U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

November 23, 2005

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On Sunday, November 6, the *Washington Post* published a feature article by Barton Gellman titled "The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans." The article presents a materially misleading portrayal of the FBI's use of National Security Letters (NSLs), which are a long-standing and important tool for preventing terrorist attacks and espionage. Contrary to the impression created by the *Post*'s article, NSLs do not empower the FBI to spy on ordinary Americans, to listen to phone calls or read emails, or to review what books Americans read or web sites they visit. Rather, NSLs empower the FBI to conduct national security investigations by requesting very specific categories of information critical in tracking the activities of terrorists and spies and determining whether a person is a terrorist or spy.

While many of the distortions and factual errors in the *Post*'s article can be debunked only through classified information, other flaws in the article's discussion are revealed on the face of public records and of the laws passed by the Congress. Indeed, some are revealed in the article's own internal inconsistencies. We have already briefed your staffs on many of the article's distortions and falsehoods, including those for which the underlying facts are classified. This letter is intended to provide you an account of the facts regarding certain inaccuracies that can be rebutted in an unclassified format. We have therefore listed a number of those errors and explained the truth regarding those errors.

1. **As a general theme, the *Post* claims that the FBI uses NSLs to spy on law-abiding Americans. This is simply false: The FBI cannot and does not use NSLs outside of authorized national security investigations.**

   Claims: "The PATRIOT Act, and the Bush administration guidelines for its use, transformed those [national security] letters by permitting clandestine scrutiny of U.S. residents and visitors who are not alleged to be terrorists or spies."; "Career investigators and Bush administration officials emphasized, in congressional testimony and interviews for this story, that national security letters are for hunting terrorists, not fishing through the private lives of the innocent. The distinction is not as clear in practice."

Fact: **By law and in practice, NSLs cannot be and are not used to spy on law-abiding Americans or to investigate ordinary crimes or even domestic terrorism — they are limited to requests for information relevant to authorized investigations of international terrorism and espionage.** To be sure, some people whose records are produced in response to an NSL may not be terrorists or spies or associated with terrorists or spies. But in these vital investigations, the FBI needs to be able to check out every tip and track down every lead. As the attacks of 9/11 taught us all, even the slightest lead must be aggressively pursued. NSLs allow the FBI use of an efficient tool for determining the seriousness of the threat posed by suspected terrorists or spies and their associates — including the ability to cull unwitting acquaintances from complicit and dangerous co-conspirators.

2. **The *Post* insinuates that the FBI uses NSLs to seek library patrons' check-out records and monitor visits to disfavored websites. But the statutes authorizing NSLs do not authorize the FBI to request information on "the books [library patrons] borrow" or to monitor traffic on websites, and the FBI complies with those statutes.**

Claims: "[T]he vendors of the software he operates said their databases can reveal . . . the books they borrow. [The purported NSL recipient] refused to hand over those records . . . ."; "If the government monitors the Web sites that people visit and the books that they read, people will stop visiting disfavored Web sites and stop reading disfavored books."

Fact: **The FBI by law cannot, and in practice does not, request that an NSL recipient disclose e-mail contents or library checkout records.** The NSL statutes strictly limit what information may be requested, and from whom. The NSL in the Connecticut case was issued under 18 U.S.C. § 2709, which does not authorize requests for book borrowing records. Indeed, despite the *Post*'s insinuation, the *Post*'s own description of the NSL at issue in the Connecticut case (the accuracy of which can only be discussed in a classified setting) does not suggest that the FBI sought check-out records. Justice Ginsburg's opinion denying emergency relief in that case confirms this, characterizing the NSL as requesting "'subscriber information, billing information[,] and access logs'" — not book check-out records. *Doe v. Gonzales*, 546 U.S. ___, No. 05A295 (Oct. 7, 2005) (Ginsburg, J., in chambers). As for websites, tracking visits to websites cannot be done under an NSL.

3. **The *Post* implies that NSLs are left entirely to the FBI's discretion. In doing so, the *Post* ignores robust mechanisms for checking misuse.**

Claim: "They [NSLs] receive no review after the fact by the Justice Department or Congress."

Fact: **FBI NSL usage is subject to Justice Department and Congressional oversight.** First, no NSL may be issued except in an authorized national security investigation, and no national security investigation may be authorized without notice to the Justice Department's Office of Intelligence Policy and Review and its Criminal Division. Second, should there be an allegation of wrongdoing involving an NSL, the Justice Department's Inspector General is empowered to investigate, and any misuse must be reported to the Intelligence Oversight Board. Third, all but one of the statutes authorizing use of NSLs require the FBI to "fully inform" Congress regarding the FBI's use of NSLs.

4. **The *Post* fundamentally mischaracterizes a recent Executive Order to claim that it requires the FBI to share private records of innocent Americans with entities outside the federal government.**

Claim: "Late last month, President Bush signed Executive Order 13388, expanding access to those files for 'state, local and tribal' governments and for 'appropriate private sector entities,' which are not defined."

Fact: **Executive Order 13388 does not give state, local, tribal, or private entities access to information gleaned from NSLs.** The Executive Order's reference to those entities directs that they be included in a federal project to bolster the "interchange of terrorism information" insofar as it is consistent with "the freedom, information privacy, and other legal rights of Americans." E.O. 13388 § 1. This policy directive implements section 1016 of the Intelligence Reform and Terrorism Prevention Act of 2004, which requires the sharing of terrorism information with "all appropriate Federal, State, local, and tribal entities, and the private sector." The information-sharing project includes policies and procedures to determine who is an appropriate recipient of what information, and to safeguard privacy and civil liberties. For instance, including private sector entities in the "interchange of terrorism information" will allow terror threat information to be shared, as appropriate, with business and critical infrastructure entities. There is no requirement that those entities be given access to information on innocent Americans.

5. **The *Post* implies that the FBI can use an NSL to compel production of private records without the intervention of a court, and that PATRIOT Act conferees are set to expand that authority. Neither contention has any basis in fact.**

Claim: "House and Senate conferees are poised again to amplify the FBI's power to compel the secret surrender of private records."

Fact: **The FBI cannot compel compliance with an NSL without seeking judicial intervention.** An NSL is not a court order or a grand jury subpoena; it is a request for records. In the event a recipient objects to the request, production can only be "compelled" by a court. Neither the House nor the Senate reauthorization bill contains language that would "amplify" existing NSL authorities. The changes supported by the Administration will create significant additional oversight and explicit procedures for judicial review — facts literally ignored by the *Post*.

6. **The *Post* implies that Congressional oversight of NSLs is inadequate and that, in any event, the Justice Department has failed to report how many NSLs it uses. To the contrary, the Justice Department provides Congress information on NSL usage in a number of forms, including reporting, briefings, and testimony.**

Claim: "The Justice Department has offered Congress no concrete information, even in classified form, save for a partial count of the number of letters delivered."; "As national security letters have grown in number and importance, oversight has not kept up."

Fact: **The Department of Justice has complied with thorough Congressional oversight of NSL use.** In addition to providing to Congress all information required by the numerous statutory reporting requirements regarding NSLs, the Department has participated in multiple hearings that addressed NSL authorities, responded to numerous written congressional queries, and conducted several classified briefings. It is simply false to suggest that the Justice Department has offered Congress "no concrete information" on NSL usage or that Congress has ignored its oversight responsibilities. Moreover, the article's denigration of the oversight the Congress can provide based on numbers of NSLs issued is unwarranted. The Department reports both the total number of NSLs issued and, most important, the number of different U.S. persons whose records the FBI has requested through NSLs. Those statistics permit Congress to see if there have been significant increases in the use of NSL authority. By way of example, if the *Post* is correct that NSLs were used during the Las Vegas investigation (a point we can neither confirm nor deny in an unclassified setting), our reports to Congress would include a huge number of U.S. persons, which would undoubtedly attract Congressional attention.

7. **The *Post* draws misleading and erroneous distinctions between NSLs and their criminal investigative counterpart, grand jury subpoenas.**

Claim: "Grand juries tend to have a narrower focus because they investigate past conduct, not the speculative threat of unknown future attacks. Recipients of grand jury subpoenas are generally free to discuss the subpoenas publicly."

Fact: **The distinctions the *Post* is attempting to draw between grand jury subpoenas and NSLs appear to be based on a fundamental misunderstanding of the grand jury process.** First, a grand jury subpoena certainly could be used to investigate "the speculative threat of unknown future attacks": grand juries are fully empowered to investigate ongoing conspiracies. Second, while grand jury subpoenas are available to investigate a wide range of criminal activities, NSLs are available only in authorized national security investigations, in which confidentiality is often a paramount concern. Finally, courts have repeatedly recognized that individuals do not have a First Amendment right to disclose information learned only by virtue of participation in an investigation, particularly where the national security is implicated.

8. **The *Post* incorrectly implies that then-Attorney General Ashcroft empowered the FBI to investigate terrorism without regard to Americans' civil rights and civil liberties.**

Claim: "He gave overriding priority to preventing attacks by any means available."

Fact: **The FBI must and does conduct its investigations within the bounds of our Constitution, statutes, strict internal guidelines, and Executive Orders.** Attorney General Ashcroft did not authorize, and could not have authorized, the FBI to disregard those constraints. It is simply false to suggest that there are no legal restrictions on the FBI's investigations, even of terrorism.

9. **The *Post* asserts that because subjects are not notified of the issuance of an NSL, no one can challenge that issuance. This contention is wrong, given the availability of various oversight mechanisms and judicial review.**

Claim: "Because recipients are permanently barred from disclosing the letters, outsiders can make no assessment of their relevance . . . ."

Fact: **Recipients can challenge NSLs in court. Moreover, they can notify the Justice Department's Inspector General about perceived abuses. And NSL usage is subject to extensive Congressional oversight.** Any recipient can challenge the NSL it receives, and the courts and the Justice Department's Inspector General are all available to address those challenges. The Department takes the position that the nondisclosure requirement does not bar *all* disclosure but rather allows disclosure to an attorney. Moreover, NSLs are not self-enforcing; the FBI cannot compel compliance absent a federal court order. Finally, Congress conducts rigorous oversight over NSL usage. In short, the idea that there is no outside oversight of the FBI's NSL usage is simply wrong.

10. The *Post* erroneously implies that the permanent nondisclosure requirements do not serve a legitimate national security purpose.

Claim: "[N]ational security seldom requires that the secret be kept forever."

Fact: **Protecting the secrecy and integrity of national security investigations, techniques, and methods is critical to our ability to protect Americans from terrorist attacks and espionage.** The nondisclosure requirement serves two ends in national security investigations: (1) it prevents the target of an investigation from being tipped off; and (2) it ensures that we are not revealing too much information about our investigative capabilities and techniques to our enemies. It is the second reason in particular that the *Post* essentially ignores. There are many parties around the world who employ sophisticated techniques for gauging our intelligence and counterterrorism capabilities. Courts have repeatedly recognized the danger of publicly revealing information that in isolation appears harmless but when combined with other information provides our enemies insights into our capabilities and techniques. The nondisclosure requirement ensures that it is the FBI or the Justice Department that makes the determination whether information can be disclosed without harm to the national security or ongoing investigations. That decision is not one properly given to the recipient of an NSL, who will almost never be in a position to make that determination accurately.

11. The *Post* implies that the standard governing NSL use is toothless, ignoring the robust, binding legal guidance that informs that standard.

Claim: "To establish the 'relevance' of the information they seek, agents face a test so basic it is hard to come up with a plausible way to fail."

Fact: **By law, NSLs are limited to requests for information relevant to international terrorism and espionage investigations, and the FBI does not use them except in those authorized circumstances.** NSLs are not available to investigate ordinary criminal activity or even domestic terrorism. Moreover, the term "relevance" is one that has been employed in the law for generations — in fact, it is the standard for the issuance of a grand jury subpoena. It is simply false to suggest that "relevance" is an undefined or limitless concept.

12. The *Post* peddles the notion that the existence of the authority to use NSLs is itself an "abuse," regardless of how lawfully they are used. But the lawful use of a Congressionally authorized investigative tool is not an abuse.

Claim: "What the Bush administration means by abuse is unauthorized use of surveillance data — for example, to blackmail an enemy or track an estranged spouse. Critics are focused elsewhere . . . 'the abuse is in the power itself.'"

Fact: **The Department of Justice takes seriously the limits on its authorities and fully understands that unlawful use of an authority is an abuse. But lawful use is by definition not abuse.** Contrary to the *Post*'s assertion, we do not limit our understanding of abuse to the egregious, such as blackmail or stalking. On the other hand, we do not agree — and neither should Members of Congress — that lawful and prudent use in appropriate circumstances of a duly authorized investigative authority itself constitutes "abuse."

13. **The *Post* implies that the nondisclosure requirement attaching to an NSL would prohibit the recipient from consulting an attorney, in spite of the Department's repeatedly stated position that the nondisclosure requirement does *not* prevent a recipient from seeking counsel.**

Claim: "He wanted to fight the FBI but feared calling a lawyer because the letter said he could not disclose its existence to 'any person.'"

Fact: **The NSL statute at issue in the Connecticut case allows disclosure of receipt to an "agent," which would include an attorney.** In practice, and in litigation, the Justice Department has repeatedly maintained that the nondisclosure requirement allows disclosure to an attorney. Moreover, the recipient *did* consult an attorney and *did* challenge the NSL, as evidenced by the *Post*'s own discussion of the lawsuit. The *Post* further ignores that the Department has expressed public support for legislation making explicit that a recipient may consult an attorney.

14. **The *Post* claims that the Department of Justice has hidden from the courts the facts underlying the Connecticut NSL case. This claim is simply baseless.**

Claim: "The central facts remain opaque, even to the judges, because the FBI is not obliged to describe what it is looking for, or why."

Fact: **The Department of Justice has fully complied with the courts' requests for the facts underlying the Connecticut case.** A comprehensive explanation was filed under seal; although the explanation is not publicly available, the judges have been fully informed. It is simply false to state that the FBI has withheld from the courts information on what the FBI is looking for and why. Moreover, with knowledge of the reason for the FBI's request, the District Court has not determined that the FBI's request is unreasonable or unwarranted; rather, the court only ruled that the law requires the availability of a challenge and prohibits a permanent nondisclosure provision. Neither of these rulings casts any doubt on the underlying validity of the FBI's request.

15. The *Post* incorrectly implies that a claim that businesses face dire consequences for noncompliance with government requests was directed to NSL requests.

Claim: The Post attributes to one expert the position that failure to comply with an NSL could mean that "a business could face criminal prosecution, 'a "death sentence" for certain kinds of companies.'"

Fact: **The Post failed to provide a single instance of the government prosecuting a business for failing to comply with a national security investigation.** This is unsurprising, as the government has never prosecuted any individual or company for failing to comply with an NSL. The Justice Department is not looking to impose the economic "death sentence" on businesses that fail to comply with NSLs, and the Post's suggestion to the contrary is irresponsible. The statements on which the Post bases its claim are taken out of context and did not, when made, refer to compliance with NSLs.

16. The *Post* incorrectly asserts that businesses have complained about the burden imposed by NSL requests.

Claim: "National security letters, [major business groups] wrote, have begun to impose an 'expensive and time-consuming burden' on business."

Fact: **The letter to which the *Post* refers did not single out NSLs as burdensome but instead indicated in general that "document requests from the government" can pose an "expensive and time-consuming burden."** There exist a variety of investigative tools with which the government can request documents from businesses, including the familiar grand jury subpoena. Many of these tools can impose substantial compliance burdens on businesses. But the *Post*'s misrepresentation that businesses groups singled out NSLs as expensive or time-consuming is simply false. Indeed, in the Justice Department's experience, NSLs are much *less* "expensive and time-consuming" for recipients than some other investigative tools, and nothing in the business groups' letter contradicts that understanding.

17. The *Post* also erroneously insinuates that there is no internal oversight of NSL usage.

Claim: "In the executive branch, no FBI or Justice Department official audits the use of national security letters to assess whether they are appropriately targeted, lawfully applied or contribute important facts to an investigation."

Fact: **The use of NSLs, like the use of any authority, is subject to significant internal oversight and checks.** As an initial matter, an NSL must be approved by a field office's Special Agent in Charge (SAC) or one of a handful of senior FBI headquarters officials — all members of the Senior Executive Service,

totaling fewer than 100 nationally. Before an NSL request even gets to the desk of an SAC, it will go through at least two levels of oversight, including legal compliance. After the fact, any misuse of an NSL is subject to significant oversight as part of the FBI's reports to the Intelligence Oversight Board. Finally, the Department of Justice Inspector General is empowered to investigate any allegations of abuse.

In addition to these corrections, we have provided classified briefings to your staffs, as well as to certain Members who requested them, regarding the following erroneous claims:

- "The FBI now issues more than 30,000 national security letters a year, . . . a hundredfold increase over historic norms."

- "The Bush administration . . . has offered no example in which the use of a national security letter helped disrupt a terrorist plot."

- "In late 2003, the Bush administration reversed a long-standing policy requiring agents to destroy their files on innocent American citizens, companies and residents when investigations closed."

- "Criticized for failure to detect the Sept. 11 plot, the bureau now casts a much wider net, using national security letters to generate leads as well as to pursue them."

- "Agents commonly use the letters now in 'preliminary investigations' and in the 'threat assessments' that precede a decision whether to launch an investigation."

- "Ashcroft remained bound by Executive Order 12333, which requires the use of the 'least intrusive means' in domestic intelligence investigations. But his new interpretation came close to upending the mandate."

- "Two years ago, Ashcroft rescinded a 1995 guideline directing that information obtained through a national security letter about a U.S. citizen or resident 'shall be destroyed by the FBI and not further disseminated' if it proves 'not relevant to the purposes for which it was collected.' Ashcroft's new order was that 'the FBI shall retain' all records it collects and 'may disseminate' them freely among federal agencies."

- "[T]he FBI had served national security letters on [Las Vegas casinos]. In an interview for this article, one former casino executive confirmed the use of a national security letter."

The Department of Justice is committed to protecting civil liberties and to using all investigative tools judiciously and within the bounds of the law. This includes NSLs, which are one of the important tools Congress provided the Department to help us secure our nation. We urge the Congress not to let a distorted and misleading portrayal of the FBI's use of this vital investigative tool skew the debate over how best to ensure our national security.

If we can be of further assistance, please do not hesitate to contact this office.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General

cc: The Honorable Patrick J. Leahy
Ranking Minority Member