



October 24, 2005

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Arlen Specter, Chairman  
Committee on the Judiciary  
United States Senate  
224 Dirksen Senate Office Building  
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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 (enclosed). 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 this year.

The documents reveal thirteen cases in 2002-2004 in which the FBI's Office of General Counsel investigated alleged FBI misconduct during intelligence activities, and reported these matters to the Intelligence Oversight Board (IOB). It appears from the case numbers assigned to each matter that the FBI reported to the IOB at least 153 instances of alleged misconduct occurring in 2003 alone.

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 hundreds of 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 the 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 12,466 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.

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 2003 FISA Annual Report revealed that the Foreign Intelligence Surveillance Court had granted 1,724 applications for secret surveillance. That made 2003 the first year ever that more FISA warrants were granted than federal wiretap warrants, which are issued only under a more stringent legal standard.

During the oversight hearings on the PATRIOT Act, representatives of the Department of Justice repeatedly stated that there had been no abuses of PATRIOT Act authority.<sup>1</sup> The Department also noted that its inspector general had received no complaints of civil liberties violations alleging employee misconduct related to the PATRIOT Act aside from the Brandon Mayfield matter.

The documents released by the FBI to EPIC, however, suggest that there may be at least thirteen instances of unlawful intelligence investigations that were never disclosed to Congress.

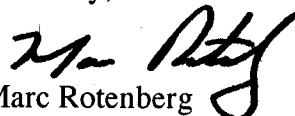
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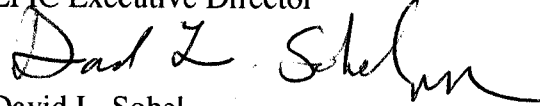
<sup>1</sup> For example, Attorney General Alberto Gonzales testified on April 27 that “[t]here has not been one verified case of civil liberties abuse” arising from PATRIOT Act authority. FBI Director Robert Mueller agreed: “I as well am unaware of any substantiated allegation that the government has abused its authority under the PATRIOT Act.” *USA PATRIOT Act of 2001: Hearing Before the Senate Select Comm. on Intelligence*, 109th Cong. (Federal News Service 2005) (testimony of Alberto Gonzales, Attorney General, and Robert Mueller, FBI Director). Deputy Attorney General James B. Comey also testified on May 11, “I don’t believe there have been abuses of the PATRIOT Act.” *The USA PATRIOT Act and Foreign Intelligence Surveillance Act: Hearing Before the House Select Comm. on Intelligence*, 109th Cong. (Federal News Service 2005) (testimony of James B. Comey, Deputy Attorney General).

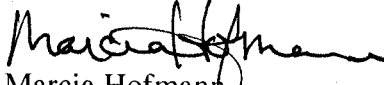
The PATRIOT Act, which will soon be considered by Senate and House conferees, significantly expanded the FBI's authority to make use of secret surveillance, including in circumstances where part of the investigation is unrelated to an intelligence investigation. The conferees should assess the significance of the allegations of unlawful intelligence activity reported by the FBI General Counsel to the Intelligence Oversight Board before action on PATRIOT Act renewal is resolved.

We ask that your Committee hold hearings to investigate this matter further to ensure that appropriate remedial actions are taken when the Attorney General is apprised of unlawful intelligence activities.

Sincerely,

  
Marc Rotenberg  
EPIC Executive Director

  
David L. Sobel  
EPIC General Counsel

  
Marcia Hofmann  
EPIC Staff Counsel

enclosures