

**FBI Oversight in the 107th Congress
by the Senate Judiciary Committee:
FISA Implementation Failures**

**An Interim Report by
Senators Patrick Leahy,
Charles Grassley, &
Arlen Specter**

February 2003

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INTERIM REPORT ON FBI OVERSIGHT: FISA IMPLEMENTATION FAILURES

I. EXECUTIVE SUMMARY AND CONCLUSIONS

Working in a bipartisan manner in the 107th Congress, the Senate Judiciary Committee conducted the first comprehensive oversight of the FBI in nearly two decades. That oversight was aimed not at tearing down the FBI but at identifying any problem areas as a necessary first step to finding constructive solutions and marshaling the attention and resources to implement improvements. The overarching goal of this oversight was to restore confidence in the FBI and make the FBI as strong and as great as it must be to fulfill this agency's multiple and critical missions of protecting the United States against crime, international terrorism, and foreign clandestine intelligence activity, within constitutional and statutory boundaries.

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

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

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

At times, the DOJ and FBI have been cooperative in our oversight efforts. Unfortunately, however, at times the DOJ and FBI have either delayed answering or refused to answer fully legitimate oversight questions. Such reticence only further underscores the need for continued

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

aggressive congressional oversight. Our constitutional system of checks and balances and our vital national security concerns demand no less. In the future, we urge the DOJ and FBI to embrace, rather than resist, the healthy scrutiny that legitimate congressional oversight brings.

One particular focus of our oversight efforts has been the Foreign Intelligence Surveillance Act (FISA). This report is focused on our FISA oversight for three reasons. First, the FISA is the law governing the exercise of the DOJ's and FBI's surveillance powers inside the United States to collect foreign intelligence information in the fight against terrorism and, as such, is vitally important to our national security. Second, the concerns revealed by our FISA oversight highlight the more systemic problems facing the FBI and the importance of close congressional oversight and scrutiny in helping to provide the resources and attention to correct such problems before they worsen. Third, members of this Committee led the effort to amend key provisions of the FISA in the USA PATRIOT Act, and the sunset or termination of those amendments in four years makes it imperative that the Committee carefully monitor how the FISA changes are being implemented.

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

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

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

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

- FBI Headquarters did not properly support the efforts of its field offices in foreign intelligence matters. The role of FBI Headquarters in national security investigations is to “add value” in two ways: by applying legal and practical expertise in the processing of FISA surveillance applications and by integrating relevant information from all available intelligence sources to evaluate the significance of particular information and to supplement information from the field. In short, Headquarters’ role is to know the law and “connect the dots” from multiple sources both inside and outside the FBI. The FBI failed in this role before the 9/11 attacks. In fact, the bureaucratic hurdles erected by Headquarters (and DOJ) not only hindered investigations but contributed to inaccurate information being presented to the FISA Court, eroding the trust in the FBI of the special court that is key to the government’s enforcement efforts in national security investigations.
- Key FBI agents and officials were inadequately trained in important aspects of not only FISA, but also fundamental aspects of criminal law.
- In the time leading up to the 9/11 attacks, the FBI and DOJ had not devoted sufficient resources to implementing the FISA, so that long delays both crippled enforcement efforts and demoralized line agents.
- The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA. Much more information, including all unclassified opinions and operating rules of the FISA Court and Court of Review, should be made public and/or provided to the Congress.
- The FBI’s failure to analyze and disseminate properly the intelligence data in the agency’s possession rendered useless important work of some of its best field agents. In short, the FBI did not know what it knew. While we are encouraged by the steps commenced by Director Mueller to address this problem, there is more work to be done.
- The FBI’s information technology was, and remains, inadequate to meet the challenges facing the FBI, and FBI personnel are not adequately trained to use the technology that they do possess. We appreciate that Director Mueller is trying to address this endemic problem, but past performance indicates that close congressional scrutiny is necessary to ensure that improvements continue to be made swiftly and effectively.
- A deep-rooted culture of ignoring problems and discouraging employees from criticizing the FBI contributes to the FBI’s repetition of its past mistakes in the foreign intelligence field. There has been little or no progress at the FBI in addressing this culture.

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

Although the DOJ and FBI have acknowledged shortcomings in some of these areas and begun efforts to reform, we cannot stress strongly enough the urgency of this situation. The pace of improvement and reform must quicken.

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

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

II. OVERVIEW OF FBI OVERSIGHT IN THE 107th CONGRESS

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

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

So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and the Congress did not diligently monitor the FBI's activities. Even when agencies such as the FBI operate with the best of intentions (such as protecting our nation from foreign threats such as Communism in the 1950s and 1960s and fighting terrorism now), if left unchecked, the immense power wielded by such government agencies can lead them astray. Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and the FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable. In this way, congressional oversight plays a critical role in our democracy.

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

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

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

1. Full Committee FBI Oversight Hearings

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

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

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

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

In response to a later question, Director Mueller stated:

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

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

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

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

³*Id.*, at p. 89.

subject to termination at the end of 2005. The “sunset” of the increased FISA surveillance powers reflected the promise that the Congress would conduct vigilant oversight to evaluate the FBI’s performance both before and after 9/11. Only in that way could Congress and the public be assured that the DOJ and FBI needed the increased powers in the first place, and were effectively and properly using these new powers to warrant extension of the sunset.

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

Within weeks of passage of the USA PATRIOT Act, the Senate Judiciary Committee held hearings with senior DOJ officials on implementation of the new law and other steps that were being taken by the Administration to combat terrorism. The Committee heard testimony on November 28, 2001, from Assistant Attorney General Michael Chertoff and, on December 6, 2001, from Attorney General Ashcroft. In response to written questions submitted in connection with the latter hearing, DOJ confirmed that shortly after the USA PATRIOT Act had been signed by the President on October 26, 2001, DOJ began to press the Congress for additional changes to relax FISA requirements, including expansion of the definition of “foreign power” to include individual, non-U.S. persons engaged in international terrorism. DOJ explained that this proposal was to address the threat posed by a single foreign terrorist without an obvious tie to another person, group, or state overseas. Yet, when asked to “provide this Committee with information about specific cases that support your claim to need such broad new powers,” DOJ was silent in its response and named no specific cases showing such a need, nor did it say that it could provide such specificity even in a classified setting.⁴ In short, DOJ sought more power but was either unwilling or unable to provide an example as to why.

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

On April 9, 2002, the Committee held a hearing on the Webster Commission’s report regarding former FBI Agent and Russian spy Robert Hanssen’s activities. That hearing exposed a deep-seated cultural bias against the importance of security at the FBI. One important finding brought to light at that hearing was the highly inappropriate handling of sensitive FISA materials in the time after the 9/11 attacks. In short, massive amounts of the most sensitive and highly classified materials in the FBI’s possession were made available on an unrestricted basis to

⁴ Transcript, pp. 31-32 (emphasis added).

nearly all FBI employees. Even more disturbing, this action was taken without proper consultation with the FBI's own security officials.

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

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

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

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

As the head of the Department of Justice as a whole, the Attorney General has ultimate responsibility for the performance of the FBI. On July 25, 2002, the Judiciary Committee held

⁵Transcript, pp. 31-32 (emphasis added).

⁶Transcript, May 8, 2002, pp. 61-62.

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

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

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

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

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

The Judiciary Committee and its Members also exercised their oversight responsibilities over the DOJ and the FBI implementation of the FISA through written inquiries, written hearing questions, and other informal requests. These efforts included letters to the Attorney General and the FBI Director from Senator Leahy on November 1, 2001, and May 23, 2002, and from Senators Leahy, Specter, and Grassley on June 4, June 13, July 3, and July 31, 2002. In addition,

these Members sent letters requesting information from the FISA Court and FISA Court of Review on July 16, July 31, and September 9, 2002. Such oversight efforts are important on a day-to-day basis because they are often the most efficient means of monitoring the activities of the FBI and DOJ.

3. DOJ and FBI Non-Responsiveness

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

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

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

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

pursued by the DOJ and the legal positions being taken by the Department on the FISA Amendments.⁸

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

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

A. Overview and Conclusions

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

We specifically sought to determine whether the systemic problems uncovered in our FBI oversight hearings commenced in the summer of 2001 contributed to any shortcomings that may

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

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

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

- (1) The FBI and Justice Department were setting too high a standard to establish that there is "probable cause" that a person may be an "agent of a foreign power" and, therefore, may be subject to surveillance pursuant to FISA;
- (2) FBI agents and key Headquarters officials were not sufficiently trained to understand the meanings of crucial legal terms and standards in the FISA process;
- (3) Prior problems between the FBI and the FISA Court that resulted in the Court barring one FBI agent from appearing before it for allegedly filing inaccurate affidavits may have "chilled" the FBI and DOJ from aggressively seeking FISA warrants (although there is some contradictory information on this matter, we will seek to do additional oversight on this question);¹⁰
- (4) FBI Headquarters fostered a culture that stifled rather than supported aggressive and creative investigative initiatives from agents in the field; and
- (5) The FBI's difficulties in properly analyzing and disseminating information in its possession caused it not to seek FISA warrants that it should have sought. These difficulties are due to:
 - a) a lack of proper resources dedicated to intelligence analysis;
 - b) a "stove pipe" mentality where crucial intelligence is pigeonholed into a particular unit and may not be shared with other units;
 - c) High turnover of senior agents at FBI Headquarters within critical counterterrorism and foreign intelligence units;
 - d) Outmoded information technology that hinders access to, and dissemination of, important intelligence; and
 - e) A lack of training for FBI agents to know how to use, and a lack of requirements that they do use, the technology available to search for and access relevant information.

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

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

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

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

B. Allegations Raised by Special Agent Rowley's Letter

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

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

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

application establishing probable cause for the criminal search warrant was exactly the same as the facts that FBI Headquarters earlier had deemed inadequate to obtain a FISA search warrant.¹²

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

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

For example at one point, the Supervisory Special Agent at FBIHQ posited that the French information could be worthless because it only identified Zacharias Moussaoui by name and he, the SSA, didn't know how many people by that name existed in France. A Minneapolis agent attempted to surmount that problem by quickly phoning the FBI's Legal Attache (Legat) in Paris, France, so that a check could be made of the French telephone directories. Although the Legat in France did not have access to all of the French telephone directories, he was able to quickly ascertain that there was only one listed in the Paris directory. It is not known if this sufficiently answered the question, for the SSA continued to find new reasons to stall.¹³

Eventually, on August 28, 2001, after a series of e-mails between Minneapolis and FBIHQ, which suggest that the FBIHQ SSA deliberately further undercut the FISA effort by not adding the further intelligence information which he had promised to add that supported Moussaoui's foreign power connection and making several changes in the wording of the information that had been provided by the Minneapolis agent, the

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

¹³Rowley Letter, p. 6, fn. 6.

Minneapolis agents were notified that the NSLU Unit Chief did not think there was sufficient evidence of Moussaoui's connection to a foreign power. Minneapolis personnel are, to this date, unaware of the specifics of the verbal presentations by the FBIHQ SSA to NSLU or whether anyone in NSLU ever was afforded the opportunity to actually read for him/herself all of the information on Moussaoui that had been gathered by the Minneapolis Division and [redacted; classified]. Obviously[,] verbal presentations are far more susceptible to mis-characterization and error.¹⁴

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

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

C. Results of Investigation

1. The Mishandling of the Moussaoui FISA Application.

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

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

¹⁴Rowley Letter, p. 7.

¹⁵Rowley Letter, p. 4.

Our investigation revealed that the following events occurred in connection with this FISA application. We discovered that the Supervisory Special Agent (SSA) involved in reviewing the Moussaoui FISA request was assigned to the Radical Fundamentalist Unit (RFU) of the International Terrorism Operations Section of the FBI's Counterterrorism Division. The Unit Chief of the RFU was the SSA's immediate supervisor. When the Minneapolis Division submitted its application for the FISA search warrant for Moussaoui's laptop computer and other property, the SSA was assigned the responsibility of processing the application for approval. Minneapolis submitted its application for the FISA warrant in the form of a 26-page Electronic Communication (EC), which contained all of the information that the Minneapolis agents had collected to establish that Moussaoui was an agent of a foreign power at the time. The SSA's responsibilities included integrating this information submitted by the Minneapolis division with information from other sources that the Minneapolis agents were not privy to, in order to establish there was probable cause that Moussaoui was an agent of a foreign power. In performing this fairly straightforward task, FBI Headquarters personnel failed miserably in at least two ways.

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

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

Second, the SSA's task was to help bolster the work of the Minneapolis agents and collect information that would establish probable cause that a "foreign power" existed, and that Moussaoui was its "agent." Indeed, sitting in the FBI computer system was the Phoenix memorandum, which senior FBI officials have conceded would have provided sufficient additional context to Moussaoui's conduct to have established probable cause.¹⁷ Yet, neither the

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

¹⁷Joint Inquiry Hearing, Testimony of Eleanor Hill, Staff Director, September 24, 2002, p. 19: "The [FBI] attorneys also told the Staff that, if they had been aware of the Phoenix memo, they would have forwarded the FISA request to the Justice Department's Office of Intelligence Policy Review (OIPR). They reasoned that the particulars of the Phoenix memo changed the

SSA nor anyone else at Headquarters consulted about the Moussaoui application ever conducted any computer searches for electronic or other information relevant to the application. Even the much touted “Woods Procedures” governing the procedures to be followed by FBI personnel in preparing FISA applications do not require Headquarters personnel to conduct even the most basic subject matter computer searches or checks as part of the preparation and review of FISA applications.

2. General Findings.

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

First, key FBI personnel responsible for protecting our country against terrorism did not understand the law. The SSA at FBI Headquarters responsible for assembling the facts in support of the Moussaoui FISA application testified before the Committee in a closed hearing that he did not know that “probable cause” was the applicable legal standard for obtaining a FISA warrant. In addition, he did not have a clear understanding of what the probable cause standard meant. The SSA was not a lawyer, and he was relying on FBI lawyers for their expertise on what constituted probable cause. In addition to not understanding the probable cause standard, the SSA’s supervisor (the Unit Chief) responsible for reviewing FISA applications did not have a proper understanding of the legal definition of the “agent of a foreign power” requirement.¹⁹ Specifically, he was under the incorrect impression that the statute

context of the Moussaoui investigation and made a stronger case for the FISA warrant. None of them saw the Phoenix memo before September 11.”

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

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

required a link to an already identified or “recognized” terrorist organization, an interpretation that the FBI and the supervisor himself admitted was incorrect. Thus, key FBI officials did not have a proper understanding of either the relevant burden of proof (probable cause) or the substantive element of proof (agent of a foreign power). This fundamental breakdown in training on an important intelligence matter is of serious concern to this Committee.²⁰

Second, the complaints contained in the Rowley letter about problems in the working relationship between field offices and FBI Headquarters are more widespread. There must be a dynamic relationship between Headquarters and field offices with Headquarters providing direction to the efforts of agents in the field when required. At the same time, Headquarters personnel should serve to support field agents, not to stifle initiative by field agents and hinder the progress of significant cases. The FBI’s Minneapolis office was not alone in this complaint. Our oversight also confirmed that agents from the FBI’s Phoenix office, whose investigation and initiative resulted in the so-called “Phoenix Memorandum,” warning about suspicious activity in U.S. aviation schools, also found their initiative dampened by a non-responsive FBI Headquarters.

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

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

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

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

As the Committee later learned from review of the FISA Court’s May 17, 2002, opinion, that Court had complained of 75 inaccuracies in FISA affidavits submitted by the FBI, and the DOJ and FBI had to develop new procedures to ensure accuracy in presentations to that Court. These so-called “Woods Procedures” were declassified at the request of the authors and were made publicly available at the Committee’s hearing on June 6, 2002. As DOJ further explained in its December 23, 2002, answers to written questions submitted on July 25, 2002:

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

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

An FBI document obtained under the Freedom of Information Act, which is attached to this report as Exhibit E, suggests that the errors committed were far broader. The document is a memorandum dated April 21, 2000, from the FBI’s Counterterrorism Division, that details a series of inaccuracies and errors in handling FISA applications and wiretaps that have nothing whatsoever to do with the “wall.” Such mistakes included videotaping a meeting when videotaping was not allowed under the relevant FISA Court order, continuing to intercept a person’s email after there was no authorization to do so, and continuing a wiretap on a cell phone even after the phone number had changed to a new subscriber who spoke a different language from the target.

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

One legitimate question is whether the problems inside the FBI and between the FBI and the FISA Court either caused FBI Headquarters to be unduly cautious in proposing FISA warrants or eroded the FISA Court's confidence in the DOJ and the FBI to the point that it affected the FBI's ability to conduct terrorism and intelligence investigations effectively.²¹ SA Rowley opines in her letter that in the year before "the September 11th acts of terrorism, numerous alleged IOB [Intelligence Oversight Board] violations on the part of FBI personnel had to be submitted to the FBI's Office of Professional Responsibility (OPR) as well as the IOB. I believe the chilling effect upon all levels of FBI agents assigned to intelligence matters and their managers hampered us from aggressive investigation of terrorists." (Rowley letter, pp. 7-8, fn. 7). Although the belated release of the FISA Court's opinion of May 17, 2002, provided additional insight into this issue, further inquiry is needed.

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

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

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

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

In order to obtain either a search warrant or an authorization to conduct electronic surveillance pursuant to FISA, the FBI and Justice Department must establish before the FISA Court ("FISC") probable cause that the targeted person is an "agent of a foreign power."²² An agent of a foreign power is defined as "any person who . . . knowingly **aids** or **abets** any person

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

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

in the conduct of [certain] activities.”²³ Those certain activities include “international terrorism,” and one definition of “foreign power” includes groups that engage in international terrorism.²⁴

²³ (b) "Agent of a foreign power" means-

(2) *any person who--*

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

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

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

²⁴ (a) "Foreign power" means- . . .

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

(c) "International terrorism" means activities that--

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

(2) appear to be intended--

(A) to intimidate or coerce a civilian population;

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

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

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

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

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

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

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

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

The SSA’s other task would be to help marshal evidence showing probable cause that Moussaoui was an agent of that group. In applying the “totality of the circumstances,” as defined in the case of Illinois v. Gates, 462 U.S. 213 (1983), any information available about Moussaoui’s “actual contacts” with the group should have been considered in light of other information the FBI had in order to understand and establish the true *probable* nature of those contacts.²⁵ It is only with consideration of *all* the information known to the FBI that

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

Moussaoui's contacts with any group could be properly characterized in determining whether he was an agent of such a group.

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

b. The Probable Cause Standard

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

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

As early as *Locke v. United States*, 7 Cranch. 339, 348, 3 L.Ed. 364 (1813), Chief Justice Marshall observed, in a closely related context, that "the term 'probable cause,' according to its usual acceptance, means less than evidence which would justify condemnation.... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. *Finely-*

²⁶Senator Specter: . . . [I]s an Islam fundamentalist who advocates "jihad" a terrorist? [Attorney #1]: On that description alone, I would say I could not say so, Senator. I would have my suspicions, I would be concerned, but I need to see what a person is doing. I need to see some indicia that they are willing to commit violence and not just talk about it. Question: But you would have your suspicions. [Attorney #1]: Yes, sir.

*tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."*²⁷

The Court further stated:

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

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

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

Unfortunately, our review has revealed that many agents and lawyers at the FBI did not properly understand the definition of probable cause and that they also possessed inconsistent understandings of that term. In the portion of her letter to Director Mueller discussing the

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

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

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

On June 6, 2002, the Judiciary Committee held an open hearing on the FBI’s conduct of counterterrorism investigations. The Committee heard from Director Mueller and DOJ Inspector General Glenn Fine on the first panel and from SA Rowley on the second panel. The issue of the probable cause standard was specifically raised with Director Mueller, citing the case of Illinois v. Gates, and Director Mueller was asked to comment in writing on the proper standard for establishing probable cause.³¹ The FBI responded in an undated letter to Senator Specter and with the subsequent transmission of an electronic communication (E.C.) dated September 16, 2002.³² In the E.C., the FBI’s General Counsel reviewed the case law defining “probable cause,” in order to clarify the definition of probable cause for FBI personnel handling both criminal investigations and FISA applications.

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

²⁹Rowley Letter, pp. 4-5.

³⁰United States v. Fama, 758 F.2d 834, 838 (2d Cir. 1985) (citations omitted).

³¹Judiciary Committee Hearing, “Oversight Hearing on Counterterrorism,” Transcript, June 6, 2002, pp. 78-79, 87 (hereinafter, Tr. 6/6/02). Sen. Specter’s letter is at Exhibit B.

³²These documents are attached as Exhibits C and D.

³³Tr. 6/6/02, pp. 224.

³⁴Tr. 6/6/02, pp. 226-27.

Rowley opined that some prosecutors and senior FBI officials may set a higher standard due to risk-averseness, which is caused by “careerism.”³⁵

SA Rowley’s testimony was corroborated in our other hearings. During a closed hearing, in response to the following questions, a key Headquarters SSA assigned to terrorism matters stated that he did not know the legal standard for obtaining a warrant under FISA.

Sen. Specter: . . . [SSA], what is your understanding of the legal standard for a FISA warrant?

[SSA]: I am not an attorney, so I would turn all of those types of questions over to one of the attorneys that I work with in the National Security Law Unit.

Question: Well, did you make the preliminary determination that there was not sufficient facts to get a FISA warrant issued?

[SSA]: That is the way I saw it.

Question: Well, assuming you would have to prove there was an agent and there was a foreign power, do you have to prove it beyond a reasonable doubt? Do you have to have a suspicion? Where in between?

[SSA]: I would ask my attorney in the National Security Law Unit that question.

Question: Did anybody give you any instruction as to what the legal standard for probable cause was?

[SSA]: In this particular instance, no.³⁶

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

Unfortunately, our oversight revealed a similar confusion as to the proper standard among other FBI officials. On July 9, 2002, the Committee held a closed session on this issue, and heard from the following FBI personnel: Special Agent “G,” who had been a counterterrorism supervisor in the Minneapolis Division of the FBI and worked with SA Rowley; the Supervisory Special Agent (“the SSA”) from FBI Headquarters referred to in SA Rowley’s letter (and referred to the discussion above); the SSA’s Unit Chief (“the Unit Chief”); a very senior attorney from the FBI’s Office of General Counsel with national security responsibilities (“Attorney #1”); and three attorneys assigned to the FBI’s Office of General

³⁵Tr. 6/6/02, pp. 226-27.

³⁶Tr., 7/9/02, pp. 35-36.

Counsel's National Security Law Unit ("Attorney #2," "Attorney #3," and "Attorney #4"). The purpose of the session was to determine how the Moussaoui FISA application had been processed by FBI Headquarters personnel. None of the personnel present, including the attorneys, appeared to be familiar with the standard for probable cause articulated in Illinois v. Gates, and none had reviewed the case prior to the hearing, despite its importance having been highlighted at the June 6th hearing with the FBI Director. To wit:

Sen. Specter: . . . [Attorney #1] what is the legal standard for probable cause for a warrant?

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

Question: Reason to believe?

[Attorney #1]: Reasonable belief.

Question: Reasonable belief?

[Attorney #1]: More probable than not.

Question: More probable than not?

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

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

[Attorney #1]: No, sir.

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

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

³⁷Gates, 462 U.S. at 36 (citations omitted).

³⁸Tr., 7/9/02, pp. 37-38, 53.

³⁹Tr., 7/9/02, pp 39-40.

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

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

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

⁴⁰Bellows Report, p. 482.

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

The Commission heard testimony that, under ordinary circumstances, the FISA process can be slow and burdensome, requiring information beyond the minimum required by the statute. For example, to obtain a FISA order, the statute requires only probable cause to believe that someone who is not a citizen or legal permanent resident of the United States is a member of an international terrorist organization. In practice, however, OIPR requires evidence of wrongdoing or specific knowledge of the group's terrorist intentions in addition to the person's membership in the organization before forwarding the application to the FISA Court. Also, OIPR does not generally consider the past activities of the surveillance target relevant in determining whether the FISA probable cause test is met.

During the period leading up to the millennium, the FISA application process was streamlined. Without lowering the FISA standards, applications were submitted to the FISA Court by DOJ promptly and with enough information to establish probable cause.

The Bellows team made another finding of particular pertinence to the instant issue. It found that “[t]he Attorney General should have been apprised of *any* rejection of a FISA request”⁴² In effect, FBI Headquarters rejected the Minneapolis Division’s request for a FISA application, a decision that was not reported to then Acting Director Thomas Pickard. Director Mueller has adopted a new policy, not formally recorded in writing, that he be informed of the denial within the FBI of any request for a FISA application.⁴³ However, in an informal briefing the weekend after this new policy was publicly announced, the FBI lawyer whom it most directly affected claimed to know nothing of the new “policy” beyond what he had read in the newspaper. From an oversight perspective, it is striking that the FBI and DOJ were effectively on notice regarding precisely this issue: that the probable cause test being applied in FISA investigations was more stringent than legally required. We appreciate the carefulness and diligence with which the professionals at OIPR and the FBI exercise their duties in processing FISA applications, which normally remain secret and immune from the adversarial scrutiny to which criminal warrants are subject. Yet, this persistent problem has two serious repercussions. First, the FBI and DOJ appear to be failing to take decisive action to provide in-depth training to agents and lawyers on an issue of the utmost national importance. We simply cannot continue to deny or ignore such training flaws only to see them repeated in the future.

Second, when the DOJ and FBI do not apply or use the FISA as fully or comprehensively as the law allows, pressure is brought on the Congress to change the statute in ways that may not be at all necessary. From a civil liberties perspective, the high-profile investigations and cases in which the FISA process appears to have broken down is too easily blamed on the state of the law rather than on inadequacies in the training of those responsible for implementing the law. The reaction on the part of the DOJ and FBI has been to call upon the Congress to relax FISA

Report of the National Commission on Terrorism at p. 11.

The Commission recommended that:

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

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

⁴³Tr., 6/6/02, p. 91.

standards rather than engage in the more time-consuming remedial task of reforming the management and process to make it work better. Many times such “quick legislative fixes” are attractive on the surface, but only operate as an excuse to avoid correcting more fundamental problems.

4. The Working Relationship Between FBI Headquarters and Field Offices.

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

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

In addition to hampering the implementation of FISA, these are problems that the Judiciary Committee has witnessed replayed in other contexts within the FBI. These root causes must be addressed head on, so that Headquarters personnel at the FBI view their jobs as supporting talented and aggressive field agents.

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

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

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

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

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

5. The Mishandling of the Phoenix Electronic Communication.

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

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

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

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

6. The FBI’s Poor Information Technology Capabilities.

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

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

⁴⁶Oklahoma City Report, p. 2.

testified that FBI personnel could only perform one-word searches in the ACS system, which results in too many results to review.

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

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

7. The "Revolving Door" at FBI Headquarters.

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

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

"Less than 5% of the Agents surveyed indicated an interest in promotion if relocation to FBIHQ was required. Of 35 field supervisors queried, 31 said they would 'step down'

rather than accept an assignment in Washington, D.C. All groups of Agents (those with and without FBIHQ experience) viewed as assignment at FBIHQ as very negative. Only 6% of those who had previously been assigned there believed that the experience was positive - the work was clerical, void of supervisory responsibility critical to future field or other assignments. Additionally, the FBIHQ supervisors were generally powerless to make decisions while working in an environment which was full of negativity, intimidation, fear and anxiousness to leave.” (bold emphasis in original).

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

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

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

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

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

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

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

IV. The Importance of Enhanced Congressional Oversight

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

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

Under current law there is no requirement that FISA Court opinions be made available to Congressional committees or the public. The only statutory FISA reporting requirement is for an unclassified annual report of the Attorney General to the Administrative Office of the United States Courts and to Congress setting forth with respect to the preceding calendar year (a) the total number of applications made for orders and extensions of orders approving electronic surveillance under Title I, and (b) the total number of such orders and extensions either granted,

modified, or denied.⁴⁷ These reports do not disclose or identify unclassified FISA Court opinions or disclose the number of individuals or entities targeted for surveillance, nor do they cover FISA Court orders for physical searches, pen registers, or records access.

Current law also requires various reports from the Attorney General to the Intelligence and Judiciary Committees that are not made public.⁴⁸ These reports are used for Congressional oversight purposes, but do not include FISA Court opinions. When the Act was passed in 1978, it required the Intelligence Committees for the first five years after enactment to report respectively to the House of Representatives and the Senate concerning the implementation of the Act and whether the Act should be amended, repealed, or permitted to continue in effect without amendment. Those public reports were issued in 1979-1984 and discussed one FISA Court opinion issued in 1981, which related to the Court's authority to issue search warrants without express statutory jurisdiction.

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

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

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

Many things are different now since the tragic events of last September, but one thing that has not changed is the United States Constitution. Congress must work to guarantee the

⁴⁷50 U.S.C. 1807.

⁴⁸50 U.S.C. Sections 1808, 1826, 1846, 1863.

civil liberties of our people while at the same time meet our obligations to America's national security. Excessive secrecy and unilateral decision making by a single branch of government is not the proper method of striking that all important balance. We hope that, joining together, the Congress and the Executive Branch can work in a bipartisan manner to best serve the American people on these important issues. The stakes are too high for any other approach.

Patrick Leahy
U.S. Senator

Arlen Specter
U.S. Senator

Charles E. Grassley
U.S. Senator