

***Bill of Rights Defense Committee presents:***

**FBI Unbound:  
How National Security Letters Violate Our Privacy**

**(Voices)**

**Lisa:** On the issue of National Security Letters, the Inspector General did show conclusively, that these powers were misused and abused by the FBI.

**George:** And I think any time you have a situation without oversight, it leads to a minimum errors, if not outright abuses.

**Lisa:** We want our federal law enforcement to be focused on genuine threats to our security and not squandered prying into the lives of innocent Americans.

**Text on screen #1**

The PATRIOT Act broadened the government's ability to obtain private records of U.S. residents through the use of National Security Letters (NSLs).

**Lisa Graves**

**(Screen ID: Lisa Graves,** Deputy Director of the Center for National Security Studies  
Formerly Deputy Assistant Attorney General in the Justice Department of President Bill Clinton)

Under the law that was in effect before the PATRIOT Act, the government had to be requesting records about a suspected terrorist or records that "pertained to" a suspected terrorist. What the PATRIOT Act did was completely unloose that restriction and allow the FBI to obtain financial records, Internet transactional records, communication transaction records without showing there was a connection between the records sought and a terrorist.

The new standard passed by Congress in 2001 was to allow the FBI to obtain an enormous array of records, sensitive personal records on Americans based on a claim of the FBI to itself that the records are relevant to an authorized investigation without any judicial check.

**Bruce Fein**

**(Screen ID: Bruce Fein,** Executive Director of American Freedom Agenda  
Formerly Associate Deputy Attorney General in the Justice Department of President Ronald Reagan)

Certainly the expansion to that extent enabled the FBI to monitor political activities far more than was previously the case, and it was precisely the political spying that was taken under the guise of spying for national security that led to many of the restrictions on the FBI through executive orders issued by the attorney general, and I was involved in some of those: Attorney General Edward Levey's guidelines, revised under Attorney General William French Smith, and even federal

statutes that generally forbade the FBI from gathering information solely based on the First Amendment activities.

**Lisa Graves:**

If there were then some evidence they wanted about a suspected terrorist, someone who they had reason to believe was conspiring to commit an act of terror, I think they could easily get an order for whatever records were relevant to that investigation.

What has happened here is that the FBI says that it needs these powers to basically build a case, they call it the building blocks of their investigations, meaning that they don't have very much information. In fact, if you look at the criminal law guidelines of the FBI, in order to open a full investigation on someone, there has to be a reasonable indication of violence. To open a preliminary investigation, by definition they don't have a reasonable indication of violence.

In the terrorism context, we don't know precisely what standard they're using. But when they open a preliminary inquiry on an American, by definition that probably means they don't have a reasonable indication of violence, and yet they keep whatever information they obtain about people.

You'll never know if your records have been turned over to the FBI as part of one of these fishing expeditions. The business that turns over those records is barred from telling you ever or telling the press that they have turned over your records even if you're innocent, even if it were a fishing expedition.

And so I think it's a very serious matter for American privacy, and the Inspector General of the United States indicated that the FBI keeps the record even if a person is cleared or a case is closed.

So suppose you had a neighbor who didn't like you, who called an anonymous tip on you, and the tip was completely baseless. If the FBI issued a National Security Letter for your credit report, your bank records, your phone records, your Internet transactions, the FBI would retain that information about you, even if they realized that the tip was bogus.

**George Christian**

(Screen ID: George Christian, Executive Director of Library Connection, a cooperative of 27 libraries in Connecticut)

Ever since the PATRIOT Act came out, librarians have been very concerned about a number of clauses within the PATRIOT act that apparently allow the Federal government to investigate the activities of library patrons and also come with a perpetual gag order as does a National Security Letter itself.

Plus, people have a trust in the library. The library is a place you can go to find out information about anything that you're concerned about, whether it's a political issue, a medical issue, a legal issue, and feel with some confidence that the information you're getting in a library is in the library because it's good information. If you're a woman who wants to research spousal abuse or divorce, it's not something you want the entire community to know you're concerned about, or whether it's cancer of a man or woman, or anything. People go to the library for things that are highly confidential.

**Text on screen #2:**

In 2005, Library Connection was among thousands of businesses to receive an NSL from the FBI.

**George Christian:**

They had called about a week before they delivered the letter. They had called Mr. Sutton, our telecommunications manager, said they were going to serve Library Connection with a National Security Letter, and asked whom it should be addressed to. And he said it goes to the Executive Director, and after the call he ran in and said you're getting a National Security Letter. Of course I had never heard those three words put together like that before. I called our attorney, she hadn't heard either, but she had a graduate law student available and said, I'll put him on the case.

He came back with the information that a National Security Letter is essentially a subpoena-like instrument that the FBI issued without any judicial review, and that an ISP in New York, Internet Service Provider, had challenged compliance with a National Security Letter, and the District Court had ruled that on its face the statute violates the First, Fourth, and the Fifth Amendments, so clearly an unconstitutional piece of law.

Armed with that, I made up my mind that, if possible, I would not comply, and when I called my attorney to say we actually received this letter, and I wanted to contest compliance, she said, "Well, the problem there is, the only way to contest compliance is to sue the Attorney General of the United States." And, although I had the legal authority to do that in the bylaws of our organization, I really felt morally I could not commit our organization to such a contest on my own, and I asked that three members of our executive committee, Peter Chase, Barbara Bailey, and Janet Nocek, who are library directors themselves, to act on the, and they're authorized to act on behalf of the board, I said, "We really need to talk about something, and you need to make a decision."

So they came in, heard the evidence, and decided that, yes, they would contest in court compliance with this.

**Voice of George Christian:**

This is the National Security Letter presented to Library Connection. It was delivered by two FBI agents. They pointed out to me the paragraph that essentially constitutes the gag order. I had learned from my attorney these requests have been judged unconstitutional by a District Court in New York so I said to the FBI that I had reason to believe that the request was unconstitutional, and would they mind if I discussed it with my lawyer and they said no. They wrote a number on the back of the business card, which they left with me and said, have your lawyer contact this person.

**George Christian:**

They wanted any and all subscriber information, billing information, and access logs of any person or entity related to the following.

IP Address: 216.47.180.118, Date: February 15, 2005; Time: 16:00 to 16:45 PM EST.

This address goes to our router at a library. Five months, and routers use address translation. Every time you turn on a computer at that library, it's randomly assigned a different address. There is no path between that router and a specific computer at the library. And five months after the fact, there is no idea who was even in the library that day. We interpreted this to mean that if we were going to comply, we would have had to tell the FBI, this is the library, here is the entire patron database.

And if you really want all the records associated with this entire patron database, that's all the books they were reading, all the activity they had—far too sweeping. And there was no reason for us to believe that whomever was using this computer at that time was even a registered patron at that library, so it was really fishing expedition.

**Text on screen #3**

One of the most controversial features of NSLs is the perpetual gag orders that accompany them.

**George Christian:**

The whole problem with a gag order on everyone is that it allows no oversight, not only in the issuance of a National Security Letter, but it allows no oversight over what the FBI is doing. I think any time you have a situation without oversight, it leads to a minimum errors, if not outright abuses. I think that's a very useful addition, and I'm glad, and the Inspector General sampled just a very small sample, but found a preponderance of violations of the FBI's own internal rules. I just don't think you can do anything in secret and assume it would always be done right.

**Lisa Graves:**

We know now, after the audit of just three years of FBI practice, that it made over 150,000 requests. I think the true number if you look at the last six years is at least twice that.

**George Christian:**

How can they issue several hundred thousand National Security Letters and no one has ever heard about it? It is because every recipient has to carry the secret of being a recipient to their graves.

**Text on screen #4:**

The American Civil Liberties Union represented Library Connection in its lawsuit challenging the NSL gag order, in hopes of being allowed to testify before Congress about the impact of NSLs.

**George Christian:**

We did ask for an immediate injunctive relief from the gag order because Congress was in the process of considering the renewal of the PATRIOT Act and we very much wanted not only to let our board know what we were up to, but to go to Congress and tell them that despite what both Attorney Generals had said and were saying, that indeed the PATRIOT Act was being used against libraries and we wanted to correct it when the PATRIOT Act was renewed.

The gag order was lifted, but the lifting was stayed to allow the government to appeal. They did appeal and we went to appellate court in New York.

But about six weeks after the PATRIOT Act was renewed the FBI, the Justice Department informed our attorneys that they would no longer oppose the lifting of the gag order in court. But by then it was too late to go to Congress.

That's why we are, the four of us are the only people in the United States who can talk about having received a National Security Letter. The government said that they had obtained the information they were looking for by other means.

I assumed that I did what any citizen of the United States would do and who knew that they were being handed an unconstitutional request and say no, I don't think I'm going to comply with this.

But perhaps the average person doesn't know that it's unconstitutional. After all, had the FBI come to me, flashed their badges, and said this is a matter of grave national security, will you cooperate with us, the impulse is to say, of course. I will. I had the luxury of knowing the instrument they were using was unconstitutional, and in reading the letter, I could tell that since they were concerned about something that had happened five months in the past, since they wrote the letter two months before they got around to delivering it to me, they were not in hot pursuit, it was not, by refusing to cooperate, I didn't feel I was jeopardizing the security of any of my fellow citizens. Had I been wrong, at any time they could have gone to a judge and said, we have probable cause here would you sign the decree, and we would have been happy to cooperate, but they never elected to go before a judge.

**Text on screen #5:**

In 2006, Congress added a requirement for annual audits of the FBI's use and misuse of NSLs.

The first audit report by the Department of Justice's Inspector General, issued March 9, 2007, for the years 2003 through 2005, reported violations ranging from poor recordkeeping and serious undercounts to unlawful requests.

In June 2007, an internal FBI audit of its use of NSLs since 2002 found more than 1,000 violations.

**Lisa Graves:**

What you might remember from 2005 and the efforts of the Bill of Rights Defense Committee and other organizations was an extensive debate about whether these powers were being abused. And what you heard over and over again from the administration was, Trust us, these powers aren't being abused. But in fact, as the Inspector General noted, they were abused and misused, even while that debate was going on. So the audit demonstrated that a lot of the abuses actually occurred at headquarters of the FBI, not in the field, although there were certainly some indications of failures there, and on a related note we've had a deep and long-standing concerns about misuses of the Joint Terrorism Task Forces, the JTTFs in each state, focusing on people who disagree with the war in Iraq, people who have no connection to Al Qaeda.

But on the issue of National Security Letters, the Inspector General did show conclusively, that these powers were misused and abused by the FBI.

**Bruce Fein:**

And we do know from the recent hearings held by Congress that the FBI itself was not applying a proper standard in issuing National Security Letters in so-called exigent circumstances, not following through after they'd gotten documents when written verification that what was under investigation was a genuine terrorist plot rather than some ordinary crime, and it's terrorism that elevated that more muscular investigatory tool that was entrusted to the FBI. And so it showed us once again that without clear oversight by Congress and some second-guessing by executive officials, you end up with abuses.

**Text on screen #6:**

NSL abuses in Inspector General's audit report of March 9, 2007:

Over-using emergency orders for NSLs.

Insufficient oversight resulting in violations of the FBI's internal rules.

Poor training and record-keeping.

**Bruce Fein:**

First of all, they are issuing National Security Letters even when they did not involve ongoing terrorist investigations. That is, for ordinary crimes. Well, this extraordinary power was thought to be appropriate only because the nature of the danger to the country was sufficiently acute. So, that's one problem. The other second problem is that they're issuing these National Security Letters orally, without anything in writing, and then the follow-up in writing to the telephone company or to a credit card company that was supposed to establish through a verified statement that this indeed was a terrorist investigation -- was never forthcoming. So we don't have any way to know exactly what was going on there because it's just an oral statement, it is a very unreliable proxy of what's ongoing. So we don't have a, you know, and then there was the last, we simply didn't have any serious management oversight and training of the FBI officials to indicate to them what were the limits of this particular extraordinary power.

The other thing that's troublesome is that there were no sanctions, no demotions, no reprimands of those who had misused the National Security Letters in the aftermath of the Inspector General's investigation. What you can expect in a post 9/11 atmosphere is that no one in the bureaucracy thinks they'll ever get punished for spying too much. You know. Spying too little, yes, then that could expose you to risk. And it's that kind of inherent bureaucratic propulsion that requires restraint and checks on what these officials in the field do.

**Lisa Graves:**

The report of the FBI that's in the audit says that they have some cases, of very few number, where they say that the power was useful. But it's interesting the way this issue is argued because they have not established that they could not have obtained those records under the old standard, which allowed them to gather records that pertain to a suspected terrorists, so they haven't demonstrated that it could not have obtained those records if they were probably focused on Al Qaeda or suspected terrorists. And the bottom line is that there have been very few actual prosecutions of people for terrorism in this country. There have been some, there have been some, but they've been very few compared to the number you see. 150,000 requests in three years. There certainly haven't been 150,000 prosecutions or even anywhere near that.

**Bruce Fein:**

Well, we just have these general conclusory statements that they're very important, but there is no identification of a particular attack or a particular conspiracy that was thwarted because of these National Security Letters. And we know historically that if there are these success stories, these poster children of how well the FBI is operating, it will be leaked to the press instantly. And the fact that there haven't been any such leaks is strong confirmation that there's nothing to leak.

**Text on screen #7:**

On March 28, 2007, Lisa Graves testified before the House Intelligence Committee on "Unchecked National Security Letter Powers and Our Civil Liberties."

**Lisa Graves:**

The fact is that when once the FBI issues a National Security Letter to demand a person's sensitive records, even if that person is cleared, those records are kept indefinitely, for decades, so that was one of the issues I raised.

I also raised, the issue of the investigative data warehouse. What are we doing with an investigative data warehouse that has more records than there are people in the United States, and there does not appear to be any way for a person to get their name out of the investigative data warehouse once it gets in there? And it is yet, has yet to be proven that being included in the data warehouse doesn't have other effects on your right to travel or even your right to employment. So this data warehouse is accessible by over 10,000 government employees, has over 500 million records in it, including millions of financial records. And we don't have anywhere near that number of people who are reasonably suspected of terrorism, let alone doing anything wrong.

**Bruce Fein:**

Surely we do not want to have a huge file of information on innocent people just laying around because it does provide a source of blackmail and intimidation, and we know that government officials have chronically misused this kind of information file.

Not only that, but people become reluctant to speak and talk. Then they don't want to communicate, because then they're creating a record that may be seized by government officials and may be used in a way that's very damaging to that individual. That's why it creates this pall of orthodoxy if you will that I think formerly plagued the United States in earlier years and led to the enactment of the Foreign Intelligence Surveillance Act and some of these protections against government abuses.

**Lisa Graves:**

I think that we would have, this would be one feature of a continuing growth in databases and dossiers on individuals, who will never be charged with any crime, who have done nothing wrong, and as databases are increasingly connected, and as our rights to travel and rights to employment are increasingly affected by identification issues and background checks, there will be consequences for individuals being included in these, in the databases.

The FBI in response to that is, Don't worry, we've got an internal working group, an actual working group, working with the Director of National Intelligence to think about whether to retain these records and how. But the government's tendency is to keep everything, as I said, indefinitely, on the notion that it might someday be helpful. Meanwhile people's private lives, their financial records, their phone records, their Internet transactions are put into a database that's accessible by over 10,000 government employees. This is not an acceptable situation for a free society that values privacy. And we want our federal law enforcement to be focused on genuine threats to our security and not squandered prying into the lives of innocent Americans.

**George Christian:**

I was testifying before the Senate Subcommittee of the Judiciary Committee and the Subcommittee on the Constitution a little while ago on my experience with the national security and there were a couple of experts there, and one of the experts pointed out that never has Congress authorized gag orders like they have with various aspects of the PATRIOT Act. In fact, even in the past, the only condition in which Congress authorized a gag order was with wiretapping, and that was for obvious reasons that while the wiretapping is going on you can't really let the person know that they're being tapped. But even then, they required that as soon as the tap ended, that the government go public with the fact that they had been wiretapping.

But here it's just perpetual. There is just no end to it at all.

**Text on screen #8:**

In 2006, the USA PATRIOT Act was altered so NSL recipients could challenge the requests and permanent gag orders. However, several problems remain with laws governing NSLs.

**Lisa Graves:**

In the law right now, a business that receives a National Security Letter can consult with its attorney. The reason why this is inadequate to protect our civil liberties is that there is very little incentive for these businesses to challenge a letter because their customers are barred from ever knowing that their record have been turned over. So that's not enough of a protection.

In the end, in terms of the gag, the administration pushed through a standard for challenging a gag, and just to be clear is that once a business receives a letter demanding an array of customer records, whether it's transactions--financial transactions, or Internet transactions, or phone records--the business is barred from telling anyone, including Congress, that this massive request has been made, or this particular request has been made.

What we sought was an opportunity, a fair opportunity to challenge a gag in the law. What the administration pushed through, with the help of the Republican Congress, was a power in writing to challenge the gag under a standard in which the government asserts that there is a national security basis or a criminal investigation, or some other more generic basis that the court must consider that assertion conclusive, meaning its a right on paper but not in reality.

**George Christian:**

It should really go back to what it was when the Act was first passed as it says here, in 1981, and then it was really an instrument to use against espionage and possible terrorism. Then the only targets of National Security Letters were registered agents of foreign governments or people suspected of terrorist activities.

**Bruce Fein:**

The chief end of the state is to make men and women free, to speak, to pursue their ambitions, and the burden of proof is on the government to demonstrate why that freedom has to be encroached. And it seems to me that the arguments for the National Security Letters as being essential and instrumental to defeating terrorism have never been made successfully. It's just the department saying, here's an additional power. It might come in usefully some time, and therefore we ought to have it. But that, say, turns the constitutional philosophy on his head. The starting point is trying to protect freedom of individuals, because the end of the state is to make individuals free and happy, not to aggrandize the state and become an empire, and the burden is on the government to show that this particular instrument is essential to preserving social tranquility and protecting ourselves from violence, and that simply was not done, that threshold was not satisfied in creating these National Security Letters.

The fact is that democracies lose their liberties on the installment plan. It's in small, incremental encroachments, and that is what's happening right now, that is why it's so critical that we get Congress and the American people to stand up and say, no, we don't want an enfeebled executive, but we want one that operates within checks and balances. We want the executive to be strong but checked and overseen by other branches to prevent these kinds of abuses and folly that are

inevitable when you've unchecked power. That's what Lord Acton meant when he said, "Absolute power corrupts absolutely."

**Text on screen #9:**

**What you can do:** [www.fbiunbound.org](http://www.fbiunbound.org) Visit our web site to download the Bill of Rights Defense Committee's discussion guide, flyer with suggested actions to reform NSLs, and links to resources.

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