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BEFORE

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

ON

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

APRIL 11, 2007

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

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

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

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

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

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

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

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

Background

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

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

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

have become outdated. It also reflects my view that new surveillance powers should be subject to effective checks and balances in our constitutional system.

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

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

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

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

There have been four major modifications to NSLs in the Patriot Act and since its enactment. First, NSLs previously were limited to counterintelligence, which essentially means stopping foreign intelligence agencies from gathering intelligence in the United States. The Patriot Act opened the use of NSLs to a much larger array of operations, for any "authorized investigation to protect against terrorism or clandestine intelligence

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The bombshell of the large numbers of NSLs became known on November 6, 2005. A front page story in *The Washington Post* reported the level was not "scores" of

NSLs but instead exceeded 30,000 per year. A key quote in the article said: "Senior FBI officials acknowledged in interviews that the proliferation of national security letters results primarily from the bureau's new authority to collect intimate facts about people who are not suspected of any wrongdoing."[10] That article was released as Congress was finishing its work on Patriot Act reauthorization.

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

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

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

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

To conclude on this section, the history shows that we are now having the first informed discussion of the scope and scale of NSL investigations. There should be no

presumption that current law has "gotten it right." We have seen an F report card for a program that operates without judicial checks, which is exactly what many on the outside had warned would happen. The lack of accurate information about the NSL program to date means that the Congress should examine it fresh, and quite likely legislate different approaches from the current one.

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

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

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

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

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

entirely absent with NSLs—that is why it so important to have a judicial check on their use.

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

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

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

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

WHAT TO DO NEXT

1. Legislative change is needed for NSLs. Federal judges should be involved in the issuance of any order, subject to the usual emergency provisions in FISA that allow surveillance to move forward subject to prompt judicial review. Legislative change is needed rather than administrative change—we know that the attention of Congress shifts over time to new issues, and so day-to-day compliance with the law is best done by judges.

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

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

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

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

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

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

ENDNOTES

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

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

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

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

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

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

[7] R. Jeffrey Smith & Robert Suro, "Waiting to Close the Trap on Suspected Spy, Federal Agencies Watched Senior CIA Officer for 13 Months While Amassing Evidence," *The Washington Post*, Nov. 24, 1996, at A1 (mentioning use of NSLs once, about 1,500 words into a long story); Michael Fechter, "INS Sums Up, Firm on Terrorism Links," *Tampa Tribune*, Oct. 14, 2000, at 3 (mentioning use of NSLs for banking records once).

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

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

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

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

[12] IG report, at x.

[13] IG report, at xvi.

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

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

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