

March 21, 2007

Senator Patrick Leahy, Chairman
Committee of the Judiciary
United States Senate
433 Russell Senate Office Bldg
Washington, DC 20510

Senator Arlen Specter
Committee of the Judiciary
711 Hart Building
Washington, DC 20510

Dear Chairman Leahy and Senator Specter:

The Electronic Privacy Information Center (EPIC) is writing regarding the recent report of the Inspector General on the Federal Bureau of Investigation's (FBI) use of Patriot Act powers, and specifically the use of National Security Letters. We wrote to you last summer regarding the related concern that violations of the Patriot Act had been reported to the Intelligence Oversight Board. We believe that the IG's report together with the documents EPIC obtained under the Freedom of Information Act raise serious questions as to the continuing use of National Security Letter authority.

National Security Letters are an extraordinary search procedure that give the executive branch the power to compel the disclosure of certain records without judicial oversight. In 1978 they were simply exceptions to the Right to Financial Privacy Act, which permitted -- but did not compel -- financial institutions to answer FBI requests.¹ The FBI's ability to compel disclosure with National Security Letters was established in 1986 with access to certain financial² and telephone records.³ In 1994, the FBI gained access to credit agency records⁴ and the financial records of government employees with access to classified information.⁵

In 2001 the Patriot Act significantly expanded this authority in several ways. Letters were no longer limited to those on foreign powers or agents of a foreign power, but simply "relevant to" or "sought for" an investigation to protect against international

¹ P.L. 95-630, §1114, 92 Stat. 3706 (1978).

² P.L. 99-569, §404, 100 Stat. 3197 (1986).

³ P.L. 99-508, §201, 100 Stat. 1867-68 (1986).

⁴ 15 U.S.C. 1681u.

⁵ 50 U.S.C. § 436.

terrorism or espionage.⁶ This includes information on people who were not subject of the investigation. Expanded as well was the number of people who could authorize the letters -- from headquarters officials to the heads of field offices.⁷ These changes dramatically increased the number of National Security Letters being issued from 8,500 in 2000 to 39,000 in 2003, 56,000 in 2004 and 47,000 in 2005.⁸

EPIC Freedom of Information Act (FOIA) requests uncovered evidence of past FBI misuse of Patriot Act powers.⁹ EPIC described these in a previous letter to the Senate Committee on the Judiciary.¹⁰ Documents released to EPIC under the FOIA revealed forty-two cases in 2000-2005 in which the FBI's Office of General Counsel investigated alleged FBI misconduct during intelligence activities and found these matters serious enough to report them to the Intelligence Oversight Board (IOB). In our letter to the Senate Committee on the Judiciary we recommended that Congress hold hearings to assess the allegations of unlawful intelligence activities.

In a letter to The Washington Post, EPIC again raised the issue that the administration has not been forthcoming about the extent of problems with the Patriot Act.¹¹ Our evidence suggested that several hundred cases of violations of individual rights occurred since the passage of the Patriot Act. There again we recommended better oversight because the administration had not been forthcoming about problems with the Patriot Act

On Friday March 9th, the Department of Justice Office of the Inspector General (OIG) released a report describing misuse of Patriot Act powers.¹² The report's finding of inaccurate FBI recordkeeping calls into question FBI accounting to Congress on National Security Letters.¹³ The OIG's review of 77 case files found that there were 17% more National Security Letters issued than were present in the database from which the FBI

⁶ P.L. 107-56, §505, 115 Stat. 365-66 (2001).

⁷ *Id.*

⁸ Associated Press, *Information About FBI Use of National Security Letters*, DESERET MORNING NEWS, March 10, 2007, available at <http://www.deseretmorningnews.com/dn/view/0,1249,660202141,00.html>.

⁹ Patriot Act FOIA, (2006) <http://www.epic.org/privacy/terrorism/usapatriot/foia/>.

¹⁰ Letter from Electronic Privacy Information Center to the United States Senate Committee on the Judiciary (June 16, 2006), available at http://www.epic.org/privacy/surveillance/sen_iob_letter.pdf.

¹¹ Letter from the Electronic Privacy Information Center to the Washington Post, (Nov 16, 2005), available at http://www.washingtonpost.com/wp-dyn/content/article/2005/11/15/AR2005111501528_pf.html.

¹² OFFICE OF THE INSPECTOR GENERAL, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), available at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>.

¹³ *Id.* at xvi.

reports to Congress.¹⁴ The OIG reported that 4,600 National Security Letter requests were not reported to Congress due to the delays in FBI data entry.¹⁵

The report of the Inspector General also described possible violations of provisions designed to protect individual rights. The OIG report found 26 possible violations that were known to the FBI.¹⁶ In finding unreported Intelligence Oversight Board violations, the report only looked at a 293 National Security Letters.¹⁷ During 2003 to 2005, the FBI issued over 140,000 such letters.¹⁸ The extent of misuse is likely much greater than this report finds.

The Attorney General is required to "fully inform" intelligence committees of NSL requests made under 12 USC § 3414, the Right to Financial Privacy Act.¹⁹ The Attorney General must also "fully inform" relevant committees of requests made under 15 USC § 1681u, the Fair Credit Reporting Act.²⁰ The director of the FBI is required to "fully inform" Congress of "all requests" made under 18 USC § 2709(b), the Electronic Communications Privacy Act.²¹

These recent development are particularly troubling in light of the fact that the Attorney General told Congress during the oversight hearings on Patriot Act reauthorization that he was not aware that violations of law had occurred.²²

EPIC documents and the OIG report show that the FBI exceeded its authority to issue National Security Letters and has not been forthcoming with information on the use of these powers. In light of the recent revelations, we believe that section 505, which established the enhanced National Security Letter authority, should be repealed.

Sincerely,

Marc Rotenberg
EPIC Executive Director

¹⁴ *Id.* at 32.

¹⁵ *Id.* at 33.

¹⁶ *Id.* at xxix.

¹⁷ *Id.* at xxxi.

¹⁸ *Id.* at xviii.

¹⁹ 12 U.S.C. § 3414(a)(5)(c).

²⁰ 15 U.S.C. § 1681u(h).

²¹ 18 U.S.C. § 2709(c).

²² *See Oversight of the USA PATRIOT Act: Hearings Before the Committee on the Judiciary United States Senate, 109th Cong. 17 (2005), available at <http://www.access.gpo.gov/congress/senate/pdf/109hrg/24293.pdf> (Statement of Attorney General Gonzales that "I'm not aware of any documented case of abuse").*

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