criminals or the suspects.

So I actually think that is a complete answer, and I have not seen any statement back about why that is not good enough.

Chairman FEINGOLD. Very, very helpful.

I know Senator Durbin wanted to be here, but he is chairing his own hearing. I know he is interested in this. There are other members on both sides of the aisle on this Committee who have expressed interest in this, so, again, I said it before but I will repeat it, how valuable this testimony is today.

We any of you like to make any quick concluding remarks at all?

Mr. CHRISTIAN. Mr. Chairman, I would just like to echo Mr. Swire's remark. I am not an expert in law the way he is, but as the victim of a gag order, I felt it was totally unnecessary in our case. We had no intention of finding out who the FBI was after, let alone informing them. But we did want to let Congress know that National Security Letters were being served on libraries, and we did want to let libraries know that now it was the policy of the Government to use the PATRIOT Act against libraries and that they should take appropriate measures.

Chairman FEINGOLD. Ms. Spaulding?

Ms. SPAULDING. Mr. Chairman, in response to your earlier question about other areas that might require some additional investigation, there is a very troubling incident relayed in the IG's report with respect to the Terrorist Financing Operations Section and their interaction with the Assistant General Counsel from the FBI's Office of General Counsel, where certain key facts with respect to requests being made to Federal Reserve banks were misrepresented to the Assistant General Counsel and guidance from that lawyer was ignored. And I think it would be important to find out more of the facts surrounding that incident and whether anybody faced any disciplinary action and what has been done in response to that.

Thank you.

Chairman FEINGOLD. Thank you.

Representative Barr?

Mr. BARR. Thank you, Mr. Chairman. I would simply urge the Chairman both in his capacity as Chairman of this Subcommittee and to urge his colleagues to move forward with very aggressive oversight at this particular time. In my experience both in the executive branch and in the oversight that we conducted in the House counterpart to the Committee of which this Subcommittee is a part, as bad as the abuses that we have seen are, at times of uncertainty when leadership is lacking or confused, such as the current situation at the Department of Justice, these problems are going to be compounded. They will not get better in the current environment over there. They will get worse. There is great potential for further abuse right now.

So I think it is very important that these matters be pursued from an oversight standpoint, immediately, repeatedly, and very aggressively. Otherwise, it will get worse. And if, in fact, the abuses that we have seen chronicled by simply scratching the surface, as the IG did here, become institutionalized by repetitive use over time, as they do during periods where leadership is confused or you do not have clear lines of authority, it becomes that much harder to dislodge those abusive patterns of behaviors and those practices.

Chairman FEINGOLD. That is a very timely warning. I appreciate it. Well, again, I thank all of you. This is exactly what I had hoped it would be, and I look forward to working with you on this in the future.

This concludes the hearing.

[Whereupon, at 4:01 p.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

Testimony
United States Senate Committee on the Judiciary
Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI
April 11, 2007

Bob Barr

TESTIMONY BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS "Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI" By Bob Barr CEO, Liberty Strategies LLC And Chairman, Patriots To Restore Checks and Balances April 11, 2007

Chairman Feingold, Ranking Member Brownback, and Members of the Subcommittee, thank you for inviting me to testify about National Security Letters and problems surrounding the use thereof. As chairman of Patriots to Restore Checks and Balances, an alliance of individuals and organizations - conservatives and liberals – committed to upholding the Constitution, I have worked with many Republicans and Democrats to do what is right for the American people. I appreciate the opportunity to talk today about the constitutional and policy questions raised by the federal government's use -- and misuse – of National Security Letters (NSLs).

In addition to serving as Chairman of Patriots to Restore Checks and Balances, I serve as CEO and President of Liberty Strategies LLC, and Of Counsel with the Law Offices of Edwin Marger. I also hold the 21st Century Liberties Chair for Freedom and Privacy at the American Conservative Union, consult on privacy issues with the American Civil Liberties Union, and am a board member of the National Rifle Association. I was honored to have served four terms in the House of Representatives, during which eight years I served on the Judiciary Committee of that body.

This hearing is a critical first step that is long over due. For over five years, those of us who fight to defend the Constitution from government over reach have pleaded with Congress to put reasonable checks and balances on intrusive powers created by the PATRIOT Act. Those pleas have largely fallen on deaf ears; and und a few weeks ago, the FBI operated in the dark, hiding its abuse of power from Congress and the public.

Finally, a ray of light. Inspector General Glenn Fine's March 9, 2007, report confirmed our worst fears: unchecked powers are being used to collect information on innocent U.S. persons, which ultimately sits in government data bases forever, and is accessed by tens of thousands of law enforcement and intelligence personnel without restriction. Over 143,000 NSL requests were issued between 2003 and 2005, and the latest numbers plumbed by the Inspector General (IG) confirm that a majority of NSLs are now being issued about U.S. persons. That data has gone straight into massive government databases, including one containing over 560 million separate records, and another having over 30,000 authorized users.

The report went on to document that FBI agents are issuing NSLs for people two or three times removed from a suspected terrorist even when there is no indication that those people are more than just innocent links. The IG also found over 700 instances of FBI agents issuing so called "exigent letters," claiming emergency circumstances and the immediate need for records. FBI agents often lied about the existence of an emergency, and never followed up with an actual legal request as promised. The NSLs or grand jury subpoenas that could have legally obtained the information never materialized. These exigent letters and sham processes continued even in the face of legal advice from the FBI General Counsel's office to cease.

However, the Administration and its supporters have tried to frame the IG's report as simply an indictment of the FBI's record keeping and management activities -- "technical" problems that could be solved with a half-hour training video and additional training manuals. I commend you, Chairman Feingold, for holding a hearing that finally looks beyond that spin, and to the heart of what the IG's report discovered: that the NSL statute is in fact, and demonstrably, broken.

As you begin to look at how such a disaster can be fixed, it is important to remember how all this started. In the wake of the September 11th attacks, we rushed to provide new tools to the intelligence community to prevent such a tragedy from ever happening again. I can say that I personally voted for the PATRIOT Act, admittedly with some hesitancy. I did so with the understanding that it was an extraordinary measure for an extraordinary threat; that it would be used exclusively, or at least primarily, in the context of important anti-terrorism cases; and that the Department of Justice would be cautious and limited in its implementation and forthcoming in providing information on its use to the Congress and the American people. Looking back, I see that trust - that hope -- was misplaced.

Fundamentally, the PATRIOT Act went too far. It concentrated far too much authority in one branch of government. In one fell swoop, we gave the Executive branch unfettered access to the lives of innocent Americans, cut out the judicial branch's constitutional role as neutral arbiter between the government and its citizens, and stripped the congressional branch of its constitutionally-mandated duty to conduct oversight.

NSLs may be the first provision to have a full and public airing; but is likely - I dare say, certain -- that other intrusive provisions of the PATRIOT Act have been abused too, as they suffer from the same fundamental failings as NSLs. Secret searches, blank wiretap orders, and access to ever-increasing amounts of private information – these authorities, too, must be reined in before abuses became institutionalized. If such patterns and practice of abuses are allowed to become the status quo, it would be virtually impossible to correct them in the future.

Truly, can we be surprised by these results? Mr. Chairman, I suspect your courageous and prescient vote against the PATRIOT Act tells me you are not surprised. Nor am I. We gave a single branch nearly unlimited and certainly unchecked authority to delve into the private lives of ordinary people in the name of the Holy Grail of "national security." History predicted exactly what would happen: that authority would be abused to drag in ever-growing numbers of innocent people. That is the natural consequence of a statute that is fundamentally based on the theory of "trust us."

As this Committee moves forward to prevent further abuse and overuse of the NSL statute, there are a number of statutory fixes that must be affected to ensure that the statute is constitutional, and respects the privacy of U.S. persons. It should be the goal of this Congress to prevent innocent people from being wrapped up in terrorism investigations, and to the extent that innocent people are, their privacy must be fiercely guarded, not treated with disdain as currently. It should be a further goal of this Congress to redefine the purpose of NSLs. Currently, NSLs are being used to suck up as much data as possible in the hopes that some relevant information may be discovered. Instead, NSLs should be judiciously and selectively used to track known and suspected terrorists and their associates, with the purpose of prosecuting or removing them. To these ends, I propose the following statutory changes:

Meaningful Standard for Issuance. Current law allows the FBI to issue NSLs only on the basis that the information be "relevant" to an investigation which the Bureau itself has determined to initiate. Prior to the PATRIOT Act, NSLs had to seek information that pertains to a foreign power, or an agent of a foreign power. This drastic change allowed the FBI to turn its microscope on people who are not

engaged in any suspicious activity. In fact, the Inspector General confirmed the FBI is issuing NSLs to gather information on people two or three times removed from a suspected terrorist without any indication those people have done anything wrong.

To pass constitutional muster and sound public policy based on respect for our Constitution, there must be some link between an individual and a reason to invade his or her privacy. The standard need not rise to the requirements of a traditional warrant, but should be raised to include at least specific and articulable facts that the individual is a terrorist or is reasonably suspected of being associated with such a person in suspicious circumstances. For example, the statutory language could provide for the possibility of issuing an NSL to gather information on a person who has contact with a terrorist when that contact is suspicious and appears to have some link to international terrorism. Importantly, such a standard would not allow the FBI to collect data on people who innocently come into contact with a terrorist. For example, it would not allow the FBI issue a NSL for the terrorist's pizza delivery boy, the delivery boy's coworkers, or every person who has ordered pizza from that same establishment. Under the current standard, these far reaching contacts could be considered "relevant," and according to the Inspector General's report, have been so determined by the FBI.

Constitutional Nondisclosure Order. The current NSL statute automatically imposes a year-long gag on a NSL recipient, regardless of the circumstance. While amendments last year created a nominal "judicial review" for the gag, that process was in effect a sham. In the end, the court has no authority to actually weigh factors in determining whether a gag is appropriate, and must defer to the government's certification -- which is " conclusive." To be constitutionally firm, the court must decide whether the gag is truly necessary, and determine that the gag is narrowly tailored in scope and time to meet a compelling state interest. In other words, the court must be able to fashion a gag that is specific to that instance, and limited in duration and scope.

In addition to constitutional concerns with an automatic and indefinitely renewable gag on recipients, there are very basic openness and participation principles at risk. The government has been able to continually over reach precisely because no one could ever come forward and let Congress or consumers know that mass amounts of data were being captured by the government. For example, if a phone company was able to come forward and say that information on 11,100 phone accounts was requested through only nine letters, as was reported in the IG report, Congress would have been tipped off far sooner about the widespread abuse of NSLs.

Court Review. Sadly, the IG's report confirms that the FBI should not be policing itself. This Congress should require prior court review as a part of the process for issuing an NSL. If the FBI is routinely issuing NSLs regarding people two or three times removed from a terrorist, and the links between the two appear innocent, the FBI is unable to even follow the "relevance" standard as currently written. Coupled with the intentional dishonesty of some agents to claim emergency circumstances to sidestep the NSL process, it may be high time to put a neutral magistrate or FISA court judge between the FBI and sensitive records.

Verifiable Reporting Re-$me. Clearly, the reporting structure created in last year's PATRIOT Act reauthorization bill is insufficient. The IG recommended a number of practical internal steps to make sure that permanent records are kept on the issuance of NSLs. However, for those NSL records to be of any use, they must form the basis of public, unclassified and verifiable reporting to Congress. Such statutory changes should include a reporting on the number of accounts that are subject to request, and not the number of physical pieces of papers mailed to the keepers of data. For example, we know that the subscriber information of 1 1,100 telephone accounts was obtained through only nine NSLs. Clearly, Congress should be given the higher number in such instances to be able to have any

meaningful oversight role. Further, Congress should also receive detailed information on how many of each type of NSL are being issued, and whether that information is being used to actually find and prosecute terrorists. The Congress should no longer allow the Executive branch to refuse to disclose such information by claiming speciously that "revealing" the fact that NSLs are issued in such-and-such numbers and for such-and-such purposes, without revealing publicly the names of targets or specifics of actual investigations, would "harm" national security.

Limits on Data Retention. The IG found that agents who received NSL responses would often blindly enter the data into massive federal databases without even determining whether the response included useful information. He also found that even after a person was "ruled out" as a terrorist, that person's data was kept, indefinitely, in those same massive databases that are accessible by tens of thousands of government personnel (query also whether such information on US persons is accessible also by foreign governments through sharing arrangements with US agencies to these databases).

First, Congress should create a presumption of destruction of information relating to a person who is "ruled out" of a terrorism investigation. There is absolutely no national security interest in keeping information on innocent people. It is absolutely abhorrent that this practice is happening, and it should be stopped as soon as possible.

Second, Congress should set parameters about what data may be kept and for what purposes. Information should only be kept if it is truly useful in pursuing terrorists or establishing ties, and it should be marked with a disposition, especially if the information relates to a person who has been "ruled out" but is important to a case in some other way. A disposition clarifies to the person accessing the record whether the records relate to a terrorist, an innocent bystander swept up in the investigation, or someone of indeterminate value. It would be tragic if a person who even the FBI admits is innocent were to be denied a job or some other benefit because a search turned up the fact that his name is in a terrorism file, but omitted the fact that he was not the target.

Limits on Data Sharing. Similar to data retention, there should be some statutorily defined limits on how data obtained by an NSL can be accessed or disseminated, especially data on those who are not an agent of a foreign power. To the extent that such information is kept at all, it should be strictly safeguarded to make sure it does not adversely impact the individual in the future, be it through denial of governmental benefits or use as the basis of typical criminal prosecutions. Specific limits on sharing of data on US persons with foreign governments, agencies, or persons, should also be enacted statutorily.

With these changes, NSLs will still be a useful tool in the war on terror. They would not, however, continue to be a giant net, grabbing as much data on U.S. persons as possible, to be data mined in the future for some as yet unknown purpose.

As a former CIA official and federal prosecutor, I witnessed first-hand how much of our national security apparatus -- even our counter- terrorism and international intelligence work -- is built on very basic policing methods. From your local grifters to the Bin Ladens of the world, bad guys are generally found and punished using a system that includes basic checks and balances on government power and which militates a p s t dragnet investigative fishing expeditions. There is simply no reason that the NSL cannot be a part of such a well established and effective system. We now know there are hundreds of thousands of innocent reasons that it must be.

Again, let me applaud you Senator Feingold for calling this hearing. It takes great courage in this day and age to stand up for the Constitution, and to insist that while we strive to keep our nation safe from

harm, we also keep it free. It has become far too easy to simply raise the specter of "national security" to kill any discussion about what methods of delving into private lives is appropriate.

Conservative or liberal, Republican or Democrat, all Americans should stand behind the Constitution; for it is the one thing - when all is said and done - that will keep us a free people and a signal light of true liberty for the world. Thank you again for allowing me to testify. I look forward to your continued leadership in this effort, and stand ready to help in any way I might be of further service.

1615 New Hampshire Avenue NW
First Floor
Washington, DC 20009-2520
USA

Telephone 202 628 8410
Fax 202 628 8419

Washington Office

ALAAmericanLibraryAssociation

Testimony for the Record

To the Senate Judiciary Subcommittee on the Constitution

Hearing

April 11, 2007

Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI

Submitted by

George Christian

Executive Director
Library Connection, Inc.
599 Matianuck Avenue
Windsor, CT 06095-3567
860-298-5322 Ex. 1012

On Behalf of the

American Library Association

Thank you for this opportunity to share with you my experiences as a recipient of a national security letter. My name is George Christian, and I, along with three of my colleagues, are the only recipients of an NSL who can legally talk about the experience. We won the right to do so in Federal District Court and have now become known as the "Connecticut John Doe's" or the "Connecticut Four." Ours is a story that we hope will provoke serious thought. Though our gag order was lifted, several hundred thousand other recipients of national security letters must carry the secret of their experiences to their graves.

My colleagues and I would, at first, not seem to be likely recipients of an NSL. I am the Executive Director of Library Connection, Inc., a consortium of 27 libraries in the Hartford, Connecticut area. At the time, along with myself, our Executive Committee included Barbara Bailey, Board president and Director of the Welles-Turner Memorial Library in Glastonbury, Peter Chase, vice-president of the Board and Director of the Plainville Public Library (who is now the current Board president), and Janet Nocek, secretary of the Board and Director of the Portland Public Library. Our primary function is to provide a common computer system that controls the catalog information, patron records, and circulation information of our libraries. Having this information in a common system greatly facilitates sharing our resources. Most patrons treat our member libraries as if they were branches of a common library. At the time we were served with a national security letter, in July 2005, we were also providing telecommunications services to half our member libraries.

Before I tell our full story, I'd like to emphasize a few lessons learned from our experience. Our saga should raise a big patriotic American flag of caution about how our civil liberties are being sorely tested by law enforcement abuses of national security letters. The questions raised vindicate the concerns that the library community and others have had for over five years about the broad powers expanded under the USA PATRIOT Act. Our story should cause everyone to pause - to consider how we can prevent such abuses from continuing. We believe changes can be made that conform to the rule of law, do not sacrifice law enforcement's abilities to pursue terrorists yet maintain civil liberties guaranteed by the U.S. Constitution.

The path we chose in Connecticut is based on a longstanding principle of librarianship - our deep rooted commitment to patron confidentiality that assures that libraries are places of free inquiry, where citizens go to inform themselves on ideas and issues, without fear that their inquiries would be known to anyone else. The freedom to read is part and parcel of our First Amendment rights. To function, the public must trust that libraries are committed to such confidentiality. When the USA PATRIOT Act was signed into law, our Connecticut library community, like the American Library Association, many other librarians as well as booksellers, authors and others, were concerned about the lack of judicial oversight as well as the secrecy associated with a number of the Act's provisions and the NSLs in particular.

Libraries are, of course, subject to law enforcement. Librarians respect the law and most certainly want to do the right thing when it comes to pursuing terrorists and protecting our country. We recognize and accept that, with appropriate judicial review, law enforcement can obtain certain patron information with subpoenas and appropriate

court orders. We are not talking about absolute patron privacy. What has disturbed the library community in recent years has been the idea that the government could use the USA PATRIOT Act, FISA and other laws to learn what our innocent patrons were researching in our libraries with no prior judicial oversight or any after-the-fact review.

Because of the NSL gag orders, librarians receiving these letters are not able to inform patrons about specific or broad inquiries. Nor can we report the use of NSLs to local or Congressional officials as part of your oversight responsibilities to insure that abuses are not taking place, and assess the best uses of these legal tools. That is why I am here today with great appreciation for what you are doing to demand accountability on these important issues. If our gag order had not been lifted, we would not be able to share our story with you and the world.

Sometime after the passage of the USA PATRIOT Act, and before our own experiences in Connecticut, some observers dropped their concerns about investigative abuses when Attorney General Ashcroft declared that librarians were "hysterical" with their concerns and that the USA PATRIOT Act had not been used in libraries. You can imagine we were therefore quite shocked to be served with a national security letter! We were disappointed that Attorney General John Ashcroft's assurances, echoed by his successor Alberto Gonzales, were inaccurate at a time when Congress was preparing to debate the renewal of the PATRIOT Act. But, because of the gag order, there was no way we could respond or tell our story at the time.

The "Connecticut Four" continue to feel strongly that libraries were and should remain pillars of democracy, institutions where citizens could come to explore their concerns, confident that they could find information on all sides of controversial issues and confident that their explorations would remain personal and private. For example, a woman looking for information on divorce or breast cancer does not want those concerns known to anyone else; a student who wants to study about the Qur'an shouldn't have to wonder if the government is second-guessing why he is interested in this topic; a business owner curious about markets for his products or services in the Middle East should not have to worry that by researching these markets at the public library he will arouse FBI suspicions. As one of my fellow John Doe's put it: "spying on people in the library is like spying on them in the voting booth."

Further, Connecticut is one of 48 states with laws protecting the privacy of library patrons and charging librarians with the responsibility of ensuring that privacy. We felt we would be violating this legal responsibility if we turned over patron information in response to a request made in a process not grounded on basic constitutional procedures.

It is widely believed that some civil liberties were restored in the revised PATRIOT Act, but they were not. Language in the revised law appears to protect the privacy of library records, but a loophole inserted into the wording allows the FBI to use a national security letter to obtain library records anyway. The revision states that a library functioning in a "traditional role" is not subject to an NSL UNLESS it is providing "electronic communication services," which the law defines as "any service that provides to users thereof the ability to send or receive wire or electronic communications." Thus, any library providing Internet service can still be served with an

NSL – that is essentially every library in the United States today. Robert Mueller, FBI Director, in a written response to a Senate Judiciary Committee inquiry, even stated that new language "did not actually change the law."

While the re-authorized USA PATRIOT Act appears to provide a way to challenge the lifetime gag order imposed on anyone who is required to turn over records to the FBI via an NSL, a loophole in the wording makes it virtually impossible for anyone to successfully challenge the gag order. According to the revised PATRIOT Act, if the government declares that lifting the gag order would "harm national security"; the court must accept that assertion as "conclusive" and dismiss the challenge. Hence, there is no prior judicial review to approve an NSL and, with rare exception, no legal way to challenge an NSL after the fact.

Like so many others, the library community believes that secrecy is a threat to open government and a free society. It is the secrecy surrounding the issuance of NSLs that permits their misuse. Because of the fact that all recipients of NSLs are perpetually gagged, no one knew the FBI was issuing so many. No one knew there was no public examination of the practice. No one could ask if over 143,000 National Security Letters in two years are necessary. No one could ask if the FBI could follow up on so many or whether it was the best use of their resources. These questions cannot be asked if gag orders and other forms of secrecy prevent even Congress from knowing what the FBI is doing with its powers. Secrecy that prevents oversight and public debate is a danger to a free and open society.

We urge Congress to re-consider the PATRIOT Act. Restore basic civil liberties. Restore constitutional checks and balances by requiring judicial reviews of NSL requests for information, especially in libraries and bookstores where a higher standard of review should be considered. National security letters are very powerful investigative tools that can be used to obtain very sensitive records. The FBI should not be allowed to issue them willy-nilly. It shouldn't be allowed to issue NSLs unless a court has approved it and found that the records it seeks are really about a suspected terrorist. We believe that terrorists win when fear of them induces us to destroy the rights that make our country free.

The details of our story support my request to you. On July 8, 2005, an FBI agent phoned Ken Sutton, our systems and telecommunications manager, and informed him that Library Connection would be served with a national security letter, and asked to whom it should be addressed. Ken said it should be addressed to myself as the Executive Director.

While I had been aware of the cautions raised by the ALA, ACLU, and others, until Ken related this phone conversation to me, I had not really thought about the term "national security letter." Nor are all attorneys familiar with the term. This is not surprising, since every recipient of a NSL is prohibited by a perpetual gag order from mentioning receipt of the letter or anything associated with it.

In considering how we should respond, I had learned that the District Court in New York had found the entire NSL statue unconstitutional because of prima facie

violations of the 1st, 4th and 5th amendments. So, by the time the letter arrived, on July 13, 2005, I had made up my mind to oppose this effort. One of the two FBI agents served the letter on me, and pointed out that the letter requested information we had about the use of a specific IP address that was registered to Library Connection, Inc. He also pointed out the letter's gag order prohibited Library Connection from disclosing to anyone that the FBI was attempting to obtain information from our library business records

We could not fathom any "exigent" nature for the FBI request. I was struck that: 1) the letter was dated May 19, almost two months before the FBI served the letter on July 13th and 2) it was addressed to Ken Sutton, the person they had called to get the correct addressee. The requested information was for use of an IP address five months earlier, on February 15.

At the same time, I did not want to impede the investigation of a perilous situation that endangered my country or my fellow citizens. Because the letter was dated two months before it was delivered to me, it seemed reasonable to conclude that the FBI was not in a rush to get the information they wanted. I told the Agent that I had reason to believe that the use of NSLs was unconstitutional, and that I wanted to consult my attorney before complying with the request. The agent wrote a phone number on the back of his business card and said my attorney could call that number.

After the FBI agents left, I called Library Connection's attorney and asked what to do. The attorney informed me that the only way I could contest compliance with a national security letter was to go to court against the Attorney General of the United States.

I did not feel that I could take a step like that on my own. The by-laws of our corporation grant the Executive Director the authority to enter into contracts on behalf of the corporation. However, I did not feel it would be morally right to engage the consortium in a legal battle with the Attorney General on my own. Library Connection receives no Federal, state, county, or grant funding. Our annual budget is around one million dollars, and our entire financial support comes from our member libraries, which must take the expense of belonging to Library Connection out of their own operating budgets. For all I knew, suing the Attorney General might lead to a dispute that went all the way to the Supreme Court. Any costs associated with this effort would have to be borne by our member libraries, and I did not feel I had the authority to commit the libraries or their funds on my own.

I therefore decided to ask the Executive Committee of the Board of Directors to make the decision on behalf of Library Connection. I reasoned that the by-laws allow the Executive Committee to act on behalf of the board of directors in circumstances when the entire board could not be consulted, and that these circumstances certainly met those criteria. So I called an emergency meeting of the Executive Committee, which consisted of Barbara Bailey, board president and Director of the Welles-Turner Memorial Library in Glastonbury, Peter Chase, vice-president of the board and Director of the Plainville Public Library, and Janet Nocek, secretary of the board and Director of the Portland Public Library.

The next day, the Executive Committee met with our attorney. I informed them about the National Security Letter, and our attorney informed us that we were now all bound by its associated gag order. After learning that the NSL statute had been ruled unconstitutional in district court, the committee decided to resist complying with the request. The Executive Committee and I met with attorneys from the ACLU in late July of 2005. After discussing a variety of options, the Executive Committee decided to engage the National Office of the ACLU to seek an injunction relieving Library Connection from complying with the NSL and to seek a broader ruling that the use of NSLs is unconstitutional. The Committee also decided to seek relief from the gag rules associated with NSLs in order to 1) allow the Executive Committee's actions to be presented to the full Board, and 2) to allow the fact that an NSL was served on a library organization to become part of the national debate over renewal of the PATRIOT Act.

At this point I would like to make it clear that the four of us who comprised the Library Connection Executive Committee --- Janet Nocek, Barbara Bailey, Peter Chase, and myself --- were equally impacted as recipients of the NSL. and equally committed in our opposition to it and its associated gag order. The story of this NSL and the Library Connection became very personal to us on the Executive Committee and impacted our lives in different and personal ways.

We also felt we were defending our democracy by insisting that the checks and balances established in the Constitution be observed. We had no court order, and there was no evidence that an independent judge had examined the FBI's evidence and found there to be probable cause justifying their request for information.

The national security letter asked for all of the "subscriber information" of "any person or entity related to" a specific IP address for a 45-minute period on February 15, 2005. We knew that the address was the address of a router at one of our libraries. Routers use address translation schemes to shield the true addresses of the computers behind them in order to make hacking into those computers more difficult. They do this by randomly assigning a different address to the computers behind them every time those computers are turned on. Since there was no way of tracing the path from the router to a specific personal computer, the FBI would have to find out who was using every computer in the library on that day. And since there was no way of determining who was using the computers in the library five months after the fact, we felt that "subscriber information of any entity related" to the IP address meant a request for the information we had on all the patrons of that library. That seemed like a rather sweeping request. Some would call it a fishing expedition.

Let me reemphasize: we did not want to aid terrorists or criminals. One of us, Janet Nocek, had actually lost a friend on one of the planes that crashed into the World Trade Center. All four of us were deeply affected by the September 11 attacks, and none of us wanted any further harm to come to our country or its citizens. But we did not feel we would be helping the country or making anyone safer by throwing out the Constitution either. All we wanted was some kind of judicial review of the FBI request. I am not a lawyer; I manage a library organization. I understand from the attorneys that it is technically legal for the FBI to deploy NSLs without judicial review. However, as a

law-abiding citizen and as a person committed to the principles of librarianship, it did not nor does not make sense to me that such intrusions into the privacy of our library patrons is reasonable, especially a wholesale request for information about many patrons, not necessarily a library patron that is the legally deemed to be specific target of an investigation. Avoiding such fishing expeditions should not be allowed in libraries, bookstores or other places of inquiry. As I understand it, there are other types of investigative letters without judicial review, but they do not have gag orders attached. In the 10 months that we contested our national security letter, the Justice Department never produced nor seemed to seek any judicial review.

In August, the ACLU filed suit in Federal District Court in Bridgeport, Connecticut. Peter Chase and I prepared affidavits to be filed with the suit. Imagine our surprise to learn we would not be allowed to attend the hearing in person because of the risk that we would be identified as the plaintiffs. Instead we had to watch the proceedings via closed circuit TB from a locked room in the Hartford Federal Court Building.

In the hearing, Judge Hall asked to review the government's evidence for keeping us gagged. The government insisted on submitting secret evidence, which they would not provide to our attorneys or us. Like the judge in New York who had ruled on the issue, Judge Hall ruled that a perpetual gag amounted to prior restraint, and was therefore unconstitutional. She also ruled that her review of the evidence found no compelling national security reasons for keeping us gagged. Her ruling was immediately appealed by the Justice Department. While the case was under appeal, we remained gagged.

The gag order caused us troubling dilemmas personally as well as professionally. We had no desire to talk about the specifics of the national security letter we received but we wanted to tell our fellow librarians that NSLs posed a threat to patron privacy as well as what it was like to be under a federal gag order. We wanted to tell our patrons that we were trying to protect their confidentiality. We also wanted to tell Members of Congress, at a time when you all were debating the renewal and sunset provisions of the USA PATRIOT Act, that the national security letter provision was being used against libraries, and that librarians felt this was a huge threat to the privacy that they and their patrons trusted to exist at libraries.

Being gagged was also frustrating on other professional and personal levels. I felt compromised since I could not reveal the problem to the full board nor to our member libraries or my own staff that had seen the FBI arrive, announce themselves and hand me a letter. No one could bring up the topic at Library Connection Board meetings, nor at meetings of the full membership. I knew that all the board members and all the member library directors knew of the case, and I suspected the Executive Committee and I had their approval. However, I had no idea whether the approval was unanimous, or whether there was a significant dissenting opinion. I felt terrible I could not let anyone know that the struggle was not depleting our capital reserves and putting the corporation at risk. I could not even tell our auditors that the corporation was engaged in a major lawsuit—a direct violation of my fiduciary responsibilities. I pride myself on my integrity and openness. I worried if, knowing I was participating in this court case behind their backs, the members of the board and other library directors were starting to wonder what else I might be concealing.

Another one of the "John Doe's" was compromised in his work as chair of the Intellectual Freedom Committee of the Connecticut Library Association. For example, he was often invited to debate the PATRIOT Act with Kevin O'Conner, a local Federal Prosecutor, who, ironically, became the attorney defending the government in our case. Mr. O'Connor felt free to continue to accept invitations to talk about the PATRIOT Act while my colleague, Mr. Chase, felt the gag order required him to decline such invitations.

At various times we had to go to extreme measures to keep from talking with the press or answering questions from colleagues and family. One of the John Doe's even had his son ask "Dad, is the FBI after you?" All he could say was that he was involved in a court case and it was extremely confidential.

It is difficult to convey the very detrimental impact that the gag order had on our lives and on our families and colleagues, as well. Everyone in the library community knew Library Connection had received an NSL and that we were involved in litigation to contest it. They also knew we were gagged, and that to talk about it carried severe risks. Practical information we could have shared with them, about the risks they faced from NSLs, could not be shared. And, of course, there were always our ongoing concerns about losing the trust of our library patrons who continued to expect appropriate confidentiality about their library records.

After our court hearing, all of this became even more difficult, as the national and local papers were full of stories about a library consortium in Connecticut that had taken the Attorney General to court over receipt of an NSL and its associated gag order. The consortium was described as "John Doe," as our case was officially known as Doe v. Gonzales. There are only four library consortia in Connecticut, so speculation about the identity of John Doe was swarming all around us.

Things soon got worse because the government had been careless in redacting identifying information from the papers associated with the court case. At the hearing itself on August 31, 2005, our attorneys discovered that the government had failed to redact Peter Chase's name in an affidavit. As officers of the court, they notified the court and the government, who then redacted it.

Within a few weeks, the *New York Times* discovered that Library Connection's identity as the plaintiff had been inadvertently disclosed on the court's web site. The *Times* published a story revealing Library Connection's name on September 21. This led to a further examination of the documents available to the public and to further redactions. However, the press soon discovered my name among the documents and a reference to one of the other plaintiffs as "chairman of the Intellectual Freedom Committee of the Connecticut Library Association." Only one person could fit that description, Peter Chase. Papers around the country picked up articles identifying Peter and me from the *New York Times* and AP wire services.

On November 6, the lead story on the front page of the Sunday *Washington Post* started with my name. This was the first article to give us some inkling of how pervasive the national security letter issue had become. The article reported that since the revision

of the NSL statute in the USA PATRIOT Act, NSLs had been issued at the rate of 30,000 per year.

The whole world now knew us as the John Doe plaintiffs in a suit over being gagged for receiving a national security letter, yet we remained prohibited from speaking to Congress or our fellow librarians and library patrons or our own families about what had happened to us. We were soon deluged with phone calls from the press at work and at home. Initially this was a very delicate situation. Our attorneys had cautioned us that even a "no comment" was tantamount to admitting we were John Doe. Our attorneys felt it was therefore better just not to discuss the issue. Everyone who read the *New York Times*, the *Washington Post*, and many other papers throughout the country knew about the Library Connection, Inc. I even received letters and clippings from around the country. Yet still we could not share our experience with Congress while Congress was debating the renewal of the PATRIOT Act.

The 2nd Circuit Court of Appeals in New York heard our case in November 2005. At least this time we were allowed to be present at our own court case. However, we had to conceal our identities by entering and leaving the court building and the courtroom separately, not sitting together, and not establishing eye contact with each other or our attorneys.

In court the government argued that merely revealing ourselves as recipients of a national security letter would violate national security. Our attorneys filed more legal papers to try to lift the gag, and attached copies of the *New York Times* articles. The government claimed that all the press coverage revealing our names did not matter because 1) no one in Connecticut reads the *New York Times*, and 2) surveys prove that 58% of the public disbelieves what they read in newspapers. To add to the absurdity, the government insisted that the copies of the news stories our attorneys had submitted remain under seal in court papers.

Even though our names were not thoroughly redacted from the court documents, the government did redact from our affidavits our claim that 48 states had laws protecting the privacy of patron library records. We could not understand the threat to national security this information posed, but we did note that Attorney General Gonzales claimed to Congress that there was no statutory justification for claims of privacy.

It appeared that Congress would vote on the renewal of the PATRIOT Act before the Appellate Court would rule on our gag order. Our attorneys took the case all the way up to the Supreme Court in an emergency attempt to lift the gag. Though clearly troubled by the case, the Court refused to lift the gag at that point.

On March 9, 2006, President Bush signed into law the revised USA PATRIOT Act. A few weeks later the government decided that our silence was no longer needed to preserve national security. They told the Second Circuit that the FBI would lift the gag order, and then they tried to get Judge Hall's decision vacated as moot. The Second Circuit refused to erase Judge Hall's decision from the books, and expressed concern about the breadth of the NSL gag provision. Judge Cardamone of the Second Circuit wrote, "A ban on speech and a shroud of secrecy in perpetuity are antithetical to

democratic concepts and do not fit comfortably with the fundamental rights guaranteed American citizens.... Unending secrecy of actions taken by government officials may also serve as a cover for possible official misconduct and/or incompetence." The court referred the rest of our case back to district court. Justice Hall's original opinion that our perpetual gag order was unconstitutional now became part of case law.

A few weeks after that, the FBI said they no longer needed the information they had sought from us and thus abandoned the case completely. In doing so, they removed the PATRIOT Act from the danger of court review.

We held our first press conference on May 31, 2006 at the offices of the ACLU in New York City. Since then, we have tried to accept every invitation to library groups, colleges and civic organizations. We want people to know that the FBI is spying on thousands of completely innocent Americans. We feel an obligation to the tens of thousands of others who received National Security Letters and now will live under a gag order for the rest of their lives.

We want you to take special note of the uses and abuses of NSLs, in libraries and bookstores and other places where higher First Amendment standards should be considered. Ours is a story we hope will encourage the U.S. Congress to reconsider parts of the USA PATRIOT Act and in particular, the NSL powers that can needlessly subject innocent people to fishing expeditions of their personal information with no judicial review. Because of the gag order, you, our Senators and elected representatives and the American public, are denied access to the stories and information about these abuses. This is information you need to conduct oversight, work for appropriate changes to current law and seek to protect our constitutional rights.

Thank you for this opportunity to testify. I hope that the story of our experience will help you in your ongoing efforts to rebalance our civil liberties with the need for protecting our national security.

Statement
United States Senate Committee on the Judiciary
Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI
April 11, 2007

The Honorable Patrick Leahy
United States Senator , Vermont

Statement Of Senator Patrick Leahy, Chairman, Committee On The Judiciary subcommittee on the constitution Hearing on "Responding to the Inspector General's Findings of Improper Use of National Security Letters by the FBI"

April 11, 2007

I thank Senator Feingold for holding this important hearing to help the Judiciary Committee determine how to prevent further abuses by the FBI.

Last year, Congress reauthorized government investigation of Americans and others, often secretly, without the check of a magistrate or court, when the Patriot Act reauthorization extended the use of so-called National Security Letters ("NSLs"). Supporters of these changes said we could trust the FBI to only use these expanded powers where necessary, and to follow the legal restrictions set by the reauthorized Patriot Act and Congress.

The Department of Justice Inspector General issued a report last month, however, finding that the FBI had breached that trust. The Inspector General found that, time and again, the FBI did not follow the law, or its own rules in issuing thousands of NSLs for personal and financial records since 2003. In his recent testimony before the full Committee, Inspector General Fine called the FBI's conduct "the product of mistakes, carelessness, sloppiness, lack of training, lack of adequate guidance, and lack of adequate oversight." Given the facts uncovered by the Inspector General, this description may even understate the problem.

The revelations concerning the FBI's misuse of NSLs would never have come to light but for the oversight of Congress and this Committee. In debating the Patriot Act and its reauthorization last year, I argued that it was vital to include safeguards and checks and balances to be sure that the government did not abuse its powers, violate civil liberties, or needlessly invade the privacy of Americans. Working with then-Chairman Specter, we insisted that the reauthorization include a review of the FBI's use of its powers by the Justice Department Inspector General. The bill was pushed through without many of the safeguards I advocated, but fortunately, the requirement of that Inspector General review survived. Without that "sunshine" provision, we would not be having this Subcommittee hearing today, and these abuses may have gone undiscovered entirely.

Inspector General Fine documented numerous, egregious errors, which he described as "clearly inappropriate" in his testimony before the Committee. He found that the FBI had no effective system for tracking the number of NSLs issued by the various FBI field offices, and in many cases the FBI never even kept signed copies of NSLs. As a result, the FBI has significantly under-reported to Congress the number of NSLs issued each year, leaving out as many as 6,000 NSLs over the past several years. Inspector General Fine found many violations of rules or law in only a small sample his office checked, none of which the FBI reported as required in the Patriot Act. The FBI Director conceded in his testimony last month that these violations likely never would have been reported, but for the Inspector General's review.

Overall, the Inspector General found improper or illegal use of NSL authority in one out of every five files his office reviewed. These violations included improperly obtained telephone records, financial records, and even full credit reports. In some cases, the requests were not appropriately authorized or did not go through proper procedures. In others, the FBI requested or got information to which it was not entitled under the relevant laws. The Inspector General found widespread "confusion" and failures to oversee the process for FBI agents seeking NSLs.

In 60 percent of the files reviewed, the Inspector General found that the FBI did not have the documentation required by its own in-house policies for issuing NSLs. In most cases, the FBI did not even have signed copies of the NSLs issued. We have to wonder how we can trust the FBI to fix these serious problems on its own if it cannot even follow its own rules.

Perhaps most disturbingly, Inspector General Fine reported that the FBI had misused its emergency authority to obtain records more than 700 times by issuing so-called "exigent letters," which contained serious misstatements. These demands were for the immediate disclosure of personal information, such as telephone and bank records, because of purported emergency circumstances and were to be followed by grand jury subpoenas. In fact, the FBI never applied for or received grand jury subpoenas, and, in at least some cases, the Inspector General found that there was no emergency. Later, the FBI tried to correct the problem by issuing "blanket" NSLs after the fact, which were not authorized by law and did nothing to solve the problem.

Throughout these many episodes, the FBI failed to police itself time and again. The FBI's Office of General Counsel became aware of the problem with "exigent letters," and recommended small changes that did little to fix the problem, but never moved to eliminate the use of such letters. And Director Mueller himself admitted that the FBI had no internal compliance program to make sure the law was being followed as to NSLs.

These abuses are unacceptable. We cannot have the FBI requesting information under false pretenses and proceeding with total disregard for the relevant laws. That the FBI continued to use lawless techniques for years in hundreds and perhaps thousands of instances is alarming.

It is important to emphasize that these are not mere technical violations. The FBI obtained private and personal information about Americans and others without following the proper safeguards, and at times agents requested and received personal information to which they were not entitled. This information was then placed in databases and distributed within the FBI, to other intelligence agencies, and beyond. The Inspector General's report makes clear that the FBI's record-keeping in connection with NSLs was so poor that we cannot even determine what has happened to much of the improperly obtained information. This is not acceptable. We cannot have these unwarranted and unauthorized invasions of Americans' privacy rights and civil liberties.

Now we must take the next step and work constructively to answer the serious questions raised by the Inspector General's findings. We need to consider whether it is necessary to roll back some of the Patriot Act's expanded powers to make sure the FBI will appropriately follow the law and respect our citizens' rights and privacy. We must consider whether more independent review would ensure that the FBI does not continue to overstep its lawful authority.

We need to explore whether the law should require higher-level review and approval, perhaps from FBI headquarters or from Department of Justice attorneys and perhaps from a judge. We must design an appropriate procedure for obtaining information in an emergency, and make clear that false and inaccurate "exigent letters" are not acceptable. We should require a process that creates a paper trail

for records received which can be easily audited and reviewed in the future. Those whose records are collected improperly should be able to rest assured that the problem will be corrected and the records destroyed. Finally, we should comprehensively reexamine the PATRIOT Act's expansion of the FBI's powers and the types of information that can be obtained.

I look forward to the insights of Senator Feingold, who has been a leader on this issue. This hearing, and others that may follow, are necessary and important steps in the oversight process, which is so essential to the protection of our freedoms and liberties under the Constitution.

Trusting the FBI to fix the problem and proceed properly from now on is no longer an option. We tried that already, and that has failed. That is why this hearing is necessary, and why we must find new ways to hold the FBI and our government more fully accountable. While we strive to strengthen the FBI and give it the tools necessary to protect our country, we cannot sacrifice the privacy and civil liberties enshrined in our Constitution and history.

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Testimony

of

Suzanne E. Spaulding

Before the

U.S. Senate Judiciary Subcommittee on The Constitution

"Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI"

April 11, 2007

Chairman Feingold, Ranking Member Brownback, and Members of the Committee, thank you for inviting me to participate in today's hearing regarding appropriate follow up to the Report of the Department of Justice Inspector General (IG) on the Federal Bureau of Investigation's (FBI's) use of National Security Letters (NSLs).

I would like to begin my testimony today by emphasizing that I have spent over twenty years working on national security issues, starting in 1984 as Senior Counsel to Senator Arlen Specter of Pennsylvania. Over those two decades, in my work at the Central Intelligence Agency, at congressional intelligence oversight committees, and as Executive Director of two different commissions

on terrorism and weapons of mass destruction, I developed a strong sense of the seriousness of the national security challenge that we face and deep respect for the men and women in our national security agencies, including the FBI, who work so hard to keep our nation safe.

We owe it to those professionals to ensure that they have the tools they need to do their job. Equally important, they deserve to have clear guidance on just what it is that we want them to do on our behalf -- and how we want them to do it. Clear rules and careful oversight provide essential protections for those on the front lines of our domestic counterterrorism efforts. Unfortunately, it appears both were lacking in the implementation of national security letter authorities.

As important as it is to examine the lessons learned from the IG Report, however, I would urge the Congress not to stop there but, rather, to take a broader approach. The various authorities for gathering information inside the United States, including the authorities in the Foreign Intelligence Surveillance Act (FISA), should be considered and understood in relation to each other, not in isolation.

One example is the requirement in Executive Order 12333, and picked up in the FISA surveillance provisions, to use the "least intrusive collection techniques feasible." The appropriateness of using FISA electronic surveillance to eavesdrop on Americans should be considered in light of other, less intrusive techniques that

might be available to establish whether the phone number belongs to a suspected terrorist or the pizza delivery shop. It's not the "all or nothing" proposition often portrayed in some of the debates. The IG Report notes that the Attorney General guidelines also cite this requirement to use the least intrusive techniques feasible but that there is not sufficient guidance on how to apply that in the NSL context or in conjunction with other available collection techniques. This highlights the need for a broader examination of domestic intelligence tools.

I would urge Congress to undertake a comprehensive review of all domestic intelligence collection, not just by FBI but also by the other national security agencies engaged in domestic intelligence collection, including the Central Intelligence Agency, the Department of Defense, and the National Security Agency. A Joint Inquiry or Task Force could be established by the Senate leadership, with representation from the most relevant committees (Judiciary, Intelligence, Armed Services, and Homeland Security and Government Affairs), to carefully examine the nature of the threat inside the US and the most effective strategies for countering it. Then Congress, and the American public, can consider whether we have the appropriate institutional and legal framework for implementing those strategies with adequate safeguards and oversight.

In the meantime, I know that this committee will be looking closely at the problems identified by the IG Report and the potential

need for legislation. Even in this context, I would urge a broad focus, not just on the specific problems in the Report but on national security letter authorities generally. The IG Report notes that the Patriot Act "significantly expanded the FBI's preexisting authority to obtain information through national security letters." (Report at p. x.) These changes were not subject to the sunset provisions and so were not included in the review and debate that took place last year in the Congress and the American public. I hope this Report will prompt that overdue examination.

Three changes in particular need to be carefully reconsidered. The first is the standard for issuing national security letters, which moved from the need to show specific facts providing a reason to believe that the records pertain to an agent of a foreign power, to the far broader standard that the records are merely "relevant to an investigation to protect against international terrorism." As the IG notes, this allows the government to get information about individuals who are not themselves the subject of an investigation--"parties two or three steps removed from their subjects without determining if these contacts reveal suspicious connections." (Report at p. xlii.)

In fact, the most tenuous of connections would seem to suffice for this NSL standard. For example, it's not clear why an "investigation to protect against international terrorism" couldn't justify demanding information about all residents of, say, Dearborn, Michigan, so that you could run them through some logarithmic

profile to identify "suspicious" individuals. In fact, Congress should examine the facts surrounding the 9 NSLs in one investigation that were, according to the IG Report, used to obtain information regarding over 11,000 different phone numbers.

Data mining is a term that refers to many different kinds of data exploitation efforts and many of those efforts are essential intelligence and law enforcement tools. However, data mining also raises a host of issues that should be carefully considered and addressed. These issues have not been addressed in the NSL context and NSLs should not become a mechanism for gathering vast amounts of information about individuals with no known connection to international terrorism for purposes of data mining.

At least as troubling is the provision in the Patriot Act that allows the government to demand not just identifying information of the kind provided for in the other NSL statutes but full credit reports and all other information that a credit bureau has on individuals. This more intrusive authority was actually granted not just to FBI but to any agency "authorized to conduct investigations of, or intelligence or counterintelligence activities or analysis related to , international terrorism." (15 USC 1681v) This would include CIA, NSA, and DOD.

Given the problems uncovered in the FBI's use of NSL authorities, Congress clearly needs to thoroughly examine how this authority is being used by these additional agencies and departments less accustomed to the sensitivities inherent in

gathering information inside the United States against US citizens. In fact, I would urge Congress to consider restricting this authority to the FBI only, as with the other NSL authorities. This not only reduces the likelihood of multiple agencies requesting the same information, it will encourage greater coordination, cooperation, and collaboration.

The Patriot Act also moved the authority to approve NSLs from senior officials in Washington down to all 56 Special Agents in Charge (SACs) of the various field offices. As a result, the legal review of these NSLs comes from attorneys in the field who work for those SACs. The IG Report found that this "chain of command" has significantly undermined the independence of those lawyers and led some to believe they cannot challenge the legal basis for NSLs sought by the agents. (Report at xliii.)

Nor do the attorneys in FBI's Office of General Counsel seem to fare much better. The IG reported on at least one instance where facts were misrepresented to the FBI General Counsels office and guidance provided by counsel was ignored. This was in the context of the "certificate letters" that the Terrorist Financing Operations Section (TFOS) of the FBI improperly issued instead of the legally required NSLs to obtain financial records from a Federal Reserve Bank concerning nearly 250 individuals. When the National Security Law Branch (NSLB) at FBI learned about this, the TFOS Acting Assistant Section Chief misrepresented key facts to the Assistant General Counsel and ignored the lawyer's admonitions to

change procedures to comply with the law. The Report does not indicate whether any disciplinary action was ever taken against the TFOS official.

In order to ensure more independent and consistent oversight of the NSL process, Congress should consider a suggestion made by David Kris, who was the Associate Deputy Attorney General and Director of the Executive Office for National Security issues at DOJ from 2000 to 2003, to transfer FBI's NSL authority to attorneys in the Department of Justice National Security Division, at headquarters and in the field. Mr. Kris notes that grand jury subpoenas are issued by DOJ lawyers (nominally by the grand jury itself). In fact, he points out, by law or rule many of the most effective investigative techniques in the criminal context-- including subpoenas, searches, surveillance, and certain undercover operations--require DOJ's participation.

DOJ has not had this same productive working relationship with national security investigators at FBI because of the legacy of "the wall." Yet, in this area of domestic intelligence collection, the oversight of DOJ attorneys may be most important. Now that the wall has been dismantled, Congress should consider ways in which the new National Security Division can more directly work with FBI national security investigators, including having the authority to issue NSLs.

With regard to the specific findings and recommendations of the IG Report, let me first emphasize that the FBI and DOJ are to be commended for having welcomed this as an important wake-up

call and initiating changes to address some of the problems identified, particularly with regard to the "exigent circumstance" letters.

Another area requiring clearer guidance is data retention. The Report notes that, "The FBI has not issued general guidance regarding the retention of [NSL] information." (Report at 27) This is particularly troubling with regard to targets that cannot be linked to international terrorism. According to the IG, "neither the Attorney General's NSI Guidelines nor internal FBI policies require the purging of information derived from NSLs in FBI databases, regardless of the outcome of the investigation. Thus, once information is obtained in response to a national security letter, it is indefinitely retained and retrievable by the many authorized personnel who have access to various FBI databases." (Report at p. 110.)

The Office of the Director of National Intelligence (ODNI) and the DOJ's Chief Privacy and Civil Liberties Officer have convened a working group to examine how NSL-derived information is used and retained by the FBI. Congress should follow the work of this committee very closely and ensure that retention policies reflect an appropriate risk management strategy that recognizes the danger of government accumulating and retaining for long periods of time retrievable databases of information about innocent people.

Purging NSL information that turns out to be irrelevant, inaccurate, or improperly acquired, however, can only be

accomplished if it is tagged as it moves through the system and makes its way into various databases and intelligence products. The IG Report recommends measures to enable tagging of NSL information used in intelligence products and in criminal proceedings. (Report Recommendation #6.) These measures should be mandatory.

In closing, Mr. Chairman, I want to commend the committee for holding this hearing and urge, again, that the lessons learned on NSLs lead to a broader examination of intelligence collection inside the United States. Nearly 6 years after 9/11, it is time to more carefully craft an effective and sustainable framework for this long-term challenge, rather than relying on a patchwork built on fear and in haste. We owe it to the men and women who undertake this vital and sensitive work on our behalf.

STATEMENT OF PROFESSOR PETER P. SWIRE
C. WILLIAM O'NEILL PROFESSOR OF LAW
MORITZ COLLEGE OF LAW, THE OHIO STATE UNIVERSITY
SENIOR FELLOW, CENTER FOR AMERICAN PROGRESS

BEFORE

THE U.S. SENATE JUDICIARY COMMITTEE
SUBCOMMITTEE ON THE CONSTITUTION

ON

"RESPONDING TO THE INSPECTOR GENERAL'S FINDINGS OF IMPROPER USE OF NATIONAL SECURITY LETTERS BY THE FBI"

APRIL 11, 2007

Mr. Chairman, Mr. Ranking Member, members of the Committee:

Thank you very much for the invitation to testify today on the subject of National Security Letters ("NSLs"). This committee and the Congress have done a service to the American people by requiring the Inspector General of the Justice Department to audit the use of NSLs.

The results of that audit are sobering, to say the least. As Inspector General Glenn Fine said in recent testimony: "Our review found widespread and serious misuse of the FBI's national security letter authorities. In many instances, the FBI's misuse of national security letters violated NSL statutes, Attorney General Guidelines, or the FBI's own internal policies." The IG Report found that 22% of the NSLs sampled violated the law. The Report found serious under-reporting of the number of NSLs to the Congress. In fact, the General Counsel of the FBI has now said that the Bureau "got an F report card" for its implementation of the law.[1] In addition to the witnesses testifying today, there has now been excellent testimony before the House Intelligence Committee, by Jim Dempsey, Lisa Graves, and others. These other witnesses have discussed many of the problems with NSLs.

In this testimony, I make specific points that I believe go beyond the existing testimony. **My biggest point is that the Congress has never agreed to anything like the program that the Inspector General's report has revealed. Here is one amazing fact. In March, 2003, the best reporting on National Security Letters came from a front-page story in the Washington Post, which stated: "The FBI, for example, has issued scores of "national security letters" that require businesses to turn over electronic records about finances, telephone calls, e-mail and other personal information, according to officials and documents."[2] "Scores" of letters, said the officials! According to the IG Report, we now know the number for 2003 alone was at least 39,000.**

As I explain in more detail below, National Security Letters were expanded by Congress in the Patriot Act and reauthorized in early 2006 under one set of assumptions. We have learned from the Inspector General Report that the reality was very different. Here are the main points that I offer for your consideration:

1. The Patriot Act fundamentally changed in the nature of NSLs, in ways that create unprecedented legal powers and pose serious risks to privacy and civil liberties.
2. Congress has never agreed to anything like the current scale and scope of NSLs.
3. The gag rule under NSLs are an especially serious departure from good law and past precedent.
4. Amendments such as those in the SAFE Act and H.R. 1739 provide desirable alternatives to the current legal rules.

The Inspector General's Report is a crucial moment in the history of surveillance by National Security Letters. Until recently, the best public information was that NSLs had been used "scores" of times, presumably for the most important national security investigations. Instead, the FBI now considers NSLs to be their "bread and butter," an authority to be used as a first resort and not in exceptional cases.[3] The Congress and the American people have never signed off on gag orders for tens of thousands of inquiries a year, concerning numerous American citizens who are under no suspicion of wrongdoing. Yet that is the system we have just learned exists.

I suggest a new meaning for the acronym NSLs – "Never Seen the Like." I hope that this Committee and the Congress take action to put effective legal limits in place on this unprecedented power.

Background

I am the C. William O'Neill Professor of Law at the Moritz College of Law of the Ohio State University, and a Senior Fellow at the Center for American Progress. I live in the Washington, D.C. area.

From 1999 until early 2001 I served as the Chief Counselor for Privacy in the U.S. Office of Management and Budget. In that role, I participated in numerous privacy, national security, computer crime, and related issues. Of most relevance to today's hearing, early in 2000 I was asked by John Podesta, the President's Chief of Staff, to chair a 15-agency White House Working Group on how to update electronic surveillance law for the Internet Age. The Working Group met intensively over a period of several months, considering numerous issues relevant to today's hearing.

The Administration's draft legislation was announced in June, 2000 and introduced as S. 3083. The Administration bill contained about a third or a half of the increased surveillance powers that were later included in Title II of the Patriot Act. The Clinton Administration bill also contained important privacy protections that were not contained in the Patriot Act. This history is relevant, I think, because it shows my

participation in, and support for, updating surveillance laws where law enforcement tools have become outdated. It also reflects my view that new surveillance powers should be subject to effective checks and balances in our constitutional system.

That bill did not pass Congress in 2000, but many of the same topics were addressed in the Patriot Act, in 2001. Since passage of the Patriot Act, much of my research and writing has been on the new surveillance provisions.[4] Notably for this hearing, I wrote at length about National Security Letters in 2004, in "The System of Foreign Intelligence Surveillance Law," 72 Geo. Wash. L. Rev. 1306 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586616. That article is perhaps the most detailed published explanation of the history and law in this area. Among other topics, the 2004 article analyzes NSLs and "gag rules," and makes a number of suggestions for legislation, including the idea, adopted in the Patriot Act reauthorization, that the DOJ Inspector General be used more frequently to investigate national security programs.

THE PATRIOT ACT FUNDAMENTALLY CHANGED THE NATURE OF NSLs, IN WAYS THAT CREATE UNPRECEDENTED LEGAL POWERS AND POSE SERIOUS RISKS TO PRIVACY AND CIVIL LIBERTIES.

In the United States, the baseline for government surveillance of citizens is the Fourth Amendment, which ordinarily requires a neutral magistrate to find that probable cause exists that a crime has been, is, or will be committed. As discussed at length in my law review writing, there has been a special history for surveillance within the United States of foreign powers and agents of foreign powers. Since 1978, wiretaps and other surveillance of agents of foreign powers have taken place under the Foreign Intelligence Surveillance Act, with federal judges in the special Foreign Intelligence Surveillance Court issuing surveillance orders. Passage of FISA in 1978 was prompted by the findings in Congressional hearings that the FBI and other federal agencies had claimed broad surveillance powers within the executive branch and had systemically violated existing laws. The wisdom of FISA was that vital national security surveillance could proceed with the participation of all three branches of government – the Executive Branch could act zealously to investigate threats; Congress received reports and exercised oversight; and the Judiciary approved each surveillance order.

As discussed below, extremely little was known publicly or in reports to Congress about National Security Letters before passage of the Patriot Act. My own understanding during my time in government, which I now know was incomplete, was that they were specialized tools used mainly for counter-intelligence. Before 2001, NSLs were available for certain financial and communication records of an agent for a foreign power, and only with approval of FBI headquarters.

There have been four major modifications to NSLs in the Patriot Act and since. First, NSLs previously were limited to counter-intelligence, which essentially means stopping foreign intelligence agencies from gathering intelligence in the U.S. The Patriot Act opened the use of NSLs to a much larger array of operations, for any "authorized

investigation to protect against terrorism or clandestine intelligence activities." This new scope – "protection against terrorism" – is much broader than the old scope – countering foreign intelligence activities. According to the IG's Report, over three-quarters of current NSLs are done under this new "protection against terrorism" authority.

Second, NSLs were previously authorized only in FBI Headquarters, by a person with the rank of Deputy Assistant Director or higher. Under the Patriot Act, NSLs can issue from any of the 56 FBI field offices, with the approval of a Special Agent in Charge. As shown in the IG's report, the ability to authorize NSLs in the field has led to apparent violations of law, such as the creation of an exigent circumstances exception that is not authorized by law.

Third, previous nondisclosure provisions got serious teeth. As explained in recent testimony by Bush Justice Department official Viet Dinh, the Patriot Act "prohibited institutions and their officers from disclosing that an NSL had been requested under any of the five statutory provisions, and for the first time provided for judicial enforcement of the confidentiality provisions in all previous provisions."[5] Below, I discuss serious problems with these "gag rules."

Fourth, and very importantly, the legal standard for issuing an NSL was transformed. Previously, the NSL could issue only where "there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power of an agent of a foreign power." This standard, although less than probable cause, is relatively strict.

The Patriot Act eliminated the need for any particularized showing. The NSL requires only that the records be "relevant to an authorized investigation." This "relevance" test is extremely easy to meet. The same term of "relevance" is used, for instance, for the scope of discovery under the Federal Rules of Civil Procedure. Every new law student learns that the scope of "relevance" is extremely broad. In addition, the limits of "relevance" are set only by the FBI itself, because no prosecutor and no judge ever see the NSL before it is issued.

Under this change, NSLs now can apply far beyond agents of a foreign power. It appears from the IG's report that one use of NSLs is where a suspect may call 20 or 100 persons. Those persons would have their phone records made subject to an NSL, and the persons that *they* call (2d degree of connection) may have *their* records subject to an NSL. This vacuum-cleaner approach is combined, furthermore, with a policy of permanently keeping the records in government files, apparently with thousands of persons having access to the database. In short, the IG's report describes a permanent database of persons who might have spoken once with persons who might have spoken once with someone being investigated.

Sweeping even more broadly, the language of the Patriot Act now seems to permit an entire phone company or financial database to be subject to an NSL. As long as there is "an authorized investigation to protect against international terrorism," the statute does

not set any limits on the type or number of records subject to the NSL. One suspect's records might trigger release of a large file to the FBI.

This last change is the legal reason for concern that NSLs may have been used to data mine the phone or Internet records of tens of millions of Americans. The USA Today story in 2006 reported that the call detail records of over 40 million Americans have been turned over to the government. The text of the Patriot Act would appear to permit one NSL to demand the phone or Internet records for millions of people. Oversight by the Congress is appropriate to determine whether the Department of Justice believes that a single NSL could be used in this way, consistent with the current statute.

It is unprecedented in American law to have this system of administrative subpoenas, for this scope of records, with no judicial oversight, subject to coercive gag rules, and with records kept on a permanent basis. The IG's report shows that a majority and growing portion of records gathered by NSLs are those of U.S.citizens. We citizens have no way to learn whether the government now has a file on us in its large and growing data centers. We do know that the records of many Americans are now in such data centers. Some of us in this room may be in the database, because we once received a phone call or an email from someone else whose records were caught in an investigation. In light of the poor data handling of the FBI, not only under the IG's report but in its many other computer problems such as Virtual Case File, there is reason for concern that innocent people are being red-flagged through absolutely no fault of their own. And there appears to be no mechanism in place for people to learn if they are in the database or to get themselves out of the database once they have been flagged.

CONGRESS HAS NEVER AGREED TO ANYTHING LIKE THE CURRENT SCOPE AND SCALE OF USE OF NSLS

The Inspector General's recent report has put NSLs on the front page, and prompted today's hearing. It is important to understand, however, just how recently the Congress and the public have begun to understand NSLs and the ways they are being used. These hearings now, in the wake of the IG report, are the first time the controversial powers to issue NSLs have been the subject of significant attention in Congress. For this reason, there should be no presumption that the current law governing NSLs is correct – it is the job of this Committee and the Congress to determine what laws should apply to this program that is so different from what even experts thought they knew.

I will discuss the path that led some others and me to raise serious concerns about NSLs already in 2004, and then document the entirely inaccurate understanding of NSLs that was available to Congress and the public until now.

To the best of my recollection, the possibility of amending NSL authorities was never raised by either the FBI or the Department of Justice during our consideration in 2000 of how to update electronic surveillance authorities for the Internet age. Many of the other provisions that ended up in the Patriot Act, by contrast, were intensively

examined within our White House Working Group, and my own legislative focus during the fall of 2001 was thus on these other, more familiar issues.

In 2003, as I was researching "The System of Foreign Intelligence Surveillance Law," a puzzle arose about why the Department of Justice seemed to be ignoring section 215, the part of the Patriot Act that allowed government access to any records with less than probable cause. In speaking on background with people who had worked in various agencies, an answer to the puzzle emerged – the government didn't need to apply to the FISA court under section 215 because they were getting the records without any judicial supervision at all, by using NSLs. This realization was the basis for my recommendations in the 2004 article that Congress do intensive oversight on NSLs and consider substantial legislative changes.

More generally, the lack of public knowledge about NSLs was essentially absolute. An on-line search of newspapers before 2002 shows a complete absence of any discussion of the desirability or nature of NSLs.[6] NSLs were mentioned exactly twice in any newspaper, once in passing concerning an anti-espionage case and once for banking records.[7]

During consideration of the Patriot Act, in the fall of 2001, the NSL amendment flew far under the radar. Once again, there was no press discussion at all. Online research shows that the only apparent mention of NSLs in a hearing was a few sentences from Assistant Deputy Attorney General David Kris. Mr. Kris described some of the legislative changes for NSLs, and said it would "give us authority that roughly corresponds to grand jury subpoena authority."[8] In terms of checks and balances, the analogy to grand juries is seriously misleading.[9] In terms of focus by the Congress and the public on the NSL powers, this one brief and incomplete discussion of NSLs appears to be the sum total of debate and discussion as NSLs were expanded so substantially in the Patriot Act.

Between 2001 and 2005, NSLs began to receive somewhat more attention. In March, 2003 the Washington Post published the aforementioned article that reported officials as saying that "scores" of NSLs had issued in anti-terrorist investigations. In that year, Senators Leahy, Grassley, and Specter of this Committee introduced S. 436, which would have required for the first time reporting to Congress of the number of NSLs (although only for financial records and not the more numerous requests for communication records). Civil liberties groups began to include NSLs more often on their lists of problem areas, and I published my own law review article discussing NSLs in 2004.

NSLs received relatively little attention, however, as Congress considered reauthorization of the Patriot Act in 2005. Sixteen provisions of the 2001 law were due to sunset on December 31, 2005, and the bulk of legislative attention focused on those provisions.

The bombshell of the large numbers of NSLs became known on November 6, 2005. A front page story in the Washington Post reported the level was not "scores" of NSLs but instead exceeded 30,000 per year. A key quote in the article said: "Senior FBI officials acknowledged in interviews that the proliferation of national security letters results primarily from the bureau's new authority to collect intimate facts about people who are not suspected of any wrongdoing."[10] That article was released as Congress was finishing its work on Patriot Act reauthorization.

Despite calls by myself and others to revisit the NSL authority as part of the reauthorization,[11] Congress made only very modest changes to the NSL rules. The most effective provision was the requirement that the Inspector General write a report to Congress about the use of NSLs. There were extremely modest and largely ineffective new mechanisms to contest an NSL in court. There was also a requirement for annual public reporting on the number of NSLs. As the IG's Report showed, however, the public report was designed to be highly misleading:

> [T]he annual public report added by Patriot reauthorization excluded requests for telephone or e-mail subscriber information, and we question whether Congress was fully informed of the basis for this omission. The administration knew for certain that this was the largest number of NSL requests--one investigation alone swept in over 12,000 subscribers. The public numbers were skewed to leave a false impression of how focused the powers were. There's a big difference between 9,000 NSL requests per year and 45,000—and it is not just that it is limited to citizens, since the FBI consistently failed to track that.[12]

One area that merits further investigation from the Committee is whether the FBI or the Department of Justice deliberately hid information from the Congress during consideration of the Patriot Act. The IG's Report not only found that the scope of reporting was misleading, as just discussed, but also found "22 percent more NSL requests in the case files we examined than were recorded in the [central FBI] database."[13] The FBI stated in March, 2007 testimony that it found reporting problems on its own, before the IG Report: "[W]e identified deficiencies in our system for generating data prior to the initiation of the OIG's review and flagged the issue for Congress almost one year ago."[14] President Bush signed the Patriot Act reauthorization in March, 2006, one year before the FBI's testimony.

Here is the question – when did the FBI learn that it had significantly under-reported the number of NSLs? In particular, what knowledge did the FBI have about the misleading reports to Congress at the time that Congress was considering reauthorization of the Patriot Act? Because the FBI now has testified that it "flagged" the issue to Congress immediately after the Patriot Act reauthorization was signed, it is important for Congress to determine the extent to which there was FBI knowledge about the misleading statistics at the time that Congress was considering what to do about NSLs in late 2005 and early 2006.

To conclude on this section, the history shows that we are now having the first informed discussion of the scope and scale of NSL investigations. There should be no presumption that current law has "gotten it right." We have seen an F report card for a program that operates without judicial checks, which is exactly what many on the outside had warned would happen. The lack of accurate information about the NSL program to date means that the Congress should examine it fresh, and quite likely legislate different approaches from the current one.

THE GAG RULE UNDER NSLs ARE AN ESPECIALLY SERIOUS DEPARTURE FROM GOOD LAW AND PAST PRECEDENT

As I wrote in my law review article, an especially troubling aspect of NSLs and section 215 orders is the provision that makes it illegal for individuals or organizations to reveal that they have been asked by the government to provide documents or other tangible objects. My research supports the following conclusions (i) the "gag rules" are unjustified expansions of a special rule for wiretaps; (ii) they are contrary to the rules that have historically applied to government requests for records; (iii) they pose significant risks both to civil liberties and to effective investigations; and (iv) they should be greatly modified or repealed.

There has long been a specialized rule for wiretaps, under both Title III and FISA, that the telephone company and others who implement the wiretap are required to keep the wiretap secret while it is in operation. The need for secrecy flows specifically from the recognition that the ongoing usefulness of the wiretap will disappear if its existence becomes known. Indeed, the special nature of ongoing surveillance is the primary reason why the Supreme Court exempted law enforcement wiretaps from the prior notice requirement of the Fourth Amendment, subject to the strict requirement of notice to the target after the wiretap is concluded.[15]

This secrecy requirement for those implementing the wiretap is entirely different than the legal rules that apply to record requests and other government investigations. Suppose that a landlord is interviewed by police about the whereabouts of a tenant or a company is asked for records about its sales to a particular individual. The American approach in such instances is that the landlord or the company is permitted to talk about the investigation with the press or other persons. This ability to speak to the press or others is an important First Amendment right. Under the "gag rule" approach, that right is taken away and individuals subject to excessive searches must risk criminal sanctions to report overreaching or abuses of government authority.

The existence of the gag rule is why it is intellectually incorrect to compare NSLs with administrative subpoenas issued by other agencies. Some federal agencies, such as the Food and Drug Administration, can ask regulated industries for records without getting a court order. These sorts of administrative subpoenas can be challenged in court, and the ability to challenge NSLs in court remains very limited under the Patriot Act reauthorization. **More importantly, the biggest practical limit on FDA or other over-reaching is that the regulated company can and will call the press or a**

local member of Congress if the agency goes too far. This ability to expose agency over-reaching is entirely absent with NSLs – that is why it so important to have a judicial check on their use.

The general American approach also has key protections for the government in terms of what a landlord or company may say. If a landlord tips off a tenant that the police are trying to catch the tenant, then the landlord is subject to punishment under obstruction of justice or similar statutes. This kind of targeted criminal sanction permits citizens to keep watch on possible overreaching by the government, while also empowering the government to punish those who assist in criminal activity.

The controversy over FISA access to library and other records has been based in part on the recognition that this sort of broad search power could expand over time into a routine practice of intrusive domestic surveillance. I have already discussed the enormous discretion given the Justice Department to define what counts as "relevant to an ongoing investigation." This broad search power, together with the "gag rule," means that the most basic check against abuse – publicity – is removed. Similar "gag rules" have unfortunately spread into other recent statutes.[16]

Instead of multiplying these suppressions on speech, a far better approach is to have a focused inquiry on whether there are gaps in the obstruction of justice, material support for terrorism, or other laws. My view is that the special circumstances that justify a temporary "gag rule" for ongoing wiretaps do not apply to records searches such as those under section 215 and the NSLs. Records searches are not typically ongoing in the same way as wiretaps, and they generally do not involve the sources and methods that have been so important to surreptitious electronic surveillance. The law should generally be clear, in my view, that disclosure is permitted absent the special circumstances of assisting the targets of investigations.

Other testimony today, moreover, shows the impossible position for ordinary people created by the current gag rules. A librarian subject to an NSL is forced to lie to family, friends, and colleagues at the risk of criminal penalty for not lying. This extraordinary intrusion into the life of the librarian or any other record-holder is startling in a free country. For wiretaps with major phone companies, there is an office staffed by professionals who have procedures for working with law enforcement and government agencies. By contrast, the expanding scope of NSLs means that travel agents, pawnbrokers, librarians, and a range of other ordinary Americans get drafted into the requirement to hide their actions and lie to those around them.

WHAT TO DO NEXT

1. Legislative change is needed for NSLs. Federal judges should be involved in the issuance of any order, subject to the usual emergency provisions in FISA that allow surveillance to move forward subject to prompt judicial review. Legislative change is needed rather than administrative change – we know that the attention of Congress shifts

over time to new issues, and so day-to-day compliance with the law is best done by judges.

2. I urge the Committee to consider reforms along the line of the bipartisan SAFE Act, introduced in the last Congress as S. 737. I believe there are useful aspects as well to H.R. 1739, recently introduced by Rep. Jane Harman. That bill would require NSLs to be approved by the FISA court or a federal magistrate judge. The bill would also: (i) require the government to show a connection between the records sought with an NSL and a terrorist or foreign power; (ii) create an expedited electronic filing system for NSL applications; (iii) require the government to destroy information obtained through NSL requests that is no longer needed; and (iv) mandate more robust congressional oversight, requiring semi-annual reports to both the Congressional Intelligence and Judiciary Committees on all NSLs issued, minimization procedures, any court challenges and an explanation of how NSLs have helped investigations and prosecutions.

3. For the reasons stated above, I believe the gag rule should be eliminated as unnecessary, or at least be substantially amended. My article on "The System of Foreign Intelligence Surveillance Law" suggests several possible ways to amend the gag rule for NSLs and section 215 orders.

4. I would like to suggest one provision that I have not seen mentioned previously. Issuance of an NSL could be accompanied by a "Statement of Rights and Responsibilities." Especially in light of the secrecy surrounding issuance of an NSL, it would be highly useful for the recipient to learn accurately about how NSLs operate. This statement might include topics such as: the right to consult an attorney; the right to appeal an NSL to a court; the operation of any gag rule that applies; the scope of records that may lawfully be released to the government; the existence of obstruction of justice and other relevant statutes if the recipient tips off a target of investigation; and so on.

Use of this "Statement of Rights and Responsibilities" would assist the FBI in training its own agents in the use of NSLs and would assist recipients of NSLs in complying in a lawful manner with government requests for records.

5. Additional oversight should be directed to the FBI and the Department of Justice on topics discussed in this hearing. My testimony has raised issues including the following: (i) whether the Patriot Act language permits the FBI to receive an entire database from a records holder if the records of one person are relevant to an investigation; and (ii) when the FBI knew that the numbers of NSLs reported to Congress were misleading, and in what ways was that knowledge communicated or not to the Congress during consideration of Patriot Act reauthorization.

In conclusion, I once again express my appreciation to the Committee for its efforts to improve the legal rules applying to NSLs. We should update our law enforcement and intelligence tools to respond to new technology and new threats. We should similarly update checks and balances to draw on the traditions and capabilities of all three branches of government.

ENDNOTES

[1] Details concerning General Counsel Caproni's statement are contained in testimony of Lisa Graves, Deputy Director, Center for National Security Studies, before the Permanent Select Committee on Intelligence of the U.S. House of Representatives, available at http://intelligence.house.gov/Media/PDFS/Graves032807.pdf.

[2] Dan Eggen & Robert O'Harrow, Jr., "U.S. Steps Up Secret Surveillance; FBI, Justice Dept. Increase Use of Wiretaps, Records Searches," Wash. Post, Mar. 24, 2003, at A1.

[3] U.S. Department of Justice, Office of the Inspector General, "A Review of the Febederal Bureau of Investigation's Use of National Security Letters," March 2007, available at http://www.usdoj.gov/oig/special/s0703b/final.pdf.

[4] My longest article in this area is "The System of Foreign Intelligence Surveillance Law," 72 Geo. Wash. L. Rev. 1306 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=586616. This article analyzes NSLs and presents the most detailed published history and explanation to date of the Foreign Intelligence Surveillance Act. Other writing includes: with Charles Kennedy, "State Wiretaps and Electronic Surveillance After September 11," 54 Hastings L.J. 971 (2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=416586; "*Katz* is Dead, Long Live *Katz*," 102 Mich. L. Rev. 904 (2004), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=490623; and chapters on Sections 214 and 215 of the Patriot Act for www.patriotdebates.com ,sponsored by the American Bar Association. These and other writings are available at www.peterswire.net. My critique of the FBI's proposal to have economy-wide administrative subpoenas is discussed at http://www.cardozo.yu.edu/uploadedFiles/CPLPEJ/Jaffer%20Panel%20Report.pdf.

[5] Testimony of Viet D. Dinh before the Permanent Select Committee on Intelligence of the U.S. House of Representatives, March 28, 2007, available at http://intelligence.house.gov/Media/PDFS/Dinh032807%20.pdf.

[6] Using Lexis/Nexis, I searched the "newspapers" and "major newspapers" databases for "national security letter."

[7] R. Jeffrey Smith & Robert Suro, "Waiting to Close the Trap on Suspected Spy, Federal Agencies Watched Senior CIA Officer for 13 Months While Amassing Evidence," Wash. Post, Nov. 24, 1996, at A1 (mentioning use of national security letters once, about 1500 words into a long story); Michael Fechter, "INS Sums Up, Firm on Terrorism Links," Tampa Tribune, Oct. 14, 2000, at 3 (mentioning use of national security letters for banking records once).

[8] Senate Intelligence Committee, Hearing of Sept. 24, 2001.

[9] In contrast to the administrative decision by the FBI to issue an NSL, a federal grand jury subpoena is different in at least three important respects: (i) an FBI agent has to convince a federal prosecutor of the merits of the investigation; (ii) the prosecutor has to convince the grand jury of the merits of issuing the subpoena; and (iii) witnesses who appear before a grand jury are not under gag orders preventing them from stating that they have been called as witnesses or what they have said to the grand jury.

[10] Barton Gellman, "The FBI's Secret Scrutiny; In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans," Wash. Post, Nov. 6, 2005, at A1.

[11] Mark Agrast & Peter Swire, "Still Not Too Late to Fix Flawed PATRIOT Deal," Dec. 9, 2005, available at http://www.americanprogress.org/issues/2005/12/b1289473.html.

[12] IG Report, at x.

[13] IG Report, at xvi.

[14] Testimony of John S. Pistole, Deputy Director, Federal Bureau of Investigation, before the Permanent Select Committee of Intelligence of the U.S. House of Representatives, March 28, 2007, available at http://intelligence.house.gov/Media/PDFS/PistoleTestimony032807a.pdf.

[15] Katz v. United States, 389 U.S. 347, 355 n. 16 (1967).

[16] *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 212(5), 116 Stat. 2135; *see also* Gina Marie Stevens, Cong. Research Serv., "Homeland Security Act of 2002: Critical Infrastructure Information Act" 12-13 (2003), http://www.fas.org/sgp/crs/RL31762.pdf (explaining the intersection of the Homeland Security Act's prohibition on discloures by federal employees and the Whistleblower Protection Act).

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