



# U.S. Department of Justice Office of the Inspector General

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## Report to Congress on Implementation of Section 1001 of the USA PATRIOT Act

*(as required by Section 1001(3) of Public Law 107-56)*

March 8, 2006

Section 1001 of the USA PATRIOT Act (Patriot Act), Public Law 107-56, directs the Office of the Inspector General (OIG) of the U.S. Department of Justice (DOJ or Department) to undertake a series of actions related to claims of civil rights or civil liberties violations allegedly committed by DOJ employees. It also requires the OIG to provide semiannual reports to Congress on the implementation of the OIG's responsibilities under Section 1001. This report – the eighth since enactment of the legislation in October 2001 – summarizes the OIG's Section 1001-related activities from July 1, 2005, through December 31, 2005.

## I. INTRODUCTION

According to the Inspector General Act, the OIG is an independent entity within the DOJ that reports to both the Attorney General and Congress. The OIG's mission is to investigate allegations of waste, fraud, and abuse in DOJ programs and personnel and to promote economy and efficiency in DOJ operations.

The OIG has jurisdiction to review programs and personnel in all DOJ components, including the Federal Bureau of Investigation (FBI), the Drug Enforcement Administration (DEA), the Federal Bureau of Prisons (BOP), the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), the U.S. Attorneys' Offices, and other DOJ components.<sup>1</sup>

The OIG consists of the Immediate Office of the Inspector General and the following divisions and offices:

- **Audit Division** is responsible for independent audits of Department programs, computer systems, and financial statements.
- **Evaluation and Inspections Division** provides an alternative mechanism to traditional audits and investigations to review Department programs and activities.
- **Investigations Division** is responsible for investigating allegations of bribery, fraud, abuse, civil rights violations, and violations of other criminal laws and administrative procedures that govern Department employees, contractors, and grantees.

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<sup>1</sup> The OIG can investigate allegations of misconduct by any Department employee, except for allegations of misconduct by attorneys (or investigators working under the direction of Department attorneys) acting in their capacity to litigate, investigate, or provide legal advice. See Pub. L. 107-273 § 308, 116 Stat. 1784 (Nov. 2, 2002). It is the Department's view that enactment of Section 1001 of the Patriot Act did not alter the existing jurisdictional authorities of the OIG and OPR to investigate allegations of misconduct by attorneys.

- **Oversight and Review Division** blends the skills of attorneys, investigators, and program analysts to investigate or review high profile or sensitive matters involving Department programs or employees.
- **Management and Planning Division** assists the OIG by providing services in the areas of planning, budget, finance, personnel, training, procurement, automated data processing, computer network communications, and general support.
- **Office of General Counsel** provides legal advice to OIG management and staff. In addition, the office drafts memoranda on issues of law; prepares administrative subpoenas; represents the OIG in personnel, contractual, and legal matters; and responds to Freedom of Information Act requests.

The OIG has a staff of approximately 400 employees, about half of whom are based in Washington, D.C., while the rest work from 16 Investigations Division field and area offices and 7 Audit Division regional offices located throughout the country.

## II. SECTION 1001 OF THE PATRIOT ACT

Section 1001 of the Patriot Act provides the following:

The Inspector General of the Department of Justice shall designate one official who shall —

- (1) review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice;
- (2) make public through the Internet, radio, television, and newspaper advertisements information on the responsibilities and functions of, and how to contact, the official; and
- (3) submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report on the implementation of this subsection and detailing any abuses described in paragraph (1), including a description of the use of funds appropriations used to carry out this subsection.

### **III. CIVIL RIGHTS AND CIVIL LIBERTIES COMPLAINTS**

*Review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice.*

The OIG's Special Operations Branch in its Investigations Division manages the OIG's investigative responsibilities outlined in Section 1001.<sup>2</sup> The Special Agent in Charge who directs this unit is assisted by three Assistant Special Agents in Charge (ASAC), one of whom assists on Section 1001 and DEA matters, a second who assists on FBI matters, and a third who provides support on ATF cases. In addition, four Investigative Specialists support the unit and divide their time between Section 1001 and FBI/DEA/ATF responsibilities.

The Special Operations Branch receives civil rights and civil liberties complaints via mail, e-mail, telephone, and facsimile. The complaints are reviewed by the Investigative Specialist and an ASAC. After review, the complaint is entered into an OIG database and a decision is made concerning its disposition. The more serious civil rights and civil liberties allegations that relate to actions of DOJ employees or DOJ contractors normally are assigned to an OIG Investigations Division field office, where OIG special agents conduct investigations of criminal violations and administrative misconduct.<sup>3</sup> Some complaints are assigned to the OIG's Oversight and Review Division for investigation.

Given the number of complaints received compared to its limited resources, the OIG does not investigate all allegations of misconduct against DOJ employees. The OIG refers many complaints involving DOJ employees to internal affairs offices in DOJ components such as the FBI Inspection Division, the DEA Office of Professional Responsibility, and the BOP Office of Internal Affairs (OIA) for appropriate handling. In certain referrals, the OIG requires the components to report the results of their investigations to the OIG. In most cases, the OIG notifies the complainant of the referral.

Many complaints received by the OIG involve matters outside our jurisdiction. The ones that identify a specific issue for investigation are forwarded to the appropriate investigative entity. For example, complaints of mistreatment by airport security staff are sent to the Department of Homeland

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<sup>2</sup> This unit also is responsible for coordinating the OIG's review of allegations of misconduct by employees in the FBI, DEA, and ATF.

<sup>3</sup> The OIG can pursue an allegation either criminally or administratively. Many OIG investigations begin with allegations of criminal activity but, as is the case for any law enforcement agency, do not end in prosecution. When this occurs, the OIG is able to continue the investigation and treat the matter as a case for potential administrative discipline. The OIG's ability to handle matters criminally or administratively helps to ensure that a matter can be pursued administratively, even if a prosecutor declines to prosecute a matter criminally.

Security (DHS) OIG. We also have forwarded complaints to the OIGs at the Department of Veterans Affairs, Department of State, United States Postal Service, Department of Defense, Department of Interior, Social Security Administration, Department of Education, and the Equal Employment Opportunity Commission. In addition, we have referred complainants to several Department of Corrections internal affairs offices that have jurisdiction over the subject of the complaints.

When an allegation received from any source involves a potential violation of federal civil rights statutes by a DOJ employee, the complaint is discussed with the DOJ Civil Rights Division for possible prosecution. In some cases, the Civil Rights Division accepts the case and requests additional investigation by either the OIG or the FBI. In other cases, the Civil Rights Division declines prosecution.

### **A. Complaints Processed This Reporting Period**

From July 1, 2005, through December 31, 2005, the period covered by this report, the OIG processed **701** complaints that were sent primarily to the OIG's Section 1001 e-mail or postal address.<sup>4</sup>

Of these complaints, we concluded that **570** did not fall within the OIG's jurisdiction or did not warrant further investigation. Slightly more than half of the complaints – **315** of the 570 – involved allegations against agencies or entities outside of the DOJ, including other federal agencies, local governments, or private businesses. We referred those complaints to the appropriate entity or advised complainants of the entity with jurisdiction over their allegations. The remaining **255** complaints raised allegations that, on their face, did not warrant an investigation. For example, complaints in this category included allegations that FBI agents pumped chemical substances into a complainant's home, injected individuals with a memory loss substance, and altered a complainant's physical appearance.

Consequently, **131** of the 701 complaints involved DOJ employees or components and included allegations that required further review. Of those complaints, **123** raised management issues, and we referred them to DOJ components for appropriate handling. Examples of complaints in this category included inmates' allegations about the general conditions at federal prisons or complaints that the FBI did not initiate an investigation into a particular complainant's allegations. The OIG identified 6 of the 123 matters referred to DOJ components as warranting monitoring by the OIG, and in these 6 cases we directed the DOJ components to which the allegations were referred to report to us on the findings from their investigations.

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<sup>4</sup> This number includes all complaints in which the complainant makes any mention of a Section 1001-related civil rights or civil liberties violation, even if the allegation is not within the OIG's jurisdiction.

**Four** of the 131 complaints did not provide sufficient detail to make a determination whether an abuse was alleged. We requested further information but did not receive responses from these four complainants.

The OIG identified **4** matters out of the 131 that we believed warranted opening a Section 1001 investigation or conducting a closer review to determine if Section 1001-related abuse occurred. As discussed in the next section, the OIG opened investigations on two of the complaints and referred to the BOP two of the complaints for an investigation.

None of the 701 complaints we processed during this reporting period specifically alleged misconduct by DOJ employees relating to use of a provision in the Patriot Act. In addition, as summarized in Section V below, the OIG examined the FBI's reporting to the President's Intelligence Oversight Board (IOB) of possible intelligence violations, including violations of the Foreign Intelligence Surveillance Act of 1978, statutes involving the issuance of National Security Letters, Attorney General Guidelines, and internal FBI policy. Some of these intelligence authorities had been altered or expanded by provisions of the Patriot Act. As we also discuss in Section V, we cannot say from our review of FBI reports to the IOB whether or not the possible IOB violations resulted from the changes brought about by the Patriot Act.

The following is a synopsis of the new complaints processed during this reporting period:

<b>Complaints processed:</b>	<b>710</b>
<b>Unrelated complaints:</b>	<b>570</b>
<b>Complaints within OIG's jurisdiction warranting review:</b>	<b>131</b>
<b>Non-Section 1001 matters</b>	
<b>Management issues:</b>	<b>123</b>
<b>Referred to a DOJ component for investigation:</b>	<b>6</b>
<b>OIG unsuccessfully sought further details:</b>	<b>4</b>
<b>Section 1001 matters warranting review:</b>	<b>4</b>

## **B. Section 1001 Cases This Reporting Period**

### **1. New matters**

During this reporting period, the OIG initiated two new Section 1001-related investigations, referred two Section 1001 matters to the BOP to investigate and provide the OIG with its findings, continued four ongoing Section 1001-related cases, and closed three Section 1001 investigations from a previous reporting period. The following describes the two new OIG matters, both of which were closed during the reporting period:

- The OIG investigated allegations made by a BOP inmate that a correctional counselor confiscated and destroyed his Koran when the inmate left it on his pillow while his cell was unoccupied. Allegedly, when the complainant inquired about having his Koran returned, the correctional counselor verbally abused him in front of several inmates and threatened to spread a rumor that the inmate was an informant. The OIG did not substantiate the allegations. During the investigation, the complainant told the OIG that he did not believe there was a pervasive problem at the facility regarding abuse of Muslim inmates and that the executive staff is approachable and addresses inmates' concerns. The complainant also said he received a replacement Koran approximately two weeks after the incident. The OIG provided a copy of its report to the BOP.
- The OIG investigated allegations made by BOP inmates incarcerated at a contract correctional facility that staff members distributed "anti-Islamic" literature; discouraged inmates from pursuing an interest in Islam; denied Muslim inmates access to the chapel; confiscated Muslim inmates' prayer rugs; failed to provide Muslim inmates with a religious program or a chaplain; and assaulted the Muslim inmates and referred to them as "terrorist devils." The OIG's investigation determined that the inmate complaints were unsubstantiated and the complainants were inaccurate in their depictions of the staff's conduct and the services offered at the facility. The investigation concluded that the staff did not engage in discriminatory practices against the Muslim inmates. The OIG provided a copy of its report to the BOP.

The OIG referred the following two matters to the BOP for investigation as Section 1001 matters and requested that the BOP provide the OIG a copy of its investigative report upon completion of the investigation.

- The OIG directed that the BOP investigate a complaint from a BOP inmate who alleged that he was removed from his prison job after receiving an incident report for having telephonic communications in

Arabic with his family. The inmate also alleged that he is not allowed to write or receive mail in Arabic and that because of the telephone and mail restrictions imposed on him, he has been unable to communicate with his family in over 20 months.

- The OIG directed that the BOP investigate an allegation from a BOP inmate that Muslim inmates were denied their Ramadan meals and verbally abused by a correctional officer. The complainant further alleged that on one of the days he was denied his Ramadan meal, he placed his arm through the food tray slot and the correctional officer “slammed” his arm in the door and threatened him.

## **2. Cases opened during previous reporting periods**

- The OIG investigated allegations made by an Egyptian national that during his detention at a BOP facility he was subjected to a body cavity search in the presence of numerous people, including a female officer; placed alone in a cell under severe restrictions for more than 2 months; and had his ability to practice his religion undermined intentionally by the prison staff. The investigation revealed that several correctional officials deviated from BOP procedures in processing the male detainee into the facility by conducting a body cavity search in the vicinity of female staff and later tried to conceal their role in the detainee’s processing. The OIG presented this matter to the U.S. Attorney’s Office for a prosecutive decision, and it declined prosecution. The OIG is preparing its report of investigation to present to the BOP for administrative action.
- The OIG investigated allegations made by a BOP inmate that correctional officers in a BOP facility humiliated and abused Muslim inmates because of the officers’ hatred of Muslims. The inmate alleged that correctional officers used excessive force on him, gave other inmates permission to assault him, and then covered up the incidents. The inmate also alleged that BOP staff improperly denied him showers, social visits, and the right to attend religious services. The investigation did not substantiate the allegations. The OIG is preparing its report of investigation for the BOP.
- The OIG investigated a complaint from a former Muslim BOP correctional officer who alleged that staff members at a BOP facility referred to certain inmates as terrorists; displayed offensive posters depicting Muslim prisoners throughout the facility; referred to him as “Bin Laden,” “terrorist,” and “towel-head;” and posted a picture of an eagle with its middle finger raised which read “Jihad this.” The investigation did not substantiate the allegations. The OIG is preparing its report of investigation for the BOP.

- The OIG is investigating allegations raised by a Muslim inmate in a BOP correctional facility that he was praying in the facility's library when a correctional officer ordered him to stop, made derogatory remarks about his religious beliefs, issued him an incident report, and placed him in solitary confinement. The investigation did not support the allegation that the inmate was physically or verbally abused in any way, but did reveal that the BOP does not have a policy designating where and when inmates can pray. The OIG is preparing its report of investigation for the BOP.

### **3. OIG investigations closed during this reporting period**

- The OIG investigated allegations raised by a Muslim inmate that he was physically assaulted; verbally abused; denied clothing, food, and water; and unjustly detained in solitary confinement for 2 years. When the inmate was interviewed, he denied being subjected to any type of physical abuse. The OIG closed this matter as unsubstantiated and provided a copy of its report to the BOP.
- The OIG investigated a complaint in which a BOP inmate alleged that a correctional officer ordered him to drop his Koran on the floor outside of his cell. According to the complaint, when the inmate complied with the order, the officer kicked the Koran and walked away. The OIG's investigation found insufficient evidence to corroborate the allegation. The OIG provided its report of investigation to the BOP.
- The OIG investigated an allegation from a BOP inmate that while the inmate was at prayer services an Assistant Warden entered his cell and ordered a correctional officer to confiscate his prayer rug and Koran and to dispose of the items in the garbage incinerator. Interviews of BOP staff members revealed that the inspecting staff confiscated inmate items found to be in violation of storage policy and also improperly confiscated the inmate's religious items. When notified that religious items were present in the property marked for destruction, staff attempted to retrieve the religious items but discovered the items already were destroyed. Interviews with other inmates confirmed that staff confiscated and destroyed all inmate personal property violating storage policy, regardless of the inmate's religious affiliation. We did not substantiate that the religious property of inmates was singled out for confiscation and destruction. The OIG provided its report of investigation to the BOP.

### **4. Brandon Mayfield matter**

Brandon Mayfield, a Portland, Oregon, attorney, was arrested by the FBI in May 2004 as a material witness after FBI Laboratory examiners identified Mayfield's fingerprint as matching a fingerprint found on a bag of detonators

connected to the March 2004 terrorist attack on commuter trains in Madrid, Spain, that killed almost 200 people and injured more than 1,400 others. Mayfield was released two weeks later when the Spanish National Police identified an Algerian national as the source of the fingerprint on the bag. The FBI Laboratory subsequently withdrew its fingerprint identification of Mayfield.

This OIG review examined the FBI's misidentification, investigation, and detention of Mayfield. The OIG sought to determine the causes of the misidentification and the FBI Laboratory's responses to the error. As part of this effort, the OIG consulted with three latent fingerprint experts from outside the FBI. In addition, the OIG examined whether the FBI used the Patriot Act in connection with the investigation of Mayfield, whether the FBI targeted Mayfield because of his Muslim religion, and whether Mayfield's conditions of confinement were inappropriate.

The OIG found that several factors caused the FBI's misidentification of the fingerprint found on the bag of detonators. First, the unusual similarity between Mayfield's fingerprint and the fingerprint found on the bag (referred to as Latent Fingerprint Number 17 or LFP 17) confused three experienced FBI examiners and a court-appointed expert. The OIG concluded, however, that FBI examiners committed errors in the examination procedure and that the misidentification could have been prevented through a more rigorous application of several principles of latent fingerprint identification.

Specifically with regard to the causes of the misidentification, the OIG found:

- In identifying Mayfield as the source of LFP 17, the FBI examiners relied in significant part on the relationship of "minutiae" or "points" within the prints. Ten of the points in LFP 17 that were used to identify Mayfield also were later used by different FBI examiners to identify Ouhmane Daoud, the Algerian national ultimately identified as the source of LFP 17. These 10 features in LFP 17 generally were consistent with a constellation of points in the fingerprints of both Mayfield and Daoud. The OIG found that such a degree of similarity between fingerprints from two different people is extremely unusual. Despite the similarities, Mayfield and Daoud did not have identical fingerprints. The OIG found that the types of points were different in several respects and other subtle but important differences existed between the prints.
- The OIG found that the FBI fingerprint examiners' interpretation of some features of LFP 17 was adjusted or influenced by reasoning backward from features that were visible in known samples of Mayfield's prints. Having found as many as 10 points of unusual similarity, the FBI examiners began to "find" additional features of LFP 17 that were not really there, but rather were suggested to them by features in the

Mayfield prints. As a result of this “circular reasoning,” murky or ambiguous details in LFP 17 were identified erroneously as points of similarity with Mayfield’s prints.

- The OIG found that examiners gave significant weight to the purported agreement of extremely tiny details in LFP 17 and Mayfield’s fingerprint known as “Level 3” details. Because Level 3 details are so small, the appearance of such details in fingerprints is highly variable, even between different fingerprint impressions made by the same finger. As a result, the reliability of Level 3 details is the subject of debate within the fingerprint community. The OIG found that none of the purported Level 3 features in LFP 17 used to identify Mayfield corresponded to features in the known prints of Daoud. Therefore, the examiners apparently misinterpreted distortions in LFP 17 as real features corresponding to Level 3 details seen in Mayfield’s known fingerprints. The OIG concluded that the examiners’ reliance on Level 3 details in this case was misplaced and contributed to the erroneous identification.
- FBI fingerprint examiners follow the “one discrepancy rule” under which a single difference in appearance between a latent fingerprint and a known fingerprint must rule out an identification unless the examiner has a valid explanation for the difference. In addition, according to the FBI, latent fingerprint identifications are subject to a standard of 100 percent certainty. The OIG found that the available information did not support this degree of certainty for the explanations the examiners adopted for several differences in appearance between LFP 17 and Mayfield’s fingerprint. For example, the FBI recognized that the entire upper left portion of LFP 17 did not correspond with Mayfield’s fingerprint. The examiners explained this difference as the result of a separate touch, possibly by a different finger or a different person. However, this explanation required the examiners to accept an extraordinary set of coincidences, and the OIG found that support for this explanation was, at best, contradictory.
- The FBI missed an opportunity to catch its error when the Spanish National Police informed the FBI on April 13, 2004, that it had reached a “negative” conclusion with respect to matching LFP 17 to Mayfield’s fingerprints. At that time, the FBI Laboratory did not adequately explore the possibility that it had erred in identifying Mayfield. The OIG concluded that the FBI Laboratory’s overconfidence in the skill and superiority of its examiners prevented it from taking the Spanish National Police’s April 13 “negative” report as seriously as it should have.

The OIG also investigated whether the FBI fingerprint examiners were made aware of and improperly influenced by knowledge of Mayfield’s religion when they made the identification of LFP 17. We determined that the FBI

examiners were not aware of Mayfield's religion at the time they concluded that Mayfield was the source of LFP 17. The records available to the examiners did not reveal his religion or his representation of other Muslims as an attorney. The OIG found no evidence that the FBI Laboratory had knowledge of Mayfield's religion until the FBI's Portland Division learned this fact in the early stages of its field investigation of Mayfield, after the identification had been made and verified by the FBI Laboratory.

However, the OIG found that the issue of whether Mayfield's religion was a factor in the Laboratory's failure to revisit its identification and discover its error in the weeks following the initial identification was a more difficult question. By the time the Spanish National Police issued its April 13 "negative" report, the Laboratory examiners had become aware of information about Mayfield obtained in the course of the Portland Division's investigation, including the fact that Mayfield had acted as an attorney for a convicted terrorist, had contacts with suspected terrorists, and was a Muslim. The OIG concluded that Mayfield's religion was not the sole or primary cause of the FBI's failure to question the original misidentification and catch its error. The primary factors were the similarity of the prints and the Laboratory's overconfidence in the superiority of its examiners. However, we believe that Mayfield's representation of a convicted terrorist and other facts developed during the field investigation, including his Muslim religion, also likely contributed to the examiners' failure to sufficiently reconsider the identification after legitimate questions about it were raised by the Spanish National Police.

In addition, the OIG reviewed the FBI's conduct in its investigation and arrest of Mayfield following the Laboratory's identification of him as the source of LFP 17, including its use of statutes that were amended by the Patriot Act. As part of its investigation, the FBI obtained authority to conduct covert surveillance and searches of Mayfield pursuant to the Foreign Intelligence Surveillance Act of 1978 (FISA). The OIG concluded that the FBI likely would have sought and been able to obtain FISA authorization for the searches and surveillance it conducted in this case even without the amendments to FISA contained in Section 218 of the Patriot Act (changing the "primary purpose" standard for issuance of a FISA warrant to a "significant purpose"). However, we found that the Patriot Act did affect the FBI's ability to share information about Mayfield gathered in the FISA surveillance and searches with prosecutors and other law enforcement agents.

We also found that, contrary to public speculation after Mayfield's arrest, the FBI did not use certain other provisions of the Patriot Act in the Mayfield case. For example, Section 213 of the Patriot Act authorizes delayed notification of the execution of criminal search warrants. The OIG found that there were no such delayed notification searches conducted in the Mayfield investigation. All the covert searches of Mayfield before his arrest were conducted pursuant to a FISA warrant, not a criminal search warrant. After

his arrest, the searches were based on overt criminal search warrants that did not implicate the Patriot Act.

The OIG did not find evidence that the FBI misused any of the provisions of the Patriot Act in conducting its investigation of Mayfield. However, the increased information sharing permitted by the Patriot Act amplified the consequences of the FBI's fingerprint misidentification in the Mayfield case.

The OIG also examined whether Mayfield's religion improperly influenced the FBI's field investigation and whether Mayfield's conditions of confinement during his two weeks of incarceration were appropriate. The OIG concluded that the FBI's field investigation of Mayfield was not improperly influenced by the FBI's knowledge of Mayfield's religion. We concluded that that investigation was initiated because of, and largely driven by, the identification of Mayfield's fingerprint on evidence associated with the train bombings, not by his religious beliefs. We believe the FBI would have sought covert search and surveillance authority irrespective of Mayfield's religion. Moreover, we did not find evidence suggesting that the investigation was prolonged because Mayfield is a Muslim.

With respect to Mayfield's confinement at the Multnomah County Detention Center, the OIG found no evidence that Mayfield was mistreated during his confinement or that his conditions of confinement violated the material witness statute.

The OIG review did not find any intentional misconduct by FBI employees. However, we made a series of recommendations to help the FBI address the Laboratory issues raised by the Mayfield case.

In addition to the OIG's review, DOJ OPR conducted an investigation into the conduct of the Department attorneys in the Mayfield matter. The OIG initially had intended to investigate the entire Mayfield matter, including the conduct of the DOJ attorneys working with the FBI. We believed that one DOJ oversight entity should investigate the matter, and we also concluded that the OIG had jurisdiction under Section 1001 of the Patriot Act to investigate allegations of civil rights or civil liberties abuses against DOJ employees, including DOJ attorneys. However, DOJ OPR disagreed. It contested our jurisdiction over attorneys in the Mayfield case, and asserted jurisdiction over the entire matter because it argued that the alleged misconduct of the FBI agents was related to that of the attorneys. It also disagreed with our position that Section 1001 provided us the authority to review the conduct of attorneys. Eventually the Deputy Attorney General resolved the matter by ruling that the Patriot Act did not change the existing jurisdiction between the OIG and OPR, and that OPR should investigate the conduct of attorneys and the OIG should investigate the conduct of FBI agents in the Mayfield case.

As a result of its investigation, DOJ OPR concluded that the DOJ attorneys assigned to the Mayfield matter did not commit misconduct.

On January 6, 2006, the OIG issued an unclassified executive summary of its findings. Since then, the OIG has been working within the Department to declassify and release publicly as much of the full report of investigation as possible. The OIG has made significant progress in this effort and intends to release publicly the full report, with any required redactions, in the near future.

#### **IV. OTHER ACTIVITIES RELATED TO POTENTIAL CIVIL RIGHTS AND CIVIL LIBERTIES ISSUES**

The OIG conducts other reviews that go beyond the explicit requirements of Section 1001 in order to implement more fully its civil rights and civil liberties oversight responsibilities. Using this approach, the OIG has initiated or continued several special reviews that relate, in part, to the OIG's duties under Section 1001. We also report on several reviews that DOJ OPR has initiated during this reporting period.

##### **A. Review of the FBI's Use of Certain Authorities Amended by the Patriot Act**

In December 2005, the OIG initiated a review of the FBI's use of two authorities amended by the Patriot Act:

(1) the FBI's authority to issue National Security Letters to obtain certain categories of records from third parties, including telephone toll and transactional records, financial records, and consumer reports; and

(2) the FBI's authority to obtain business records from third parties by applying for ex parte orders issued by the Foreign Intelligence Surveillance Court pursuant to Section 215 of the Patriot Act.

The Patriot Act reauthorization bill currently under consideration by Congress, known as the USA Patriot Improvement and Reauthorization Act of 2005 (H.R. 3199), contains provisions that direct the OIG to conduct reviews of the extent to which the FBI has used these authorities; any bureaucratic impediments to their use; how effective these authorities have been as investigative tools and in generating intelligence products; how the FBI collects, retains, analyzes, and disseminates information derived from these authorities; whether and how often the FBI provided information derived from these authorities to law enforcement entities for use in criminal proceedings; and whether there has been any improper or illegal use of these authorities. See Sections 106A and 119 of the Conference Report No. 109-333 (December 8, 2005).

While the Patriot Act legislation directing the OIG to submit these annual reports has not yet been enacted, the OIG has already initiated its review of these issues. Our reviews will include examination of FBI investigative files, interviews of FBI and other DOJ officials, visits to FBI field offices, and an analysis of the FBI's use of these authorities in the last several years.

**B. Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York**

An OIG special review issued in December 2003 (and described in detail in our January 2004 Section 1001 report) examined allegations that some correctional officers physically and verbally abused some detainees held in connection with the Department's terrorism investigation at the Metropolitan Detention Center (MDC) in Brooklyn, New York.<sup>5</sup> We concluded that certain MDC staff members abused some of the detainees, and we found systemic problems in the way detainees were treated at the MDC. In December 2003, we provided the results of our investigation to the BOP for its review and appropriate disciplinary action.

In response to our report and recommendations, the BOP OIA initiated an investigation to determine whether BOP OIA could independently sustain the OIG's findings sufficient to present to BOP disciplinary officials. During this reporting period, BOP OIA issued its findings to BOP disciplinary officials, who initiated a disciplinary process against 13 staff members. The BOP disciplinary process involves notification of allegations to staff members who have an opportunity to present their case to the disciplinary officials prior to the officials making a determination.

As of February 2006, based on the OIG's report and the BOP OIA's review, the BOP imposed the following discipline on 11 staff members: 2 correctional officers were terminated from the BOP; 2 officers received 30-day unpaid suspensions; 4 correctional officers received either 2- or 4-day unpaid suspensions; and 3 senior officers were demoted. These staff members may appeal their discipline to the Merit Systems Protection Board. The remaining two staff members are awaiting decisions by BOP disciplinary officials. The BOP has indicated to us that the decisions on these staff members are imminent.

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<sup>5</sup> See "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" (MDC Report), issued December 18, 2003. The MDC Report supplemented an OIG report issued in June 2003 entitled, "The September 11 Detainees: A review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks." Both reports can be found on the OIG's website ([www.usdoj.gov/oig](http://www.usdoj.gov/oig)) under "OIG Reports" and then "Special Reports."

The OIG will continue to monitor the BOP's actions with regard to disciplinary action.

### **C. Recommendations in the Detainee Report**

In the June 2003 Detainee Report, the OIG made 21 recommendations related to issues under the jurisdiction of the FBI, the BOP, and leadership offices at the DOJ, as well as immigration issues now under the jurisdiction of the DHS. As of this reporting period, 20 of the recommendations have been resolved. The one open recommendation calls for the Department and the DHS to enter into a memorandum of understanding (MOU) to formalize policies, responsibilities, and procedures for managing a national emergency that involves alien detainees. The DOJ and DHS agreed with the recommendation and began negotiating over language in the MOU to implement the recommendation. However, more than two years after the OIG made the recommendation, the MOU still has not been completed. As of February 2006, we were informed that discussions between the Department and the DHS over the language of this MOU remain ongoing.

### **D. Review of the FBI's Implementation of Attorney General Guidelines**

In September 2005, the OIG issued a report on the FBI's implementation of and compliance with four sets of Attorney General Guidelines: Attorney General's Guidelines Regarding the Use of Confidential Informants; Attorney General's Guidelines on FBI Undercover Operations; Attorney General's Guidelines on General Crimes, Racketeering Enterprise and Terrorism Enterprise Investigations; and Revised Department of Justice Procedures for Lawful, Warrantless Monitoring of Verbal Communications. These guidelines govern the FBI's principal criminal investigative authorities with respect to investigations of individuals and groups and its use of confidential informants, undercover operations, and warrantless monitoring of verbal communications (also known as consensual monitoring).

Following the September 11, 2001 attacks, the Attorney General ordered a comprehensive review of the guidelines to identify revisions that would enhance the Department's ability to detect and prevent such attacks. In May 2002, the Attorney General issued revised Investigative Guidelines that provided FBI field managers with greater authority to conduct preliminary inquiries, general crimes and criminal intelligence investigations, and undercover operations.

The OIG's review examined what steps the FBI has taken to implement the Attorney General's Investigative Guidelines, analyzed how effective those steps have been, and assessed the FBI's compliance with key provisions of the guidelines. Because the FBI's adherence to these guidelines could implicate

civil rights or civil liberties issues under Section 1001, we are including a description of the review in this report.

While the OIG found many areas in which the FBI complied with the Attorney General's Investigative Guidelines, it found significant non-compliance with the guidelines governing the operation of confidential informants and failures to notify FBI Headquarters and other Department officials of the initiation of certain criminal intelligence investigations. We also identified shortcomings in training on the guidelines and the FBI's planning for and implementation of the revised guidelines.

Specifically with regard to the Confidential Informant Guidelines, we found one or more Guidelines violations in 87 percent of the confidential informant files that we examined. Compliance errors were identified in several aspects of the FBI's management of the Criminal Informant Program: the FBI's conduct of initial and continuing suitability reviews designed to assess the suitability of individuals to serve as confidential informants (34 percent of the non-compliant files were initial suitability reviews and 77 percent were continuing suitability reviews); the instructions FBI agents are to give confidential informants (49 percent non-compliant files); the use of its power to authorize confidential informants to participate in "otherwise illegal activity" (60 percent non-compliant files); the notification requirements associated with a confidential informant's commission of "unauthorized illegal activity" (42 percent non-compliant files); and the necessary steps agents must take when a confidential informant is deactivated (37 percent non-compliant files).

The OIG's final report offered 47 recommendations designed to promote greater accountability for guidelines violations, enhance training on guidelines requirements and the consequences of guidelines violations to FBI investigations and Department prosecutions, require supervisory approval and more systematic recordkeeping on the FBI's use of new authorities to visit public places and attend public events for the purpose of detecting and preventing terrorist activities, and prepare a comprehensive implementation strategy for the next guidelines revisions. The FBI concurred with 43 of the 47 recommendations and partially concurred with the 4 remaining recommendations.

### **E. Ojeda Rios Shooting**

In September 2005, at the request of the FBI Director, the OIG initiated an investigation of an FBI shooting incident in Puerto Rico that resulted in the death of Filiberto Ojeda Rios. Ojeda was a founder and leader of Los Macheteros, a Puerto Rican pro-independence organization. Ojeda was arrested in 1985 in connection with a major bank robbery in Connecticut, but had been a fugitive since escaping in 1990 while released on bail.

The FBI's attempt to arrest Ojeda at a rural residence in western Puerto Rico on September 23, 2005, resulted in an exchange of gunfire. An FBI agent was wounded and Ojeda was shot. The OIG is examining the circumstances surrounding the arrest, the shooting, and the FBI's entry into the residence.

As of March 2006, the OIG had interviewed approximately 60 witnesses and reviewed several thousand pages of documents. We also have consulted with outside experts to assist in our evaluation of the FBI operation and the use of deadly force.

#### **F. The FBI's Interviews of Potential Protestors in Advance of the 2004 National Political Conventions**

In the summer of 2004, news articles stated that the FBI had questioned political demonstrators across the United States in connection with threatened violent and disruptive protests at the Republican and Democratic National Conventions held in the summer of 2004. The initial article stated that dozens of people had been interviewed in at least six states, including anti-war demonstrators and political demonstrators and their friends and family members. The FBI issued a statement responding to these allegations which stated in part: "The FBI is not monitoring groups, or interviewing individuals, unless we receive intelligence that such individuals or groups may be planning violent and disruptive criminal activity or have knowledge of such activity."

Following publication of the news articles, several members of Congress requested that the OIG initiate an investigation into "possible violations of First Amendment free speech and assembly rights by the Justice Department in connection with their investigations of possible protests at the Democratic and Republican political conventions in Boston and New York and other venues." In response, the OIG initiated an examination of the FBI's use of its investigative authorities to conduct interviews in advance of the 2004 national political conventions and the FBI's monitoring of protest groups in connection with the national political events. This review is nearing completion, and the OIG is in the process of drafting its report of investigation.

#### **G. Review of FBI Conduct Relating to Detainees in Military Facilities in Guantanamo Bay and Iraq**

The OIG is reviewing FBI employees' observations and actions regarding alleged abuse of detainees at Guantanamo Bay, Abu Ghraib prison, and other venues controlled by the U.S. military. The OIG is examining whether FBI employees participated in any incident of detainee abuse, whether FBI employees witnessed incidents of abuse, whether FBI employees reported any abuse, and how those reports were handled by the FBI. In addition, the OIG is assessing whether the FBI inappropriately retaliated against or took any other

inappropriate action against any FBI employee who reported any incident of abuse.

As part of this ongoing review, the OIG has interviewed detainees, FBI employees, and military personnel at Guantanamo. In addition, the OIG has administered a detailed questionnaire to approximately 1,000 FBI employees who served assignments at Guantanamo Bay, in Iraq, and Afghanistan. The questionnaire requested information on what the FBI employees observed, whether they reported observations of concern, and how those reports were handled. The OIG has received over 900 responses to its questionnaire. The OIG investigative team is conducting follow-up interviews and is in the process of drafting the report summarizing the results of the investigation.

## **H. DOJ OPR Reviews**

### **1. National Security Agency surveillance program**

In December 2005, several members of Congress sent a letter to the OIG asking us to review the Attorney General's authorization of warrantless domestic surveillance by the National Security Agency (NSA). After careful review of the request, the OIG concluded that the Department of Justice Office of Professional Responsibility (DOJ OPR) rather than the OIG has jurisdiction to conduct an investigation regarding the legal authorization for the NSA surveillance program.<sup>6</sup> Consequently, the OIG referred the December 2005 letter to DOJ OPR. According to Counsel for DOJ OPR, his office has opened an investigation into the role of Department attorneys in the legal authorization and oversight of the NSA surveillance program and compliance with the Foreign Intelligence Surveillance Act.

However, the members of Congress argued in letters to the OIG that the OIG had jurisdiction to review the matter by virtue of Section 1001 of the USA Patriot Act. The Patriot Act, enacted into law in October 2001, required the OIG "to review information and receive complaints alleging abuses of civil rights and civil liberties by employees and officials of the Department of Justice." The issue presented by the members' position is whether Section 1001 altered the jurisdiction between the OIG and DOJ OPR with respect to who could

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<sup>6</sup> Under a 1994 Attorney General order, OPR was given responsibility for investigating "allegations of misconduct by Department attorneys that relate to the exercise of their authority to investigate, litigate or provide legal advice. DOJ OPR shall also have jurisdiction to investigate allegations of misconduct by law enforcement personnel when they are related to the allegations of misconduct by attorneys within the jurisdiction of DOJ OPR." For example, OPR would be responsible for investigating alleged Brady violations by a Department attorney, while the OIG would investigate an allegation of travel voucher fraud by the same attorney. The respective jurisdictional authority of the OIG and OPR was codified into statute by the 21st Century Department of Justice Appropriations Authorization Act. See Pub. L. 107-273 § 308, 116 Stat. 1784 (Nov. 2, 2002).

investigate complaints of civil rights and civil liberties abuses involving Department attorneys acting as attorneys, or whether the language maintained the existing jurisdictional apportionment between the OIG and DOJ OPR.

As referenced earlier in this report on pages 12-13, this issue arose during the OIG's investigation of the FBI's actions in the Brandon Mayfield case. In that case, although the OIG intended to investigate the entire Mayfield matter, including the conduct of Department attorneys working with the FBI on the case, DOJ OPR also asserted jurisdiction over the matter because it involved the conduct of attorneys. Eventually, the Deputy Attorney General ruled that Section 1001 of the Patriot Act did not change the existing jurisdiction between the OIG and OPR, and that OPR should investigate the conduct of attorneys and the OIG should investigate the conduct of FBI agents in the Mayfield case.

Therefore, under the Department's interpretation of the jurisdictional authority of the OIG and OPR, allegations regarding the Attorney General's legal authorization of NSA surveillance fell within DOJ OPR's jurisdiction, not the OIG's. As noted above, DOJ OPR has opened its investigation relating to this issue.

## **2. Material witness warrants**

The American Civil Liberties Union (ACLU) and Human Rights Watch issued a report in June 2005 entitled "Witness to Abuse: Human Rights Abuses under the Material Witness Law since September 11." The report reviewed a number of material witness cases and alleged that the material witness law had been misused to hold suspects in cases where there was insufficient evidence to charge them criminally; a number of witnesses were not brought promptly before a judge, were denied counsel, or were not provided with the reason for their arrest; the government had improperly alleged that every witness was a flight risk; the government had conducted abusive interrogations; and many of the judicial proceedings were improperly conducted in secret.

Based on the allegations in the report, DOJ OPR opened inquiries regarding the allegations concerning 13 individuals, and one group of 8 individuals detained together. Some of these matters involved allegations that individuals were held for long periods of time on material witness warrants with no effort to obtain their testimony. Several of these individuals were later charged criminally or deported based on immigration violations. Other matters involved the alleged failure to bring individuals before a court within the required time frame and failure to inform witnesses of the basis for their arrest. DOJ OPR's inquiry is ongoing.

## **V. REVIEW OF THE FBI'S REPORTING OF POSSIBLE INTELLIGENCE VIOLATIONS TO THE INTELLIGENCE OVERSIGHT BOARD**

During this reporting period, the OIG initiated an examination of the FBI's process for reporting possible violations involving intelligence activities to the Intelligence Oversight Board (IOB). In this section, we describe the OIG's review. We provide background on the creation of the IOB, the FBI's internal process for reporting possible violations to the IOB, and the various authorities that apply to the FBI's intelligence activities. We also summarize our review of the FBI documents analyzing and reporting the possible intelligence violations.

The OIG is often asked whether any of the civil rights and civil liberties allegations we reviewed and are required to report under Section 1001 involve "violations of the Patriot Act." This question with regard to the possible IOB violations that we discuss in this section cannot be answered fairly with a simple "yes" or "no." Some of the reported IOB violations involve authorities that have been altered or expanded by provisions of the Patriot Act. For example, the Patriot Act changed the FISA statute and the statutes involving National Security Letters, and in response to the Patriot Act, the Attorney General Guidelines and internal FBI policies were also revised. On their face, some of the possible violations reported to the IOB involve statutes, guidelines, and policies altered in response to the Patriot Act, while others clearly did not. However, we cannot say from our review whether or not the IOB violations resulted from the changes brought about by the Patriot Act. Rather, we are describing these possible IOB violations because of our obligation under Section 1001 to report potential civil rights or civil liberties violations, regardless of whether or not they involved authorities changed by the Patriot Act.

### **A. Background of the IOB**

In the 1970s, Congress conducted a series of hearings probing allegations of improper domestic intelligence activities by the U.S. government, including the FBI and the Central Intelligence Agency (CIA). The House of Representatives and the Senate held hearings and issued reports documenting improper intelligence activities directed at U.S. citizens, including covert intelligence programs conducted by the FBI. Following these revelations, Congress and the Executive Branch established various mechanisms to provide additional oversight of intelligence activities in the United States. For example, Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA), which established the Foreign Intelligence Surveillance Court (FISC), a special court authorized to approve electronic surveillance and, later, physical searches of U.S. citizens and others in the United States. The House of Representatives and the Senate each established intelligence oversight committees.

In addition, an Executive Order signed by President Ford in 1976 created an Intelligence Oversight Board (IOB) within the Executive Branch. Over the next 20 years, the functions and organization of the board were modified by a series of Executive Orders. The current Executive Order (E.O. 12863) designates the IOB as a standing committee of the President's Foreign Intelligence Advisory Board (PFIAB) within the Executive Office of the President. According to the E.O. 12863, the President appoints the 16 members of the PFIAB "from among trustworthy and distinguished citizens outside the Government who are qualified on the basis of achievement, experience and independence." Among its duties, the four-member IOB is charged with reviewing activities of the U.S. intelligence community and informing the President of any activities that the IOB believes "may be unlawful or contrary to Executive order or Presidential Directives." E.O. 12863 also provides that inspectors general and general counsels of the Intelligence Community are to report to the IOB on at least a quarterly basis intelligence activities they "have reason to believe may be unlawful or contrary to Executive order or Presidential directive."<sup>7</sup>

The IOB does not normally provide its reports to Congress, and only one IOB report to the President has been made public. In June 1996, the IOB released a report on the role of U.S. intelligence agencies in Guatemala in the 1980s and early 1990s.

However, a Freedom of Information Act (FOIA) request recently resulted in the public disclosure of redacted versions of 20 of the FBI reports to the IOB of possible intelligence violations. The FBI's reports to the IOB are classified. The redacted reports released in response to the FOIA request indicated that the FBI has reported to the IOB a variety of possible intelligence violations, including violations of the FISA, statutes involving the issuance of National Security Letters, Attorney General Guidelines, and internal FBI policy.

## **B. The FBI's Procedures for Evaluating and Reporting Possible IOB Violations**

Pursuant to E.O. 12863 and guidance provided by the IOB and the Department's Office of Intelligence Policy and Review (OIPR), the FBI has developed a process for evaluating possible violations of laws or policies governing its use of intelligence authorities to determine if the possible violations should be reported to the IOB. The current FBI process is described in a memorandum dated February 10, 2005, to all FBI divisions from the FBI's Inspection Division, entitled, "Revised Procedures for the Submission of Reports of Potential Intelligence Oversight Board (IOB) Matters." The

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<sup>7</sup> The function of evaluating FBI reports of possible IOB violations has been performed by the Office of the General Counsel of the FBI (FBI-OGC).

memorandum describes the process the FBI uses to report to the IOB “intelligence activities conducted by the FBI which may have been unlawful or contrary to Executive Orders, Presidential Directives, Department guidelines or investigative procedures.” While portions of the memorandum are classified, we provide below an unclassified summary of the FBI procedures from this memorandum and other unclassified sources.

The procedures require FBI employees to report potential IOB violations (described in subsection C below) within 14 days of discovery both to the FBI’s National Security Law Branch (NSLB) in FBI-OGC and the Internal Investigations Section (IIS) of the FBI Inspection Division. FBI headquarters’ divisions and field office supervisors also are responsible for monitoring intelligence activities and reporting possible IOB violations to FBI-OGC and IIS. Each FBI field office and headquarters’ division is required to submit quarterly reports to FBI-OGC certifying that all employees were contacted concerning the requirements to report possible IOB matters.

When possible IOB violations are reported to FBI-OGC and IIS, the field office or FBI headquarters division is required to include a description of the status of the subjects of the investigative activity at issue, the legal authority for the investigation, the potential violation, and when it occurred. The only function that IIS serves when it receives the incoming report is to open a file and assign a number to the IOB matter. IIS then forwards the incoming report with the number assigned to FBI-OGC.

FBI-OGC reviews the incoming report describing the possible IOB violation and prepares a written opinion as to whether the matter should be reported to the IOB under internal standards developed by FBI-OGC and the IOB. If FBI-OGC determines that the matter should be reported to the IOB, FBI-OGC prepares correspondence to the IOB setting forth the basis for the notification. A copy of the correspondence to the IOB is sent to IIS, the FBI Inspection Division, the Special Agent in Charge or Assistant Director of the office where the matter originated, the Office of the Attorney General, and OIPR.

The February 10, 2005, FBI memorandum identifies six possible violations that must be reported to the IOB, two of which are classified. The four unclassified possible violations are:

1. Activities believed to be unlawful or contrary to Executive Orders or Presidential Directives.
2. Suspected violations of the United States Constitution.

3. Initiating a form of electronic surveillance or search without authorization from the FISC or failing to terminate the authorized surveillance at the time prescribed by the FISC.

4. Failing to adhere to minimization or dissemination requirements specified in the FISC order.<sup>8</sup>

However, FBI-OGC sometimes concludes that a possible violation is not sufficiently serious to warrant reporting to the IOB. In coordination with the IOB, FBI-OGC has established a *de minimis* standard for possible violations that fall outside the reporting requirement. Among the matters reported to FBI-OGC deemed to fall within the *de minimis* standard were slightly untimely reports of documentation of the initiation or progress of investigations, slightly untimely submission of requests to approve the extension of investigations, or the continuation of investigations after their authority expired with little or no investigative activity during the period outside the authorization. According to internal FBI memoranda released in redacted form in the course of the FOIA litigation referenced above, “violations of provisions that are essentially administrative in nature need not be reported to the IOB.”

If FBI-OGC determines that the possible violation is non-reportable, then FBI-OGC must retain the incoming memorandum reporting the possible violation for three years together with the FBI-OGC opinion stating the basis for the determination not to report to the IOB. These documents are maintained in the event that Counsel to the IOB wants to review them.

If the possible IOB violation involves the unintentional or improper acquisition of information under FISA, the information is either destroyed or provided to OIPR for sequestration with the FISC. In addition, the government provides an explanation of the matter to the FISC. If the possible IOB violation involves the unintentional acquisition of information unrelated to a FISC order, the FBI is supposed to take appropriate remedial action and initiate steps to obtain the information appropriately. In most cases, remedial action is initiated by the field office at the time the possible violation is discovered. In addition, FBI-OGC may also direct, or OIPR may recommend, that remedial action be taken.

If FBI-OGC determines that the conduct of an FBI employee involved in the possible IOB violation is more than a performance issue, FBI-OGC refers the matter to the FBI’s IIS for appropriate investigation. Over the past two years, IIS has investigated several IOB matters. Upon the completion of an investigation of an IOB violation which is alleged to have been committed by an

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<sup>8</sup> FISA imposes minimization requirements “reasonably designed . . . to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons . . .” 50 U.S.C. §§ 1801(h)(1), 1821 (4)(A).

FBI employee, the findings are referred to the FBI Office of Professional Responsibility (FBI-OPR) for adjudication.

FBI-OPR has adjudicated several of these matters since 2001 and has imposed discipline on a few FBI employees arising from the reported IOB matters. The discipline in these cases has included counseling, oral reprimands, letters of censure, or suspensions. For example, FBI-OPR imposed a 3-day suspension on an FBI Supervisory Special Agent who failed to ensure compliance with the FISA requirement that Attorney General approval be obtained prior to the use of FISA-derived information in grand jury subpoenas.

In addition to the self-reporting procedure set forth above, the FBI's Inspection Division has included an audit of the IOB process and a limited review of closed counterintelligence files within the scope of its triennial inspections of FBI field offices and FBI headquarters' divisions. As part of its normal inspection process, the Inspection Division conducts a pre-inspection survey and reviews a sample of closed files to test compliance with the requirements to report possible IOB violations to IIS and FBI-OGC in a timely fashion. In the course of these efforts, the Inspection Division has identified possible IOB violations, the findings of which were reported to FBI-OGC and, where appropriate, the IIS.

### **C. Summary of Possible Intelligence Violations reported to the IOB in FY 2004 and 2005**

The OIG examined FBI documents reflecting the reporting of possible IOB violations to FBI-OGC in accordance with the process described above. In addition, we reviewed the FBI's reports to the IOB in fiscal years (FY) 2004 and 2005 and the internal FBI-OGC memoranda reflecting the incidents reported and not reported to the IOB. The FBI made 108 reports of possible violations to the IOB for these two years.

The reports to the IOB describe incidents that generally fell into one or more of the following three categories: (1) improper utilization of authorities under FISA; (2) failure to adhere to Attorney General Guidelines or implementing FBI policy; and (3) improper utilization of authorities involving National Security Letters.

The matters reported to the IOB in FY 2004 and 2005 encompassed the range of intelligence activities used by the FBI, and the possible violations varied from relatively minor to significant. However, possible violations generally related to "over-collection" and "overruns." An "over-collection" refers to information gathered within the authorized period of a FISC order but outside the scope or intent of the order. An "overrun" refers to investigative activity conducted outside the time period of the FISC order or outside the

authorized period of investigative activity, which may involve the collection of unauthorized information. In some instances, agents may have reported to FBI-OGC a possible violation involving both an overrun and an over-collection.

With respect to “over-collection” and “overruns” of information collected pursuant to FISA authorities, based on matters for which data was available, we determined that the average duration of the over-collections and overruns reported to the IOB was approximately 24 days in FY 2004 and 16 days in FY 2005.<sup>9</sup> The duration of possible violations of the Attorney General Guidelines or FBI implementing policy governing national security investigations averaged 185 days in FY 2004 and 130 days in FY 2005 for the reports we examined in which the duration of the possible violation was readily available.\*

The nature of the information collected either as over-collection or overruns under FISA or NSL authorities or in the course of national security investigations where Attorney General Guidelines, FISC orders, or FBI policy may have been violated included telephone calls, audio recordings, facsimile intercepts, e-mail communications, financial records, and credit reports. In one matter reported to the IOB, the FBI received 181 full content telephone calls instead of just billing and toll records.

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<sup>9</sup> For those matters reported to the IOB in FY 2004, arising solely from the FBI’s use of FISA authorities, where the possible violation was attributable either solely or partially to FBI conduct, the duration of over-collections and overruns averaged 26 days, the median was 16 days, and the range was from 1 day to 120 days. For those matters reported to the IOB in FY 2004 where the violation was ascribed solely to the conduct of a third party, the duration of the over-collections and overruns averaged 21 days. The median was 14 days, and the range was from 1 day to 92 days.

For those matters reported to the IOB in FY 2005, arising solely from the FBI’s use of FISA authorities, where the possible violation was attributable either solely or partially to FBI conduct, the duration of the over-collections and overruns averaged 9 days. The median was 8 days, and the range was from 1 day to 21 days. For those matters reported to the IOB in FY 2005 where the violation was ascribed solely to only the conduct of a third party, the duration of the over-collections and overruns averaged 46 days. The median was 19 days, and the range was from 1 day to 58 days.

These figures are estimates because the files we reviewed did not always state when the overrun or over-collection began, when the FBI or third party discovered it, or when the violation was corrected. To calculate the average length of time in days that the over-collections or overruns lasted, we subtracted the date when the possible violation began from the date the violation was corrected. If either date could not be readily determined, the matter was not included in our calculation. This calculation does not reflect how quickly the FBI acted to end the violation upon discovery. The FBI stated that its policy is to terminate overruns and over-collections immediately upon discovery.

\* The report released on March 8, 2006, contained data errors that affected the calculations of the average duration of over-collections and overruns in this paragraph and in footnote 9. This version of the report contains the corrected numbers for this calculation and also the calculation of the average duration of possible violations involving the Attorney General Guidelines or FBI implementing policy.

The possible violations reported to the IOB occurred in various FBI headquarters divisions and field offices. Ten different field offices generated four or more matters reported to the IOB in the 2-year period under review. The most reports generated by a single field office or headquarters' division during this period was eight.

*Timeliness of Internal FBI Reporting to FBI-OGC.* As noted above, FBI policy requires that agents must report possible IOB violations to FBI-OGC within 14 days after discovery. In the cases in which we could determine the date the possible violation was discovered (over 80 percent), FBI personnel referred to FBI-OGC possible IOB violations within the 14-day standard in slightly over half of the cases in both years. The average time that elapsed from the date of discovery of the possible violation to the date of its referral to FBI-OGC was approximately 50 days in both years.<sup>10</sup>

*Amount of Time for FBI-OGC Review.* Although FBI policy does not specify a time limit, we calculated the amount of time FBI-OGC has taken to decide whether to report the possible violations to the IOB. On average, the time between the date of the report from the field office or headquarters' division and the date that FBI-OGC sent the reporting field or headquarters' division a notification that it would report the matter to the IOB was 140 days for matters reported to the IOB in FY 2004 and 101 days for matters reported in FY 2005.<sup>11\*</sup>

*U.S. versus Non-U.S. Persons.* In a significant majority of the matters referred to FBI-OGC, we were able to determine whether the subject or target was a "U.S. person" for purposes of FISA. In more than two-thirds of these matters in both years, the subjects or targets of the surveillance or physical search were U.S. persons only. In FY 2004, approximately one-third of these cases involved only non-U.S. persons as subjects or targets, with approximately one-fifth in this category in FY 2005.

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<sup>10</sup> To calculate the timeliness of internal FBI reporting of all potential IOB violations, we subtracted the date that the possible violation was discovered from the date of the incoming memorandum reporting the possible violation to FBI-OGC. We did not include in this calculation any matters reported to FBI-OGC for which the date of the possible violation could not be ascertained.

<sup>11</sup> For this calculation, we subtracted the date of FBI-OGC's memorandum advising the field or headquarters division that it would report the possible violation to the IOB from the date of the incoming memorandum to FBI-OGC. Some of the matters reported to the IOB in FY 2004 and FY 2005 included matters referred to FBI-OGC in FYs 2002 and 2003 (7 percent); however, these matters are not included in the calculations.

\* The report released on March 8, 2006, contained data errors that affected the calculation of the average time of FBI-OGC review of possible IOB violations in FY 2005. This version of the report contains the corrected number.

*Possible Violations that Involved Third Parties.* Some possible IOB violations were attributable to the conduct of third parties. According to the data we reviewed, third parties such as telephone companies were involved in or responsible for the possible violations referred to FBI-OGC in approximately one-quarter of the cases in FY 2004 and 31 percent in FY 2005. For example, companies sometimes provided content not authorized by the FISC order or National Security Letter. In other cases, they failed to inform the FBI that the subjects of the surveillance had changed their telephone numbers.

*Types of Reports to the IOB Involving Improper Use of FISA Authorities.* The reports we examined referenced incidents in which FBI personnel:

- intercepted communications outside the scope of the FISC order, whether due to FBI or third-party error, resulting in intercepts of the wrong telephone number, the wrong facsimile number, the wrong target, or the wrong locations;
- improperly disseminated FISA-derived information;
- violated minimization rules designed to protect the rights of U.S. citizens; and
- used FISA-derived information to obtain other information about the subject without first obtaining Attorney General authority to do so.

Approximately 54 percent of the reports we examined for FY 2004 and 47 percent of the reports we examined for FY 2005 fell into the category of improper use of FISA authorities.

*Reports to the IOB Involving Failure to Adhere to Attorney General Guidelines or FBI Implementing Policy.* We also examined possible IOB violations arising from failure to adhere to the Attorney General's Guidelines on National Security Investigations and Foreign Intelligence Collection (or the predecessor Attorney General Guidelines known as the Attorney General Guidelines for FBI Foreign Intelligence Collection and Foreign Counterintelligence Investigations), or failure to comply with FBI internal manuals implementing the Guidelines. These Attorney General Guidelines establish the subject matter, approval levels, timing, and limitations on counterterrorism and counterintelligence investigations and are further explained by internal FBI manuals and guidance. The possible violations of these Guidelines and FBI policy include incidents in which FBI personnel:

- initiated investigative activity without proper authorization;
- continued investigative activity after the authority expired;
- failed to file or failed to timely file periodic memoranda with their supervisors and headquarters personnel documenting initiation or extension of the investigation; and
- used investigative techniques authorized by the Guidelines on the wrong individual.

Approximately 35 percent of the matters in FY 2004, and 49 percent in FY 2005 fell into this category.

*Reports to the IOB Involving National Security Letters.* The FBI reports of possible IOB violations reference instances in which the potential violation arose from the FBI's use of its authority to issue National Security Letters. These included incidents in which:

- third parties provided e-mail content information that was not requested or authorized;
- a National Security Letter was issued after the investigation was extended without authorization;
- the FBI issued a National Security Letter for the wrong subject due to a similar name; and
- typographical errors by the FBI led to the collection of information about an individual who was not a subject of the investigation.

Approximately 13 percent of the reports we examined for FY 2004 fell into this category, compared with approximately 4 percent of the reports we examined for FY 2005.

*Reported vs. Unreported Matters.* Approximately two-thirds of the matters sent to the FBI-OGC resulted in reports to the IOB in FY 2004 and 2005. We examined the nature of the matters not reported to the IOB and determined that most of the matters not reported fell into the category involving violations of Attorney General Guidelines and implementing FBI policy. For example, FBI-OGC did not report an incident in which an FBI agent failed to file a timely report on a human source as required by FBI policy.

In most instances, factual distinctions evident from the field office's or headquarters division's memoranda to FBI-OGC appeared to justify the decision not to report the violation to the IOB. In several instances, however, it appeared that some factually similar incidents led to reports to the IOB, while others did not. For these cases, we intend to ascertain whether the FBI had a reasonable explanation for the apparent discrepancy in the reporting decisions.

The chart below summarizes the percentages of possible violations reported to the IOB in the three main categories described above, broken down by specific intelligence activity. It is important to note that the following percentages of matters reported to the IOB should not be interpreted to reflect the level or volume of collections in the various categories.

<b>Summary of Possible Violations Reported to the IOB (FY 2004-2005)</b>		
<b>Category</b>	<b>2004</b>	<b>2005</b>
<b>FISA</b>		
Electronic Surveillance (ELSUR) not within authorized time period ("overrun") <sup>12</sup>		
-Telephone number	0.0%	0.0%
-Telephone communications/Audio recordings	3.2%	2.2%
-Facsimile number	0.0%	0.0%
-Facsimile number intercept	3.2%	0.0%
-E-mail address	0.0%	0.0%
-E-mail communication	4.8%	4.4%
<b>ELSUR Not Within Authorized Time Period Subtotal</b>	<b>11.2%</b>	<b>6.6%</b>
ELSUR outside scope/intent of FISC order ("over-collection")		
-Incorrect telephone number	9.5%	8.9%
-Telephone communications/Audio recordings	12.7%	11.1%
-Incorrect facsimile number	0.0%	4.4%
-Facsimile intercept	0.0%	4.4%
-Incorrect E-mail address	3.2%	6.7%
-E-mail communication	4.8%	15.6%
-Incorrect subject	4.8%	13.3%
-Incorrect location	0.0%	0.0%
-Other	9.5%	4.4%
Failure to comply with OIPR directive to terminate collection	3.2%	0.0%
<b>ELSUR Not Authorized by FISC Order Subtotal</b>	<b>47.7%</b>	<b>68.8%</b>
Improper use of ELSUR to access financial and other records	3.2%	2.2%
FISA physical search conducted prior to receipt of Emergency Authorization from the Attorney General	3.2%	0.0%
Unauthorized or improper dissemination	3.2%	0.0%
Violation of minimization procedures	3.2%	0.0%
Failure to complete timely search warrant return	0.0%	0.0%
<b>FISA Subtotal (Includes ELSUR not within authorized time period and not authorized by FISC order)</b>	<b>71.4%</b>	<b>77.8%</b>

<sup>12</sup> The term "electronic surveillance" (ELSUR) means the acquisition of the contents of certain wire or radio communications by an electronic, radio, or other surveillance device, or the installation or use of such a device in the United States for monitoring to acquire other types of information. The four types of ELSUR are set forth in 50 U.S.C. § 1801(f).

<b>AG Guidelines/FBI Policy</b>		
Failure to file timely periodic Letter Head Memorandum (LHM) <sup>13</sup>	4.8%	4.4%
Failure to file periodic LHM	6.3%	6.7%
Failure to file timely annual LHM	1.6%	4.4%
Failure to file annual LHM	4.8%	2.2%
Failure to obtain extension for PI (no investigative activity)	3.2%	0.0%
Investigation without authorization (PI or Full)	7.9%	0.0%
Investigation after authority expired (PI or Full)	9.5%	24.4%
Failure to properly close investigation (PI or Full)	1.6%	8.9%
Mail covers for the wrong individual(s)	0.0%	2.2%
Exceeded AG-approved deposit limit for undercover operation	0.0%	0.0%
Failure to file timely evaluation of human source	0.0%	0.0%
<i>AG Guidelines/FBI Policy Subtotal</i>	<i>39.7%</i>	<i>53.3%</i>
<b>National Security Letters (NSL)</b>		
Improperly prepared NSL (such as wrong name)	6.3%	2.2%
Content provided outside of NSL request	4.8%	2.2%
NSL issued after closure of investigation	1.6%	0.0%
<i>NSL Subtotal</i>	<i>12.7%</i>	<i>4.4%</i>
<b>U.S. Constitution</b>	0.0%	0.0%
<b>Ex Parte Orders from FISC for Business Records (§ 215)</b>	0.0%	0.0%

Source: OIG analysis of files provided by FBI-OGC

Note: Several possible IOB violations appear in multiple categories

The OIG intends to continue to monitor the FBI's process for handling IOB matters. In addition, in the OIG's ongoing review of certain authorities amended by the Patriot Act, which is referenced in section IV. A. of this report, we intend to examine the effectiveness of the FBI's self-reporting system for possible IOB violations in the context of its use of authorities to issue National Security Letters.

<sup>13</sup> The FBI uses LHMs to document the opening or status of investigations.

## **VI. EXPENSE OF IMPLEMENTING SECTION 1001**

Section 1001 requires the OIG to:

*Submit to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate on a semi-annual basis a report...including a description of the use of funds appropriations used to carry out this subsection.*

During this reporting period, the OIG spent approximately \$1,330,621 in personnel costs, \$22,787 in travel costs (for investigators to conduct interviews), and \$1,972 in miscellaneous costs, for a total of \$1,355,380 to implement its responsibilities under Section 1001. The total personnel and travel costs reflect the time and funds spent by OIG special agents, inspectors, and attorneys who have worked directly on investigating Section 1001-related complaints, conducting special reviews, and implementing the OIG's responsibilities under Section 1001.