

June 16, 2006

Arlen Specter, Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Senator Patrick Leahy
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter, Senator Leahy and Members of the Senate Judiciary Committee:

The Electronic Privacy Information Center (EPIC) is writing to draw your attention to documents we recently received from the Federal Bureau of Investigation under the Freedom of Information Act. The FBI released these documents in response to EPIC's request for records concerning the Bureau's use of PATRIOT Act powers subject to sunset in 2005.

Last year, using documents released pursuant to the same request, EPIC uncovered account accounts of apparent intelligence violations.¹ In response to these apparent violations, the Department of Justice Inspector General has examined the FBI's procedures for reporting possible agent misconduct.² The findings were relayed in a semiannual report to Congress about civil rights or civil liberties complaints made against Justice Department employees.³

According to the Inspector General, the FBI reported more than one hundred instances of possible intelligence misconduct to the Intelligence Oversight Board (IOB) in the past two years. The report says a number of these matters were "significant," including one instance in which the FBI collected the full content of 181 phone calls instead of just billing and toll records.⁴ The Inspector General also found that possible violations of the Foreign Intelligence Surveillance Act accounted for nearly 70 percent of reports to the board in 2005, up from 48 percent in 2004.⁵

¹ Letter from Electronic Privacy Information Center to the United States Senate Committee on the Judiciary (Oct. 24, 2005) (on file with Electronic Privacy Information Center).

² *DOJ Inspector General Reports on Possible Intelligence Violations*, 13 EPIC ALERT [5] (Mar. 10, 2006), http://www.epic.org/alert/EPIC_Alert_13.05.html.

³ U.S. DEPT. OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, REPORT TO CONGRESS ON THE IMPLEMENTATION OF SECTION 1001 OF THE PATRIOT ACT (March 8, 2006).

⁴ *Id.* at 25.

⁵ *Id.* at 29.

The documents most recently released to EPIC under the Freedom of Information Act reveal 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). For example, one report indicated that FISA disclosure provisions had been violated when a grand jury subpoena contained FISA-derived information without approval from the Attorney General. In another instance, an electronic communication was intercepted without authorization because of an error made by an Internet Service Provider. One report stated that pen register and toll information was recorded inadvertently after a subject changed telephone numbers. Another report cited inadvertent recording of wrong subjects' cell phones. Some records indicated that surveillance had continued past the authorized period.⁶ These examples demonstrate continuing potential violations during intelligence investigations, which require remedies and measure to prevent future violations.

Under Executive Order 12863, inspectors general and general counsel throughout the intelligence community must report to the IOB "intelligence activities that they have reason to believe may be unlawful or contrary to Executive order or Presidential Directive." The IOB, in turn, reports such activities to the President and Attorney General. The documents obtained by EPIC raise the troubling possibility that numerous allegations of unlawful investigations are reported from various agencies to the IOB each year. Yet there is no requirement that Congress is notified of these allegations or how these matters are ultimately resolved.

These facts suggest a need for legislation that would require the Attorney General to report to the Judiciary Committees on matters forwarded to him by the IOB, as well as the Justice Department's response, if any, to intelligence activities that have been found unlawful or contrary to Executive order or Presidential directive.

We believe there is particular urgency for the Committee to pursue this matter. Over the last several years, the FBI has been granted significantly expanded authority to undertake intelligence investigations in the United States. As FBI Director Robert Mueller stated in March 17, 2004 testimony before the House Appropriations Committee on FBI's Fiscal Year 2005 Budget Request:

Today, our mission has changed dramatically and our budget reflects this change. ... Approximately 44 percent of the funding is allocated to counterterrorism and counterintelligence—or about \$2.2 billion and 12,446 positions. Compared to FY 2001, this represents more than double the amount of funding and equates to an 80 percent increase in the number of people devoted to the counterterrorism and counterintelligence missions.⁷

⁶ The decision by the Department of Justice to redact the latter half of the case numbers has made it more difficult to interpret the significance of these documents.

⁷ Robert S. Mueller, III, Director of the Federal Bureau of Investigation, Statement before the House Committee on Appropriations Subcommittee on the Departments of Commerce, Justice, and State, the

One of the practical consequences of the FBI's expanded intelligence role has been the dramatic increase in the use of the secretive Foreign Intelligence Surveillance Act (FISA) to conduct searches in the United States. That law was originally enacted to address the specific problem of Soviet agents operating within the United States. However, the 2005 Foreign Intelligence Surveillance Act Annual Report, the government made 2,074 applications to the Foreign Intelligence Surveillance Court in 2005 for approval to conduct physical or electronic searches.⁸ Two of the applications were withdrawn before the court decided whether to approve them, though one of these applications was later resubmitted and approved by the court. Though the court did not deny any of the applications, it did modify 61 applications before approving them.⁹

The number of secret surveillance applications approved is a marked increase over 2004's total of 1,758, which itself had been more than in any previous year.¹⁰ The years 2003-2005 are the only ones since FISA's 1978 passage that more secret surveillance applications were granted than federal wiretap warrants, which are issued only under a more stringent legal standard.

For the first time, this year's annual report included information about the government's requests for access to business records and issuance of national security letters.¹¹ The report stated that the government issued 9,254 national security letters for information about 3,501 United States persons in 2005.¹² The Justice Department also reported that it made 155 applications for access to business records and production of tangible things in 2005, all of which were approved by the court.

The limited means of oversight for FISA surveillance and searches based on national security letter authority conflict sharply with the traditional Fourth Amendment standards that guide the conduct of government when it conducts surveillance under the federal wiretap act and searches with judicially approved warrant applications. The opportunities for abuse as well as the likelihood that significant law enforcement resources are directed toward investigations of little benefit are substantial. News reports indicate that unprecedented surveillance of the communications of American citizens, without any judicial review, has already occurred.¹³ In such circumstances, Congress has

Judiciary, and Related Agencies (March 17, 2004), *available at* <http://www.fbi.gov/congress/congress04/mueller031704.htm>.

⁸ 2005 U.S. DEP'T. OF JUSTICE OFFICE OF LEGISLATIVE AFFAIRS OFFICE OF THE ASSISTANT ATT'Y GEN. FOREIGN INTELLIGENCE SURVEILLANCE ACT ANNUAL REPORT, *available at* <http://www.fas.org/irp/agency/doj/fisa/2005rept.html>.

⁹ *Id.*

¹⁰ *Secret Surveillance at an All-Time High*, 13 EPIC ALERT [9] (May 5, 2006), http://www.epic.org/alert/EPIC_Alert_13.09.html.

¹¹ *Id.*

¹² 2005 Foreign Intelligence Surveillance Act Annual Report, *supra*.

¹³ *See, e.g.,* James Risen and Eric Lichtblau, *Spying Program Snared U.S. Calls*, N.Y. TIMES, Dec. 21, 2005, at A1; Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls; 3 Telecoms Help Government Collect Billions of Domestic Records*, USA TODAY, May 11, 2006, at 1A.

a heightened oversight interest in ensuring compliance with legal authority and investigating allegations of potential abuse.

The PATRIOT Act significantly expanded the FBI's authority to make use of secret surveillance, including in circumstances where part of the investigation is unrelated to an intelligence investigation. EPIC is concerned that the Intelligence Oversight Board is not fulfilling its mandate. We ask that your Committee hold hearings to assess the significance of the allegations of unlawful intelligence activity reported by the FBI General Counsel to the Intelligence Oversight Board, and to ensure that appropriate remedial actions are taken when the Attorney General is apprised of unlawful intelligence activities.

Sincerely,

Marc Rotenberg
EPIC Executive Director

Courtney Barclay
EPIC IPIOP Clerk

Jay Goodman Tamboli
EPIC IPIOP Clerk