



Questions Posed by Senator Feinstein

82. As you offered at the hearing, please provide:

a. A description of how many of the 2,072 FISA warrants that the FBI obtained last year were “emergency” applications, as opposed to non-emergency applications.

Response:

The response to this inquiry is classified and is, therefore, provided separately.

b. The average amount of time the FBI needs to file and get a FISA warrant in each of these categories.

Response:

The response to this inquiry is classified and is, therefore, provided separately.





NSA Surveillance Program

100. Has the FBI received, via information sharing, information from the NSA's domestic wiretapping conducted outside of FISA? If so, is a system in place, either at the FBI or NSA, to identify when information was obtained without a FISA warrant? Does the FBI have any minimization procedures in place for information shared with the FBI by the NSA that has been obtained outside of existing FISA procedures? If so, please describe those procedures and the date when they were enacted.

Response:

It is not appropriate to discuss the operational details of the Terrorist Surveillance Program in this context. The full Senate Select Committee on Intelligence has been fully briefed on the operational details of the TSP described by the President.

101. Has the FBI, like the NSA, conducted non-Title III domestic electronic surveillance (hereinafter "domestic wiretapping") without obtaining or seeking a FISA warrant? If not, why has the FBI chosen not to do what the NSA has done? If so, please describe (in a classified submission, if necessary) the nature of the FBI's activities, the date on which such domestic wiretapping without FISA court approval began, and the reason(s) why the FBI determined that FISA warrants were not legally required for these activities.

Response:

All electronic surveillance conducted by the FBI is in accordance with the Constitution and laws of the United States. The FBI conducts domestic electronic surveillance pursuant to Title III and FISA. In addition, the FBI engages in two types of surveillance without court order: consensual monitoring (based on the consent of one party to the conversation) and under circumstances in which there is no reasonable expectation of privacy. The TSP is not a "domestic" surveillance

program. Rather, that program targets for interception only international communications where NSA determines there is probable cause to believe that at least one party to the communication is a member or agent of al-Qa'ida or an affiliated terrorist organization.

102. In his written testimony, Inspector General Fine noted how the FBI has reported a variety of claims of civil rights and civil liberties violations to the President's Intelligence Oversight Board ("IOB"), including some in FYs 2004 and 2005 relating to "intercepting communications outside the scope of the order from the FISA court," and how "[n]ot all possible violations were attributable solely to FBI conduct." Did the FBI ever submit, to the IOB, concerns about the NSA's (or the FBI's, or any other agency's) activities relating to domestic wiretapping without a FISA warrant? If so, please provide the date and subject matter of such submissions, and please produce all such submissions that the FBI sent to the IOB (in classified form, if necessary).

Response:

The FBI's obligation is to report intelligence activities affecting FBI investigations that violate law, AG Guidelines, or the FBI's internal policies established to protect the rights of United States persons. Because DOJ has opined that the TSP is lawful, there has been no basis for reporting activities related to that Program to the Intelligence Oversight Board.

Questions Posed by Senator Feingold

National Security Letters

103. When you appeared before the Judiciary Committee on May 2, 2006, I asked you about the disparity between the number of National Security Letters (NSLs) that were issued in 2005 versus the number of Section 215 business records orders issued in 2005. You agreed that obtaining a Section 215 order requires judicial approval, and that issuing a NSL does not require judicial approval, but said that you would get back to me about why so many more NSLs were issued in 2005. Please provide a response.

Response:

NSLs are available to obtain the records that form the basic building blocks of most investigations (e.g., telephone records and banking records). They are used frequently and in many national security investigations (similar to the role of grand jury subpoenas in criminal investigations). Orders pursuant to Section 215 of the USA PATRIOT Act, on the other hand, are used only if the records cannot be obtained through other means (e.g., through NSL or voluntary production).

The preference toward NSLs is not borne of any desire to avoid judicial review, but rather from a desire to obtain the information needed to pursue a national security investigation in the most efficient way possible under the law. Because NSLs can be issued at the field office level, they are far more efficient than 215 orders, which require court filings.

NSA Wiretapping Program

104. When did you first learn about the NSA wiretapping program authorized by the President shortly after September 11, which circumvented the FISA court process?

Response:

Director Mueller became aware of NSA's TSP at or near the time the program commenced.

105. Did you raise any objection to the NSA wiretapping program at the time?

Response:

As I explained at the hearing, I do not believe I should go into internal discussions I may have had with others in the Executive Branch.

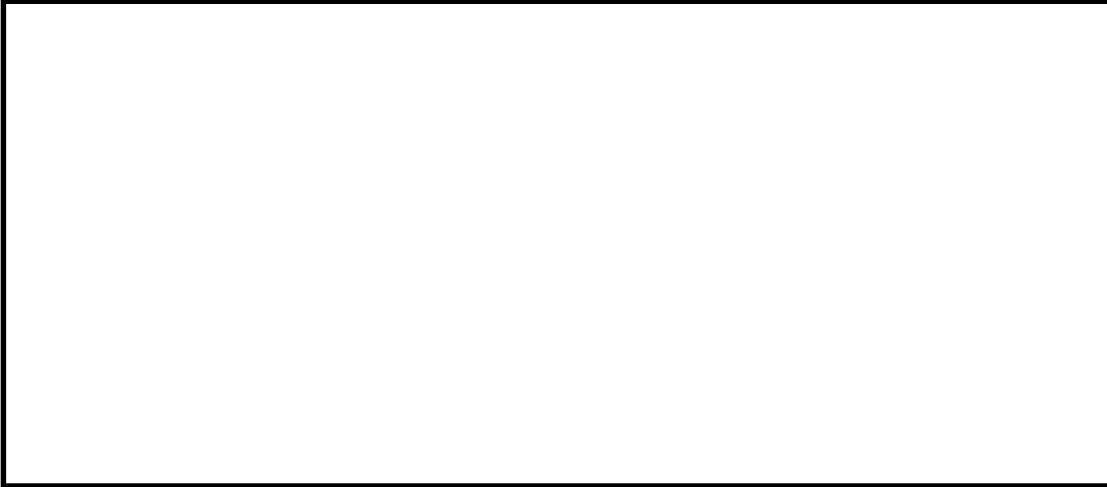
106. Do you have any concern that judges would not permit the information gathered through the use of these wiretaps to be used in criminal prosecutions?

Response:

The purpose of the TSP is to gather intelligence about what al-Qa'ida and affiliated terrorist organizations are planning, particularly in the United States or against United States interests, not to gather evidence for use in criminal proceedings. The FBI has used FISA and Title III as the exclusive means of eavesdropping on individuals within the United States, whether we are attempting to develop evidence for use in criminal proceedings or to gather foreign intelligence.

Outside the Scope





USA PATRIOT Act

109. In March, Chairman Specter introduced legislation (S. 2369) that contained four additional changes to the Patriot Act, beyond what was in the reauthorization package.

a. In Chairman Specter's bill, the provision relating to Section 215 would require the government to convince a FISA judge: (1) that the business records pertain to a terrorist or spy; (2) that the records pertain to an individual in contact with or known to a suspected terrorist or spy; or (3) that the records are relevant to the activities of a suspected terrorist or spy. Do you agree this standard is adequate to provide agents with the flexibility they need? If not, please provide specific examples demonstrating why not.

Response:

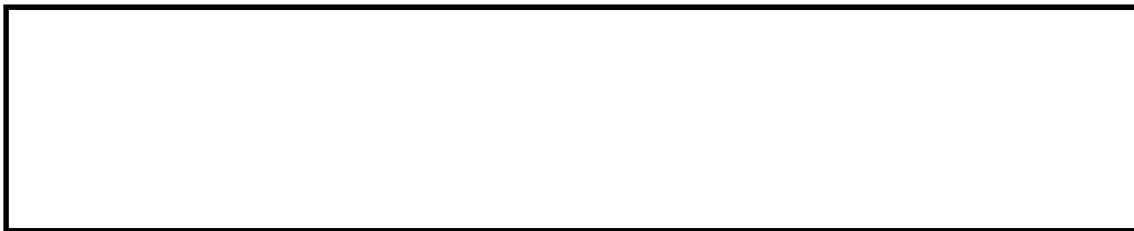
The response to this inquiry is classified and is, therefore, provided separately.



c. Another provision of the bill would make sure that recipients of business records orders under Section 215 of the Patriot Act and recipients of National Security Letters can get meaningful judicial review of the accompanying gag orders. Under the reauthorization package, the recipient would have to prove that any certification by the government that disclosure would harm national security or impair diplomatic relations was made in bad faith. This seems to be a virtually impossible standard to meet. How frequently would you estimate that FBI agents make such certifications in bad faith?

Response:

The bad-faith standard to which this question refers, contained in the USA PATRIOT Improvement and Reauthorization Act of 2005 (hereinafter the "Reauthorization Act"), applies in the very limited context of a petition challenging the nondisclosure provision of a national security letter or a FISA business records order in which there has been a certification by the AG, the DAG, an Assistant AG, or the FBI Director that disclosure of the letter or the business records order may endanger the national security of the United States or interfere with diplomatic relations. We do not expect that any such certifications will be executed in bad faith. We should note, however, that under the statutory scheme contained in the Reauthorization Act, if the government invokes any other reason for nondisclosure (i.e., interference with a criminal, counterterrorism, or counterintelligence investigation or danger to the life or physical safety of any person), even if such a certification is made to that effect by one of the officials enumerated above, or if the certification is made by an official other those enumerated above, then the nondisclosure provision can be set aside if the district court finds there is no reason to believe such damage will occur. Accordingly, the bad-faith standard to which the question refers will be applicable only in a very narrow subset of all cases in which nondisclosure provisions in NSLs or business records orders are challenged. We note that there have only been two such challenges in the history of the NSL statutes (there has been no challenge to a FISA business records order), and none since the USA PATRIOT Act was reauthorized. In one of the two challenges, after the enactment of the Reauthorization Act, the government did not certify that its disclosure would cause harm and the NSL was, in fact, disclosed. Outside the Scope





116. Among the more disturbing aspects of everything the Inspector General has presented today in his written testimony are his reports of FBI intelligence violations, specifically: FBI agents intercepting communications outside the scope of FISA orders; FBI agents continuing investigative activities after the authority for the investigation expired; and third parties providing information that was not part of a national security letter request. In light of these findings, please explain the following.

a. Were any of these activities that the OIG defines as violations authorized by you, personally, or any deputy of yours?

Response:

No. As indicated in response to Question 60, above, the errors identified by the OIG were either inadvertent or third-party errors. None were the product of directives to exceed FISA or other investigative authority.

b. Were any of these activities authorized by the President?

Response:

No.

c. Does the use of surveillance outside the scope of FISA orders by the FBI have any connection to the NSA domestic surveillance program the President has described? Is it part of a separate program?

Response:

No, in response to each question. As previously stated, the compliance issues noted by the IG were inadvertent, and not wilful, violations. Outside the Scope





U.S. Department of Justice
Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 30, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed please find responses to questions posed to FBI Director Robert S. Mueller III, following Director Mueller's appearance before the Committee on May 2, 2006. The subject of the Committee's hearing was "Oversight of the Federal Bureau of Investigation." The FBI submitted these responses for clearance on July 10, 2006. We hope this information is helpful to the Committee.

The Office of Management and Budget has advised us that from the perspective of the Administration's program, there is no objection to the submission of these responses. If we may be of additional assistance in connection with this or any other matter, we trust that you will not hesitate to call upon us.

Sincerely,

James H. Clinger
Acting Assistant Attorney General

Enclosure

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

FEDERAL BUREAU OF INVESTIGATION
FOIPA
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