



National Security Law Report

*Editor's Note: This issue opens with an essay from former Senator **Sam Nunn**, currently co-chairman of the Nuclear Threat Initiative, concerning the nuclear threat and the path ahead for national and global security. Following that, we present the transcript of a recent event hosted by the Standing Committee addressing issues associated with the FBI's use of national security letters. Participants in the event include Suzanne Spaulding (Principal, Bingham Consulting Group), Valerie Caproni (General Counsel, FBI), Andrew McCarthy (Senior Fellow, Foundation for the Defense of Democracies), Jeffrey H. Smith (Partner, Arnold & Porter), Michael Vatis (Partner, Steptoe & Johnson), and Spike Bowman (then Senior Research Fellow, Center for Technology and National Security Policy, National Defense University).*

The Nuclear Proliferation Threat

Sam Nunn

I have spent a large portion of my life attempting to communicate in clear and understandable words, so I have developed a keen appreciation for those who can capture a complicated subject with a succinct phrase. One of my favorites: When asked to give a definition of foreign policy, Dean Acheson replied, "It's one damn thing after another." Today, in the national security arena, we not only have one damn thing after another, we have one damn *change* after another – some of them big and sweeping.

The greatest dangers we faced during the Cold War were addressed primarily by *confrontation* with Moscow. The greatest threats we face today — catastrophic terrorism, a rise in the number of nuclear weapons states, increasing danger of mistaken, accidental or unauthorized nuclear launch – we can successfully address only in *cooperation* with Moscow and many other capitals.

These changes have come in the last 15 years, and have left us with serious security gaps – not because the new threats cannot be countered, but because they have changed quickly, and our responses are changing slowly.

The Greatest Danger

In my view, the threat of terrorism with nuclear weapons and other weapons of mass destruction presents the gravest danger to our nation and the world.

- We know that al Qaeda is seeking nuclear weapons. We don't know how many other groups may also have similar ambitions.
- We know that nuclear material al Qaeda desires is housed in many poorly secured sites around the globe.
- We believe that if they get that material, they can build a nuclear weapon.
- We believe that if they build a nuclear weapon, they will use it.

Continued on next page

I am not sure we fully grasp the devastating, world-changing impact of a nuclear attack. If a 10-kiloton nuclear device goes off in mid-town Manhattan on a typical work day, it could kill more than half a million people. Ten kilotons, a plausible yield for a crude terrorist bomb, has the power of 10,000 tons of TNT. To haul that volume of explosives, you would need a cargo train one hundred cars long. But if it were a nuclear bomb, it could fit into the back of a truck. Beyond the immediate deaths and the lives that would be shortened by radioactive fallout—the casualty list would also include an erosion of civil liberties, privacy and the world economy.

So American citizens have every reason to ask, “Are we doing all we can to prevent a nuclear attack?” The simple answer is “no, we are not.”

The Race Between Cooperation and Catastrophe

Increasingly, we are being warned that an act of nuclear terrorism is inevitable. I am not willing to concede that point. But I do believe that unless we greatly elevate our efforts and the speed of our response, we could face disaster.

We are in a race between cooperation and catastrophe, and the threat is outrunning our response.

In his last year in office, when President Reagan was asked what he believed was the most important need in international relations, he talked of the need to cooperate against a common threat. He said: “What if all of us discovered that we were threatened by a power from outer space—from another planet. Wouldn’t we come together to fight that particular threat?”

I submit that when weapons of mass destruction are at the fingertips of individuals and groups who are eager to use them to inflict massive damage to mankind, President Reagan’s question “wouldn’t we come together to fight that threat?” should be

front and center for the United States, for Russia, and for the world.

Nuclear Tipping Point

We’re clearly at a tipping point with regard to the both the proliferation of nuclear weapons and the production of weapons-usable nuclear material. Terrorists are seeking nuclear materials and weapons as the list of potential suppliers expands.

Mindful of the rising threat of nuclear weapons, and troubled by the poor results of current policy in reducing the threat, George Shultz, Bill Perry, Henry Kissinger and I published an article this past January in the Wall Street Journal about how to pull back from this tipping point.

Titled “A World Free of Nuclear Weapons,” the op-ed called for the United States to “lead the world to a solid consensus for reversing the reliance on nuclear weapons globally.” This leadership and this consensus, we wrote, would be “a vital contribution to preventing the proliferation [of nuclear weapons] into potentially dangerous hands and ultimately ending them as a threat to the world.”

THE ABA NATIONAL SECURITY LAW REPORT

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We made the point that the old form of Cold War deterrence is obsolete. Today, “non-state terrorists groups are conceptually outside the bounds of a deterrent strategy” and even among states—“unless urgent new actions are taken,” the U.S. will find itself in a nuclear era “more precarious, psychologically disorienting, and economically even more costly than was Cold War deterrence.”

At the same time, we’re conscious that the quest for a non-nuclear world is fraught with practical challenges. As *The Economist* magazine has said: “By simply demanding [the goal of a world without nuclear weapons] without a readiness to tackle the practical problems raised by it ensures that it will never happen.”

The four of us, plus many other former security and foreign policy officials, have taken aim at the “practical problems” by laying out a series of steps that we believe constitute the “urgent new actions” that will lay the groundwork for building a world free of the nuclear threat. These steps would include:

- Changing the Cold War posture of deployed nuclear weapons to increase warning time and thereby reduce the danger of an accidental or unauthorized use of a nuclear weapon.
- Continuing to reduce substantially the size of nuclear forces in all states that possess them.
- Eliminating short-range nuclear weapons designed to be forward-deployed.
- Initiating a bipartisan process with the Senate, including understandings to increase confidence and provide for periodic review, to achieve ratification of the Comprehensive Test Ban Treaty, taking advantage of recent technical advances, and working to secure ratification by other key states.
- Providing the highest possible standards of security for all stocks of weapons, weapons-usable plutonium, and highly enriched uranium everywhere in the world.

- Getting control of the uranium enrichment process, combined with the guarantee that uranium for nuclear power reactors could be obtained at a reasonable price, first from the Nuclear Suppliers Group and then from the International Atomic Energy Agency (IAEA) or other controlled international reserves. It will also be necessary to deal with proliferation issues presented by spent fuel from reactors producing electricity.
- Halting the production of fissile material for weapons globally; phasing out the use of highly enriched uranium in civil commerce and removing weapons-usable uranium from research facilities around the world and rendering the materials safe.
- Redoubling our efforts to resolve regional confrontations and conflicts that give rise to new nuclear powers.

Certainly, each of the steps we outlined would enhance the security of the United States. But each of the steps must be taken in cooperation with other nations. None of them can be taken alone.

Cooperating Against Common Threats

I believe that preventing the spread and use of nuclear and other weapons of mass destruction should be the central organizing security principle for the 21st century.

What would this mean? We have a clear lesson from the 20th century. Addressing the threat of communism in the 1952 State of the Union message, President Truman said: “The United States and the whole free world are passing through a period of grave danger. Every action you take here in Congress, and every action that I take as President, must be measured against the test of whether it helps to meet that danger.”

In our efforts to fight against the spread of communism, protect the free world and deter World War III, this was the standard that governed our nation during the Truman administration and the Republican and Democratic administrations that followed.

Every diplomatic mission, every international alliance, and every national security initiative was guided with that goal in mind.

We have seen what it looks like when world leaders unite, when they listen to each other, when they cooperate against common threats. It is my hope that we will soon employ this model of international teamwork in reducing nuclear dangers around the world.

The United States and its partners must be as focused on fighting the nuclear threat in this century as we were in fighting the communist threat in the last century. We must do it now.

Sam Nunn represented the State of Georgia in the United States Senate from 1972 until 1997. He now serves as co-chairman and chief executive officer of the Nuclear Threat Initiative.

**ABA Standing Committee Special Program:
Responding to the Department of Justice
Inspector General's Report on the Use of
National Security Letters**

Moderator: Suzanne Spaulding, Principal,
Bingham Consulting Group

Panelists: Valerie Caproni, General Counsel,
FBI

Andrew McCarthy, Senior Fellow, Foundation
for the Defense of Democracies

Jeffrey H. Smith, Partner, Arnold & Porter and
former General Counsel, CIA

Michael Vatis, Partner, Steptoe & Johnson and
former Associate Deputy Attorney General

Spike Bowman, Senior Research Fellow, Center
for Technology & National Security Policy, NDU

Suzanne Spaulding: I thought what I would do tonight is start with a very brief primer on National Security Letters for those of you who might have forgotten what you have known about them over the years. National Security Letters have an older

antecedent, but National Security Letters per se really originated in 1986 when Congress enacted legislation as an exception to the Right to Financial Privacy Act and then as an exception in the Electronic Communications Privacy Act, to permit senior FBI officials to issue a signed letter requesting access to certain specified financial records and communication records on customers from telecommunications providers, and also ISPs and the like. Those National Security Letters were issued based on specific and articulable facts giving reason to believe that the customer or entity whose records are sought is a foreign power or an agent of a foreign power.

About 10 years later, in the mid 90's, Congress added additional statutory authority to issue National Security Letters for investigations of government employees related to leaks of classified information, and for access to credit agency records pursuant to the Fair Credit Reporting Act. That was primarily to be able to more effectively use the Right to Financial Privacy Act authority which allowed you to get some bank account information. The challenge was figuring out which banks to go to; which banks did this target have accounts at? So the authority to go to the credit agencies was to find out which financial institutions might have records about this target. The Patriot Act then made changes to the National Security Letters. It significantly broadened the FBI's authority to use NSLs by both lowering the threshold standard for issuing them and expanding the number of FBI officials who could sign the letters. The Patriot Act eliminated the requirement that the information sought pertained to a foreign power or an agent of a foreign power and instead required a lower threshold standard that the information requested be relevant to or sought for an investigation to protect against international terrorism or espionage. The Patriot Act had a number of significant impacts but most significant perhaps is that the information sought did not have to be about a person who was a target of an investigation—it could be about persons other than the actual subjects of those investigations, so long as it was relevant to an investigation. And it also authorized all 56 Special

Agents in Charge to issue these National Security Letters. The Patriot Act also added a new National Security Letter provision—new statutory authority to issue the National Security Letters that applied not just to the FBI but to any government agency that was investigating or analyzing international terrorism. All could now issue, under this authority, their own National Security Letters, and they could obtain full credit reports, not just the names of the financial institutions where an individual might have accounts but anything that a credit agency had on a particular person. The Patriot Act re-authorization put some limits on the National Security Letters, primarily with respect to the ability to consult with an attorney, as well as other provisions which maybe Spike will explain to us in greater detail.

It also asks the Inspector General to review the use of this authority and report back to Congress. And that is what brings us to this evening—the Inspector General filed a report on March 9, 2007. (Incidentally, the same day the Inspector General released a report on the use of Section 215--which did not get nearly as much press attention—but did not find any abuses of that authority and actually made some interesting findings about how it has been used and maybe we will have a chance to get into some of that). What the Inspector General found is that, after the Patriot Act, the FBI's use of National Security Letters increased dramatically—in 2000 the FBI issued approximately 8500 National Security Letter requests, approximately 39,000 in 2003, 56,000 in 2004, and approximately 47,000 in 2005. The Inspector General reported that in total during the 3-year period covered by his review the FBI issued more than 143,000 National Security Letter requests; and in fact what the Inspector General says is that there is a good chance that this even understates the number of National Security Letter requests because the FBI database used to track these requests is inaccurate and does not include all National Security Letter requests. The Inspector General found numerous instances of not following precisely the procedures laid down for the use of National Security Letters; he did not find any indication that any of these were intentional, or designed to get around the limits on National

Security Letters or to get information that they could not otherwise get access to, but rather that these were largely a result of sloppiness or misunderstandings or of failure to follow procedures. But they did find problems in approximately 60 percent of the investigative files that they looked at. The Inspector General estimates that there may be as many as 3,000 violations not identified or reported—violations of the procedures for issuing National Security Letters.

Another area that got a lot of attention that the Inspector General focused on and found many problems was the issuance of “exigent circumstance” National Security Letters. These were issued in emergency circumstances where they would go to the holder of records, most of the time with a written letter but sometimes without, and they would indicate that there were going to be subpoenas or that they had filed for subpoenas to follow this up. But the subpoenas were never forthcoming. Also, these emergency petitions were filed under circumstances that were not necessarily emergencies and they were issued by folks who were not authorized to issue National Security Letters. So this in a nutshell is a brief description of the I.G.'s report, but out of fairness I am going to ask the panelists to talk with us about what they think are the most significant aspects of the Inspector General's report, or perhaps the most overlooked aspects of the Inspector general's report.

Andrew, let's start with you.

Andrew McCarthy: First, let me say thank you for inviting me here this evening. It is a pleasure to be here.

I was struck (reading not only parts of the report, but also the Director's testimony) by the small number of targets that we are actually talking about here. Suzanne mentioned a couple of hundred thousand requests. But those letters, I understand from the Director's testimony, concern about 20,000 targets, which if you do the math is less than 1/10th of 1 percent of the people of the US. We are not talking about an enormous pool of people,

then, and furthermore we are really not talking about the types of records that Americans should be shook up about the government accessing and even warehousing.

For the most part and perhaps even exclusively we are talking about third-party records, which the supreme court has long held do not implicate Fourth Amendment concerns, and which frankly are much easier to obtain, and are obtained with much less scrutiny, in the criminal justice process than by the national security division. When a prosecutor—and I was one for almost 20 years—wants these types of records, he simply writes a grand jury subpoena and hands it to an FBI agent. The court does not necessarily ever see it—sometimes there is sloppiness about whether the grand jury ever actually sees it and a lot of times the records sit for long periods of time really not scrutinized closely enough. I would say, having seen how things work in both systems, that there is much more exactitude on the national security side of things than on the normal criminal justice side of things. Nevertheless, one of the effects of 9/11—unfortunately I think—has been to force a reconsideration of a lot of these tools that are vital to investigators and which actually have been on the books and pretty well-settled, sometimes in excess of 30 years. So I do think that in a lot of ways the alarmist value of this controversy far outstrips the substance of it.

What I don't think has happened, and think needs to happen, is the Bureau needs to go out and explain in a way that is meaningful to people (and I know many people here are working hard to do that) how small the substance of what we are talking about is. But I also think we need to do a better job of explaining why it is we need National Security Letters in the first place. Most of the information we are talking about here can be obtained by other means, and they are means generally speaking that make people more comfortable because they involve some safety valves I guess. If you have to pursue things by, for example, a § 215 order under the Patriot Act, there is involvement of the Justice Department with that and it has to go to a court. Administrative subpoenas

are different from National Security Letters—I'd say a step up from National Security Letters, because they are really like court process. They can be enforced more easily than a National Security Letter, and at least they give people a sense that somebody other than the FBI is eyeballing this stuff before people's records are obtained.

I think having those checks, or explaining why they are not necessary, is important because people need to get a comfort level about this, as the FBI really has to be our domestic national security agency. It long has been, of course, but you get these proposals floated quite often now that we need an MI5 type outfit rather than what we have. A lot of us who have been in this business think that would be a real mistake. One question I think the folks pushing the MI5 idea never answer, or at least never answer satisfactorily, is what would be the downside effect of decoupling what you have in the FBI, which is the law enforcement mechanism married up with the intelligence mechanism, which I think works better than the British system. But for the FBI to be the kind of flourishing national security domestic agency that it needs to be, we have to be able to get this information, because the only safety from terrorism is being able to actually do things like that and figure out patterns, and figure out who the terrorists are. When you have probable cause that means we already know somebody is dangerous. The biggest challenge we face in our threat mosaic is figuring out the unknown terrorist. The FBI can do that better than anyone else. But they have to be able to give people a comfort level that they can have access to this information.

Spike Bowman: I think Andrew has hit some of the really major points here. On the I.G.'s report there are two things on which I'd like to comment. There are a lot of things I could say about it, actually, but I am going to limit myself to two at this point. The first is that where the report says that the Patriot Act broadened and deepened the scope of the authority and power of the FBI with NSL's: what he failed to mention, as Andrew just pointed out, is that it is basically the same authority and the same standard that the criminal side has had for

decades (relevant to an authorized investigation). We had asked for that matching authority for several years because the standard before the Patriot Act was a hard one. It was not that a person is or may be a foreign agent, but that a person is a foreign agent, which is a higher standard than the electronic surveillance standard. So when the Patriot Act came along, they simply changed the standard to the same one that the criminal process has used for decades. I think that the I.G. report disserves the public by not pointing out what happened.

In the second place, I think the I.G.'s report disserves the public by not really explaining what the intrusiveness of a National Security Letter is. As Andrew pointed out, this is information that is not constitutionally protected. There are three types of NSL's that the FBI uses. The most intrusive one is the one that Suzanne mentioned that allows you to get a credit report so you can see what banking institutions a person uses. The next most intrusive is the credit card transaction, or banking transaction, and the third one is the telephone records, which by Supreme Court case law have no constitutional protection whatsoever. Now, what the I.G. doesn't mention is that the one that is the most intrusive is the one used the least, and that the one that is the least intrusive is the one used the most. I think this is a real disservice by not completing that picture. Which is not to say that this is much ado about nothing, but I am saying that

this is much ado about a lot less than what the IG report seems to paint on its face.

And the final thing I will mention—something the FBI has been saying for many years, and I am sure Valerie will repeat it here in a minute—is that the FBI will be happy to trade in the National Security Letter authority for administrative subpoena authority. The FBI has asked for that from Congress for years and Congress has deliberately said no, we are going to keep you to the National Security Letters. This is a process that stems from the 1970's and the Church Committee Hearings, when it was decided by Congress to allow the secrecy of intelligence investigations to be preserved, but, in return, they would deliberately put stumbling blocks in the way getting information that is more easily obtained if you are on a criminal investigation. So the NSL is sort of a hold over from that thought process going back into the 1970's. I think there are many ways to approach the issues that are raised in the IG report, and I suspect that we will talk about all of them in passing tonight, but I think I am going to limit myself to that right now and let Valerie who has been on the hot seat here for the last week to give her thoughts.

Valerie Caproni: Good evening everybody. The question was: What was the most important thing about the report and, maybe, what has not gotten a lot of attention. I would say I do not disagree with

Continued on page 8

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what Spike and Andrew have said in large measure, though I would note that the argument that the Bureau should be explaining why this isn't such a big deal is not actually a good strategy, because in fact it is perceived very much as a big deal, largely because when we were fighting with Congress over extending the Patriot Act, we argued that they didn't really need to worry about the National Security Letters and the standards that were set, because we have lots of controls in place and this was not a tool that could be abused. And what the IG report showed was that our controls were not that strong and we did not have a vigorous compliance program; we had substantial failures of internal controls that were not caught by our own internal processes.

From my perspective this report was a rude awakening. It was a rude awakening because working in the Bureau, I work with men and women everyday who really do strive to do the right thing—they are very rules-oriented, it is a very rules-oriented culture. People really do try to do the right thing. But what this showed me is that as much as they want to do the right thing, you still have to have a compliance program in place to make sure you are setting the right policies, giving the right training, and you are auditing as appropriate to guard against risks. I too was an assistant US attorney for many, many years, and I have said the same thing that Spike and Andrew have said many times, which is, that the controls that we have in place on National Security Letters are extraordinary compared to the controls that are in place with grand jury subpoenas.

As a brand new AUSA, wet-behind-the-ears, I used grand jury subpoenas to get lots and lots of telephone records, all the time, and there were no controls in place. Now, that does not excuse anything. But the difference I think, and it is a significant difference between the criminal justice structure and the national security structure, is that the criminal structure is set up as a fairly transparent system. Ultimately, all of those cases are being worked with the hope and expectation that the agent is going to put handcuffs on somebody and

that they are going to be charged and there is going to be a defense attorney in the mix and any failures during the course of the criminal investigation are going to be revealed, and the agent is going to have to support and defend the steps that he or she took during the course of that investigation under cross examination. That keeps people on the straight and narrow in terms of what the rules are. On the national security side, in contrast, everything is done in secret, and rightfully so. While some national security cases ultimately become criminal cases, it's by far the minority. So many, many cases are worked and either resolved or closed without ever seeing the light of day. I think that the changed construct—where we took lots and lots of agents who were trained and grew up in the criminal world and moved them over into the national security world where the transparency was gone—really imposed on the Bureau an obligation to put into place compliance structures that we in fact did not put into place.

I can quarrel with lots of things in the IG's report. Suzanne notes that there may be as many as 3,000 unreported errors in use of National Security Letters. I can say, yes, that's right, but also that there are liars, damn liars, and statisticians. I can slice and dice those numbers lots of different ways. Based on what the IG says, you can get to that 3,000 number. But I can also tell you that half of those are third party errors where there was an overproduction. I can also tell you that a lot of those errors are as minor as in the electronic communication that accompanies the NSL and the NSL not matching in all particulars, so it is a technical policy violation, but it is not a violation of anyone's rights. I can tell you that some of those errors involve a memo going from a Special Agent to the Assistant Special Agent in Charge, skipping over the Supervisory Special Agent; well, maybe the supervisor was out of town. So some of the errors identified were that type of error.

Does that suggest some broad-scale violation of American's rights? I don't think so. But the numbers are what the numbers are, and it's kind of hard to quarrel with them. I think that there are

things in the report that we think have been overblown, having sat through HPSCI's hearing yesterday where we were excoriated by the right and the left and everybody in between. There is a lot in the report you can fuss at the FBI about, but I think that the one thing that it really did show us was that we need to do a better job of creating a compliance culture on the national security side, because as we continue to pour more and more agents into national security investigations, there is an awful lot that those agents do on the national security side that risk intrusions into American's civil liberties and privacy interests -- even if NSLs do not particularly do so. So to me this was a wake up call. I agree this is not constitutionally protected information, and to some extent you want to say to everybody, "Stop, it's a phone record for god's sake." But it has been a wake up call, and I think we are going to make a lot of changes in terms of how we operate to answer what is really the root call of this report, even if we do not focus exclusively on National Security Letters.

Michael Vatis: One of the most significant things that I found in the report was that despite the huge increase in the number of NSL's -- and of individual requests for information within each NSL -- there was not a process in place to monitor whether that information was being obtained in accordance with the FBI's rules, or how this information was being used and whether it was being used effectively. When you don't have systems in place to deal with such a huge volume of information, you typically don't know what is being done with the information. This means you can't use it effectively, you can't share it effectively, and you have no audit trails, so you can't determine whether it's been used legally and properly. When the I.G. asked how much of the information derived from NSL's was shared with other agencies—whether other intelligence agencies or state law enforcement—the Bureau essentially could not provide an answer. They could say they had shared information, but they really couldn't tell how much, because there are no records of this. So on the one hand you do have this large amount of information being gathered, including about people who are not suspected

of being terrorists or spies, and on the other hand you have no way of effectively using this information because the systems are not in place to analyze it effectively or share it effectively. You end up with this strange dichotomy of an unintentional abuse of power that is also an ineffective use of the authority given to the agency.

The thing that is not said in the report at all, I think, is that this sort of situation was inevitable when Congress passed the Patriot Act, when it lowered the threshold for an NSL. Because when you change the standard from one that requires a reason to believe that the person is an agent of a foreign power merely to one that requires merely "relevance" to an investigation, you are going to get overbroad demands for information. The government will get information that really is not all that helpful; and then the information just sits there because the agency can't deal with the volumes of information it has been getting. Yet, I don't remember the NSL provision being mentioned at all during the very short debate on the Patriot Act. The NSL provision got so little attention that it was not even subject to the sunset mechanism (section 215 and other provisions were subject to a sunset period which required that they be reviewed a few years later to see how they were being implemented and whether any abuses were being committed). It was not until a front page Washington Post article in 2005 that many members of Congress realized how much more information was being gathered through this new authority. So while I do think that this is a very important report and I am very happy now that Congress is finally paying attention to it, the devil's advocate that exists within me is a little bit perturbed that Congress is on such a high horse now, because I think Congress as an institution is partly responsible for the problem by providing this authority and then just basically forgetting about it and not exercising any real oversight for five years.

The last point that I will make is a related one—the civil liberties community also by and large did not pay much attention to NSL's all along. We heard a lot, starting with the Patriot Act and continuing for

Continued on page 10

several years about the so-called library provision, section 215 of the Patriot Act. (As a sidenote, section 215 involves much more than just libraries, and gives the government the authority to get “any tangible things” as part of an intelligence investigation. Ironically, as of 2005, the provision apparently has never been used against a library, probably in part because the real materials you want from a library are internet-access records, and you can get those using NSL’s, without having to go to the FISA court to get a section 215 order). But it struck me that the civil liberties community was barking up the wrong tree when it came to worrisome things in the Patriot Act. Hopefully they have learned a lesson about not just calling attention to things that seem to capture the public’s attention but which really are not as important as other more obscure authorities or government activities. Because the IG report on section 215 that came out the same day as the NSL report shows that section 215 really hasn’t been much of a problem. The violations have been relatively minor. And section 215 orders, judging by the numbers at least, don’t seem to be as important to the government as NSL’s. Maybe section 215 orders are used to get really important information, though it is hard to tell from the IG report. But in terms of the number of orders, they are a side show compared to NSL’s.

Jeff Smith: Thank you Michael and Suzanne. We are happy as always to host here this evening, and this is a very important discussion. My own role in National Security Letters has not been on the law enforcement side, obviously, but on the intelligence side, going back to my time at the Department of State, on the Hill, and at the CIA. Frankly, when I was with State and CIA, the frustration was that we had a hard time getting information that was needed for counter-espionage investigations, and internal counter-intelligence investigations. And in the wake of the Ames case, it was very clear that the FBI did not have adequate authority. Joe’s Used Car Lot could get more information on an American who was applying to purchase a used car than the FBI could get in the case of a real counter-intelligence investigation. So I was pleased, frankly, when Congress expanded the authority to use National

Security Letters. What I found disappointing was the manner in which the FBI used that authority, and I think all my colleagues on the panel expressed surprise as well that the Bureau did not do a better job of managing or using that authority. And I am disappointed for several reasons. One, I believe that it undermines Americans’ confidence in the Bureau. And I think that it is critical that Americans have confidence in the Bureau.

There is, as Valerie said, confidence that when information is collected through grand jury subpoenas, the use of that information will be subject to all of the rules of evidence and constitutional protections and so on. We have no such confidence that there will be subsequent scrutiny of the use of information collected for intelligence purposes, and that is obviously the difference. One could argue that even greater flexibility should be given to the Bureau to collect information for intelligence purposes. There does need to be a great deal of flexibility, but the standards for the initial collection, and the management procedures to authorize the collection need to be of the very highest order and followed scrupulously because at the other end of the process there are not the protections associated with prosecution. And that seems to be the real significance of this report—can we really trust the Bureau to use the authority it has been given?

I think a related question is one that has come up recently about affidavits supporting applications in the FISA court. Again, very disturbing to those of us who are strong supporters of what the Bureau needs to do. I suspect my colleagues share some of those concerns. I also believe that it is interesting that this report was mandated by Congress—that it was not something generated internally, but was a result of congressional persistence. I would have felt a little better, I suppose, if the Bureau had started this on its own. I think this sort of thing, if I were the Director, I would rather discover this on my own rather than being mandated by Congress. As far as what is missing in the report, I agree with what Michael just said. You don’t know from the report how the information was used, what was the value of the information collected. The report talks

a good deal about how the IG was told that various field officers were certain it was of value. I think it would be very interesting to know how valuable it was. Now, I don't think the agents who are unbelievably busy should be going around filing lots of reports on the value of what I did at work today. On the other hand, it would be useful to find some way of knowing what the value was. Certainly in the intelligence business a good deal of effort is spent trying to figure out what the value is of all this stuff that has been collected.

And finally, on the issue of longterm impact—the issue of confidence in the Bureau—I have been one who has argued for some time that we do need a domestic security service separate from the FBI. My own suggestion would be to separate the national security division from the Bureau, but leave it as part of the Department of Justice. I am of the view, and have been for some time, that the inherent conflict between law enforcement and intelligence is so fundamental that putting both in one agency does not really work. It is not unlike having the State Department and the Defense Department in a single department. The functions are so different, the statutory grounding for what they do is so different, that I would like to have them separate. I understand the arguments, particularly that the fact that information gathered may be used in court will prevent abuses. I think that is what Andrew was talking about. It may be that this report sort of cuts against my argument that you can trust the Bureau if you simply give them the attorney general guidelines you don't need the threat or the inherent enforcement—the disciplines we have talked about. . . In any event, I am happy to discuss that. I know I am in the minority, particularly in this group, but I do think it is an important issue that at some point will come to the floor again.

Suzanne Spaulding: Well, and I don't think it is a surprise that some of our speakers have moved to a broader discussion about domestic intelligence. It is certainly something I would like to see Congress do as well, to not just address each of these issues as they come up piecemeal but instead to take a step back and look comprehensively at the challenges of

domestic intelligence collection and craft a coherent legal framework for that new aggressive way of looking at our investigative efforts. And I was struck too at the standard for National Security Letters, that Spike said was brought in line with and is the same as the criminal standard. I have always argued that the criminal standard is actually fundamentally different, to talk in terms of an investigation to protect against international terrorism versus an investigation into criminal activity—and that the former is potentially far broader. And I wonder if that may be partly what accounts for the greater numbers. The numbers of the National Security Letter requests and the dramatic increase since 9/11—there are intuitive, obvious potential reasons for that, and the numbers are potentially meaningless. But I am wondering with this smart group up here whether we can draw any conclusions or detect anything. What can we read into, what can we tell from that increase in numbers? What should we think about that?

Valerie Caproni: I think what I would say is the numbers are very, very difficult to parse given the numbers that have been made public, although we have made public more numbers than have ever been made public before. The report says that the vast majority of National Security Letters are issued under the Electronic Communications Privacy Act (ECPA), so the vast majority are for telephone records. Now remember that within telephone records we have NSL's for both billing records and for subscriber information. I think most people would view subscriber information as fairly innocuous -- information that in the old days was public. When everybody had a land line you could go to a crisscross directory and get subscriber information for telephone numbers, so on Spike's continuum of intrusiveness, I would say that subscriber information is non-intrusive. The numbers beyond that are not in here because they are classified. But as a general matter, the more intrusive the tool gets, the less it is used. In terms of the total numbers to look at, think about the fact that the declassified report shows that we have gotten information on approximately 18,000 people per year. Now, that is not

Continued on page 12

necessarily 18,000 different people, because one person—we could have gotten information on him in 2003, 2004, 2005, so he will show up in each of the bar graphs. And those numbers necessarily and always are going to be a little bit squirrely because they rely on people's names; so John Doe is the same as Johnny Doe is the same as Mr. and Mrs. J. D. Doe. So those numbers are never really precise, so we are talking about approximately 18,000 people.

Well, if you think about just the standard investigation where we need telephone records for just one person, you are going to have at least 3 NSL's in all likelihood, because you are going to want the person's land line, their cell phone number, their office number and maybe a fax number. So, if you take that 17,000 or 18,000 people and you start looking at how many requests a standard investigation would need just to get the basic information on a person—who is he in contact with?—you are talking about a factor of 3 or 4, and if you are doing a financial investigation on him, you are talking about a bank, an American Express card, a Visa Card. And so you start, and if you look at the total number of people and you use those metrics to look at the total number, the total number does not look unreasonable to me. It looks like about what you would expect given the number of people being investigated. In terms of the number of people being investigated, as Andrew said, it's a small percentage of all people in the US. And further, remember that post 9/11 the Director said—and he said it publicly—every terrorism lead will be followed up. And also during that period of time we had the British bombings, we had the Madrid bombings, we had the guys in Canada that got arrested, and I could keep going with the number of threats—there have been huge numbers of threats all of which have to be rundown in terms of their US contacts.

Andrew McCarthy: I just want to answer that briefly. Whenever I get in one of these discussions one of the things, especially in a legal setting, which is where a lot of these panels tend to take place—what gets glossed over I think is something very

fundamental which resonates with ordinary people who are outside the legal system in a way which I think perhaps it doesn't with lawyers groups. And that is the reason that we have all the safeguards that we have in the criminal justice system is because we are talking about depriving people's liberty. That's the fundamental assumption that we are talking about, and all those safeguards are in place because we have a philosophical premise that we operate from which is that we would prefer to see the government lose—we would actually prefer to see a guilty person go free than run an undue risk that an innocent person would have his liberty taken away or have his privacy unduly disturbed. That is as it should be. That is our system. It is the envy of the world and that is why it is the envy of the world. But what we are talking about here is not taking people's liberty away.

What we are talking about here is really not even the reputation of the FBI, although the reputation of the FBI is crucially important. What we are talking about here is the national security of the US. In order to protect it from an enemy that operates in stealth, that doesn't have a territory to conquer or a treasury we can take away and make them disappear, the only defense that we have against them is collecting intelligence: finding out who they are, mapping out their networks and trying to figure out what they are going to hit and not let them hit it. The only way that you can effectively do that is to over-collect. Valerie said before, what's the big deal? You know, this is a big deal and obviously the FBI should treat it as a big deal. It is mainly a big deal to people who are in the privacy lobby, frankly, and people up on the Hill. I think for most Americans—and I don't expect the FBI to say this, but I am going to say it—it's not a big deal. If they get your phone number and they get your subscriber information and they get your calls and that's what they need to do in order to map out information in order to figure out where the threats are, you know, that's not a big deal.

Michael talked about volumes of information being collected on people who have really not done anything wrong. Get on a plane, try to go into a

public building. Every one of you—every one of us—is subjected to a much more intrusive search, and in that sense a much more intrusive challenge to our privacy, than what we are talking about here, which is enabling the agency that we need to be an effective domestic intelligence agency to do the only thing that we can hope is our defense against terrorists, which is to figure out who they are and to try to stop them. What I worry about when I hear discussions like this is we have a fairly fresh history of over-regulation and over-correction where these civil liberties issues come up. And very often they are hypothetical violations and sometimes they are real violations, but they are very minor in the greater scheme of things. Our tendency when putting in compliance programs, which is an admirable thing to do, is to over correct. And over-correction is fine in the criminal justice system because it means that people's liberty is better protected. But those principles don't carry over well into national security because if we over correct and we do not get the information we need, then we are talking about the next 9/11, which could be a lot worse than the last one.

Spike Bowman: I'd like to add one thing to what Valerie said. I think it is really very important to keep in mind that if you are investigating a person you are probably going to end up with quite a few NSL's on that person or ones related to that person. But there is another aspect of this, too, and it is something that is kind of hard to keep in a frame of mind because most people have not lived through it. I was an intelligence officer in the Navy before being sent to law school and within two years of graduating from law school I was thrown back into intelligence by being sent to the National

Security Agency, right after the Church Committee. It was at that point and time that we (the government) wrote a lot of the stuff that is really relevant today in the way of privacy. The Privacy Act had just been written, the Freedom of Information Act had just been written, the Right to Financial Privacy Act was being written as I got there—the Executive Order regulating the Intelligence Community was being rewritten (Executive Order 12333). Procedures for the order were being developed after I got there and we worked on that. But the point of all of this is at that point in history we were, for intelligence purposes, focused on the Cold War; we were focused on spies in the US, we were focused on collecting information on particularized individuals. There is a huge difference I think today when our primary investigative task is to prevent terrorism. You are not focused so much on an individual as you are focused on a threat. So one of the things you have to do is figure out how you focus your efforts where you can defeat the threat. When you are talking about terrorism (unlike espionage) one of the most valuable tools you can get, believe it or not, is a plain old telephone number, because then you can use the capabilities we did not have thirty years ago in link analysis to try and figure out who people are talking to. A lot of the NSL's that are issued help wash out people because we find out they are talking to Domino's or something, and not to some bad guy or network of bad guys. The unfortunate thing is we don't have the records to know exactly how we used each one of these things. But using telephone records related to terrorism and link analysis is one of the most important tools we have, and that is one reason we see a lot of NSL's out there, because we don't

Continued on page 14

17th Annual Review of the Field of National Security Law Conference

Please mark your calendar! The 17th Annual Review of the Field of National Security Law Conference will be held on Thursday, November 15th and Friday, November 16th, at the Renaissance Hotel in Washington D.C. (with an opening reception on the evening of Wednesday, November 14th). Hotel reservations may be made at the ABA conference Rate of \$259/single/double. This is a busy time in DC - call the hotel NOW to book your hotel reservation, please! Please call 1-800-468-3571 (or 202-898-9000) There are only a very few government/military rooms left at the rate of \$188. Registration form and additional information will be posted on our website - www.abanet.org/natsecurity and mailed in the next couple of weeks.

want to keep investigating or keep a suspicion alive on some individual who does not deserve it -- and frankly we clear out a lot of people for whom there was an original suspicion by these very, very low intrusive means.

Suzanne Spaulding: Andrew talked about the potential for over reaction, and clearly this kind of a report—what we are seeing on the Hill is at least a lot of pressure or interest in taking some action. I guess what I would like to move us to next, briefly, is to talk about and get the views of this panel on the appropriate next steps. And Valerie, I know that the Bureau has already taken some steps to address this and I want to give you an opportunity to talk to us about the new guidelines for emergency NSL’s and other steps that the Bureau has already taken. And then I would love to get the panelists thoughts on whether there is an appropriate action for Congress to take at this point in light of what’s been learned from the IG Report. And then broader than that, is there an opportunity to use the Congressional interest in this to focus finally on this issue (Mike, as you have indicated, there has been sort of a lack of focus, interest or oversight) to look at not just the problems identified in the IG Report but to step back and look at the National Security Letter authorities generally, and consider whether there is a better way to authorize appropriate collection activity in this area by the Bureau. Does it make sense, for example, to have this authority spread out in different parts of the US Code because they are going after different records and to provide exceptions to privacy requirements in different arenas, or would it make sense to have a single statutory authority with uniform standards and guidelines and procedures? Valerie if you would like to start with the changes that have been made so far, that would be great.

Valerie Caproni: We have made a few changes already, and we have others in the pipeline. The first one relates to what Suzanne described as the exigent letter problem. And just to explain in a little more detail what the exigent letter problem actually was, as opposed to the way it has been portrayed in the press: there is a single unit within headquarters

that does virtually all of our analytical work with telephones and telephone numbers. So after the subway bombings in England when the Brits gave us telephone numbers of the British suspects, those numbers were very quickly analyzed to determine whether the British bombers were in contact with U.S. counterparts. This is the unit that does that work, so they spend a lot of time working under incredibly stressful circumstances. This is not to excuse them for what they did but to just explain the environment they work in. They, for reasons that are lost in the midst of history, had taken to doing the following: They would give the carrier a letter that said: “there is an emergency, and we need telephone records on the following numbers”—maybe a list of numbers. And the letter also said, “we have already requested a grand jury subpoena.” That was false after the very early days of this, but what they were supposed to do is promptly request a National Security Letter. The IG found that letter to be on its face illegal, which I don’t agree with.

In my view, if used properly -- if used when there truly was an emergency circumstance -- it was a legitimate invocation (although not very well written (no lawyer had seen it)) of the provision 18 U.S.C. § 2702. Section 2702 allows a carrier to voluntarily provide information to law enforcement if there is an emergency. I think the carriers were entitled to rely on the FBI’s statement that there were emergency circumstances. And the promise of future process, to me, was a “belts and suspenders” issue. The carrier was entitled to give us the information with no process, but it certainly didn’t hurt anything for us to follow it with process. Moreover, following the request with process gave rise to congressional reporting. If it is just a voluntary production of records, there is no congressional reporting. So the “belts and suspenders” approach did not bother me. But it bothered the IG: so that structure for these exigent letters—where they ask for emergency disclosure and promise subsequent process—has now been banned. Agents can continue to get records in an emergency pursuant to a letter that has been drafted and reviewed by an attorney that specifically invokes 2702—it specifically tells

the carrier that this is a voluntary act on their part to provide us with the records, and it does not promise future legal process, so that's been done and hopefully that problem will not repeat itself.

Another thing that we have done concerns our advice and training for National Security Letters. Our advice was in lots of different places—it was all available on our intranet website, but it was all over the place. We have collected it all in one document so it will all go out as sort of the master handbook of National Security Letters—everything you ever wanted to know but were afraid to ask—all in one handy place and written in plain English. We think that will probably help as well. We are providing mandatory training for all of those involved with the issuance of National Security Letters. We have now mandated the legal review of all National Security Letters. All of those things I think will improve just pure compliance. We are also developing an automated system in order to produce National Security Letters. Right now an agent who wants a National Security Letter for, say, a telephone number, has to type that number twice. Needless to say you end up transposing digits because you are typing those numbers twice. Furthermore, for our congressional reporting, we “fat finger” all of that information into a separate database, so there is yet another opportunity for error. This entire process is going to be combined into one workflow where an agent will be able to say, “I want an ECPA NSL that can be served on Verizon, and the telephone number is xxx-xxxx,” and the machine itself will self-populate the electronic communication and the National Security Letter. It will automatically grab the statistics that we need for congressional reporting. We realized this problem on our own—we didn't need the Inspector General to tell us about it; but as with all software development, it is taking a while. We will probably roll it out this summer. So I think we are doing a number of things.

The other thing we are doing, as I indicated, is recognizing the need for compliance—not just for National Security Letters but really for national security investigations at large. As I keep telling the

director, who is probably the least patient human being in America, we have got to get this right and getting it right is more important than getting it fast, so we are trying to figure it out. I am open to suggestions from all of you smart lawyers who advise private companies and not-for-profits all the time on how to create a compliance program (much the way private companies have) within a world of a federal agency. How do you do that? What does it look like? To whom does it report? Where does it sit within the organization? What's the functional equivalent of an independent audit committee? How do we set that up? Any suggestions ya'll might have we are open to because this is very much in the formation stage.

The conversation continued at this point with additional discussion among the panelists and questions from the audience. The full audio of the panel can be obtained from the SCOLANS website: Part 1 (http://www.abanet.org/natsecurity/multimedia/WS_30059_pt1.rm) and Part 2 (http://www.abanet.org/natsecurity/multimedia/WS_30059_pt2.rm).

If you are interested in exploring national security letters further, consider the following materials (especially the revised FBI guidelines):

* *The Inspector General's Report on National Security Letters:* <http://www.usdoj.gov/oig/special/s0703b/final.pdf>

* *FBI Statement in Response to IG Report (March 9, 2007):* <http://www.fbi.gov/pressrel/pressrel07/nsl030907.htm>

* *CRS Report: National Security Letters in Foreign Intelligence Investigations: Legal Background and Recent Amendments (March 20, 2007):* <http://fas.org/sgp/crs/intel/RL33320.pdf>

* *The revised NSL Guidelines (June 1, 2007):* http://www.epic.org/privacy/nsl/New_NSL_Guidelines.pdf

In Case You Missed It ...

Staying current in the field of national security law is never easy. Every week there are significant new opinions, statutes, indictments, reports, articles, and any number of other developments. Many of these items prompt coverage in the major media outlets, but some fly beneath the radar. In an effort to assist practitioners and scholars in keeping up to date with these events – and in particular to provide ready access to primary sources in electronic format – Professor Robert Chesney of Wake Forest University School of Law maintains a listserv for professionals and academics working in this area. “In Case You Missed It...,” featuring selected posts from that listserv, will be a recurring item on the back page of the National Security Law Report. Those interested in subscribing to the listserv may do so by contacting Professor Chesney at robert.chesney@wfu.edu.

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- **United States v. Abdi (S.D. Ohio)** - Agreement in which Nuradin Abdi pleads to one count of conspiring to provide material support in violation of 18 U.S.C. 2339A, based on his attempts to obtain military-style training overseas and his involvement with Iyman Faris and other al Qaeda-linked suspects in the U.S.
 - **Guantanamo transfer temporarily blocked** - Order by the D.C. Circuit temporarily precluding the repatriation of Guantanamo detainee Ahmed Belbacha to his home country of Algeria, in order to permit consideration of the merits of Belbacha’s claim that he should not be transferred in light of the risk that he will be tortured.
 - **United States Military Academy Combating Terrorism Center, “An Assessment of 516 Combatant Status Review Tribunal (CSRT) Unclassified Summaries” (July 25, 2007)**, available at <http://www.ctc.usma.edu/CTC-CSRT-Report-072407.pdf>
 - **United States v. Awan (E.D.N.Y. July 17, 2007)** - Opinion by Judge Sifton declining to impose the “terrorism enhancement” under the Sentencing Guidelines. Awan had been convicted on material support charges in connection with the provision of aid to the Khalistan Commando Force (KCF), but Judge Sifton concluded that the mens rea requirement of the terrorism enhancement nonetheless had not been met (as there was reason to believe Awan acted for reasons other than a desire to coerce or intimidate a government or civilian population).
 - **Executive Order: Interpretation of the Geneva Conventions Common Article 3 as Applied to a Program of Detention and Interrogation Operated by the Central Intelligence Agency**, available at <http://www.whitehouse.gov/news/releases/2007/07/20070720-4.html>
 - **Bismullah v. Gates (D.C. Cir. July 20, 2007)** - Opinion by the D.C. Circuit construing the scope of the review it may conduct with respect to Combatant Status Review Tribunal determinations, pursuant to the Detainee Treatment Act. Available at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200707/06-1197a.pdf>