

Testimony of
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Members of the Senate Judiciary Committee:

Thank you for allowing me this opportunity. I never anticipated that my letter to Director Mueller would have this kind of impact. The letter was not the result of any lengthy planning or preparation but was written from the heart over the course of a fairly sleepless three day period after being notified that I was to be interviewed by the "Special Staff" of the 9/11 Joint Intelligence Committee. An additional impetus was the fact that I knew the FBI's plans for a so-called "Super Squad" were on the verge of being implemented.

As you may know, my acceptance of Senator Leahy's invitation to address your committee was conditioned upon FBI (Bureau) approval and the caveat that I cannot speak on any of the events of September 11th nor on the inquiry commenced by the Department of Justice's Office of Inspector General. Public discussion of those topics could have adverse affects upon the Moussaoui prosecution as well as adverse national security implications and is properly before the (closed) Joint Intelligence Committee. I am only here to comment generally on some of the problems endemic to the FBI Bureaucracy and to the federal law enforcement! national security process as a whole. I do not presume to speak for all FBI agents, however, in the past week I have noticed some common themes in the numerous e-mails, letters and telephone calls I have received from FBI agent and support employee ranks. A fair number of retired FBI leaders have also acknowledged the truth of some of the criticisms expressed in my letter.

I will therefore strive to briefly describe some of these bigger problems as well as some possible solutions. They are as follows:

I. (Ever)growing bureaucracy

At least three negative aspects to the FBI's ever growing bureaucracy can be identified:

a) Careerism/ risk aversion

I've heard there is a saying at FBI Headquarters, "Big cases, big problems; little cases, little problems; no cases, no problems." The idea that inaction is somehow the key to success manifests itself repeatedly because up to now the consequences of inaction have not been that apparent while the opposite has been true for instances when FBI leaders did take some action. Despite what one may see on the "X-files," FBI agents are only human. As humans, we all make mistakes. Mistakes are inevitable. But a distinction can and should be drawn between those mistakes made when trying to do the right thing and those mistakes caused due to selfish motives.

b) Too many approval levels which impede effective decision making

I have been told there are between seven and nine management levels at FBIHQ: Supervisory Special Agent (SSA); Unit Chief; Assistant Section Chief; Section Chief; Deputy Assistant Director; Assistant Director; (and in terrorism matters) Deputy Executive Assistant Director, and Executive Assistant Director; and finally Director. The resulting cumbersomeness of getting approval(s) for even the smallest decisions is obvious. Past Directors have tried to eliminate some of the Headquarters layers, but each time, their meager efforts have, in no time at all, been totally erased. Like the plant in the "Little Shop of [Horrors]" movie, the bureaucracy just keeps saying, "Feed me, feed me." Ironically, even with all the management layers at FBIHQ, it often appears that there is little or no real supervision of the mid-management levels.

e) Make work- paperwork

One Sunday, approximately three months ago, I happened to come into our office in Minneapolis for some reason. I bumped into a supervisor who, after only about one year on the desk, told me he was reluctantly going to have to "step down". He had spent several weekends in the office completing "crime surveys," Annual Field Office Reports (AFORs), pre-inspection program descriptions and other miscellaneous paperwork. The long hours were taking a toll on his family- (he's the father of four little girls). His anguished decision to step down was, however, not solely due to the time spent away from his family but was more because of the exasperating purposelessness of the endless "reports" that were occupying his time. It's one thing to work around the clock on a breaking kidnaping, armored car robbery, terrorist incident, etc., but it's quite another to have to spend hours engaged in completing the myriad of required "reports" the FBI bureaucracy has spawned in order (at least in part), to justify its existence! This Supervisor who is, in fact, now relinquishing his management position, happened to be one of very few who, prior to becoming a supervisor, had a long and successful background (approximately fifteen years) as a stellar investigator. The endless, needless paperwork and writing exercises were actually preventing him from doing his job of supervising the agents on his squad. I think this supervisor's experience is a common problem which has been echoed by many in the FBI who say it reminds them of the old story, "The Emperor has no Clothes".

The bureaucracy problem is huge and I have only touched upon it. It did not get this bad overnight nor can it be quickly cured. It may even be presumptuous to think it can be cured when so many earlier efforts have failed. But it may be possible to trim it some through: 1) reduction of the levels of management at FBIHQ to three or four; 2) delegation of authority to the lowest possible level in the field and/or at FBIHQ- (it appears that FBI Director Mueller has already made a good start in this direction with the portion of the AG Guidelines that delegate authority to field SACs to open terrorism investigations); and 3) strict compliance with the Paper work Reduction Act eliminating all unnecessary paperwork.

As I mentioned earlier, one of the things (kind of the "straw that broke the camel's back." you might say), that prompted me to write to Director Mueller was this notion of a FBI Headquarter's "super squad" that, according to the early information being given out, would be an expert team of terrorism managers assigned to FBIHQ who would be quickly dispatched to a field division experiencing a terrorist threat or incident. For a number of reasons, no one I know in the field thinks such a plan will work and, as I said in my letter, it flies in the face of what went wrong pre September 11th. But the term "flying squad" has also now been used somewhat interchangeably

to describe this initiative. If that means, as the name implies, that a contingent of additional expertise and resources, (such as translators, computer forensic investigators, surveillance experts, etc.), stands ready to come in a supportive role upon a field division's request, then I think the idea may have some merit.

II. Roadblocks

It should be acknowledged that the events of September 11th themselves have greatly dislodged the idea of inaction having no consequences. All Americans, including FBI agents, are very aware now of the real dangers facing our citizenry. The alert actions of the various passengers and flight personnel on the Richard Reid flight are but one example of this new mind set. In the FBI we have been told that prevention is now more important than prosecution. This is pure common sense and, as such, predated the recent terrorist events, especially with respect to violent crimes. Continual reminders are, however, in order especially if the country is able to go for a time without another terrorist event and begins to lapse back into complacency; and the FBI and federal attorneys offices lapse back into a career risk-adverse culture. Finally it should be noted that there may still be some who have not yet made the transition.

Hopefully, then, it will be the rare case, (at least in the near future) of encountering unjustified roadblocks in seeking to investigate concrete indications of terrorism. In those rare cases, I would propose we implement a mechanism that is rather novel to the attorney profession but is well-established in other professions, namely in the medical field, that of seeking a "second opinion." Just as a person diagnosed with a serious medical problem often obtains a second opinion before embarking on a course of treatment, FBI investigators ought to be able to pursue a second opinion from a cadre of federal attorneys with greater expertise in terrorism matters than the average assistant United States attorney when the potential consequences are serious and substantial disagreement exists between the investigators and the lawyers. I will just add that it appears that Director Mueller has again beaten me to this idea, (at least to a partial extent with respect to the FISA process) with his recent directive that all FISA requests which are turned down by mid-managers are to be then reviewed by himself. Consideration should also be given to applying the "second look" idea to the criminal route, at least in terrorism cases- (kind of an aggressive DOJ "super squad" which can be directly accessed from the field).

As I mentioned in my letter, it should go without saying that affidavits, whether criminal or FISA, should only be corrected for grammatical or format type errors. Substantive changes by those who are not in first hand positions must be avoided or at least minimized. Field office agent affiants could easily travel to Washington D.C. to personally present their affidavits to the FISA Court, if necessary, in conjunction with a Bureau supervisor. Neither the Court nor attorneys in the Department of Justice should elevate a particular desired style over the substance of an affidavit.

III. Intelligence gathering/handling

Hopefully my letter did not give a wrong impression, but in truth I do not have any great expertise in either foreign counter intelligence or international terrorism investigations. Again however, I have heard from many others who do. By and large, it seems that the Director's requests for enhancements for intelligence gathering and analysis are needed and well founded.

The need for people at FBIHQ who can connect the dots is painfully obvious. In addition to the beefing up generally of the FBI's intelligence and analytical ability, the following suggestions (many of which do not cost much) should also be considered:

1) Administration: Lift some of the administrative burden from the line field supervisor, by reducing outdated rules, regulations, forms, policies, and procedures, which will enable them to focus on field operations and mentoring new agents.

2) Guidance: Revamp our manuals (especially the National Foreign Intelligence Program [NFIIP] one [dated 6/95]) by developing a clear concise operational guidebook to aid investigators, rather than the current outdated ones which are used on occasion to punish agents for minor infractions and require cumbersome compliance.

4) Culture: Transition from the risk averse to a proactive atmosphere by changing our evaluation process, i.e., inspection, performance evaluation, oversight (IOB, OPR, IG). Reward innovation.

5) Management of Intelligence: Centralized intelligence is required. However, it must be properly analyzed, evaluated and disseminated in a timely fashion to the field. Recently, the state and local officials (as well as the media) have frequently received more information than FBI field divisions.

6) Technology: Continue technology upgrades and integration projects linking the FBI with other agencies.

7) Enhance authority: The Patriot Act and the revised Attorney General Guidelines were long overdue. FBIHQ should not undercut the new Attorney General Guidelines by creating overly restrictive Bureau policy. Consideration should be given to grant some Title 8 (Immigration and Naturalization Service [INS]) authority to enhance field operations and provide on the spot administrative detention authority that is currently lacking.

8) DOJ: Consider creation of a DOJ "super squad" with experts in terrorism to provide consistent, aggressive, coordinated prosecutions as part of a comprehensive national strategy to neutralize and dismantle terrorist operations and fund raising activities. In the interim, eliminate the need for field agents to go to FBI and DOJ Headquarters in order to contact their respective local United States Attorney's Office to discuss the most effective strategies.

9) Development of Confidential sources and assets: Just recently, in the wake of the Whitey Bulger scandal, the guidelines for development of confidential sources and assets have become extremely restrictive and burdensome. While some of the measures undertaken to monitor the informant process were necessary, they have now gone too far and if not reviewed/trimmed, may result in reduced ability on the part of the FBI to obtain intelligence.

10) Leadership: Executive level management, in the field and at the highest level of FBIHQ, must support future investigative activities in the "intelligence world", which is frequently less than "probable cause". To be effective, this support must be apolitical, consistent, and resolute. All promotions in the FBI, and especially those to the highest positions, must be

more than "legally defensible;" they must be designed to select those personnel with the most investigative experience or expertise in their area and those with real leadership abilities.

IV. Other legal issues

This is an area which is more in line with my personal background as a division legal counsel. And it is something that Congress can perhaps do something about directly! I will limit myself to two of the most important legal issues, the so-called "McDade law" making federal prosecutors subject to the attorney ethics provisions of the states they practice in (and/or are licensed in); and the "public safety" exception to Miranda which I alluded to in a footnote in my letter to Director Mueller. Although I'm not sure all of you were fully aware of the adverse ramifications to law enforcement when the McDade law was passed in 1999, I believe many of you have since been advised at various times by the FBI and the Department of Justice of how this law has come to be applied and of the serious adverse ramifications it has had upon law enforcement. Although I would like to provide you with some cogent examples of how this law, (the application of which arguably violates the Supremacy Clause of the Constitution), has resulted in case after case being stifled, I hesitate to do so here in open session for fear of instructing the criminals and even the terrorists in our country on the power of this law and how they can use it to avoid effective investigation. Perhaps I and/or other FBI agents can be given a chance in the future to more fully describe the problem to members of the Committee in a private forum. I think some of you maybe shocked to discover what has transpired. I think most of you will, at the very least, agree that these consequences were not what was envisioned when the law was passed. At the present time, the adverse impact is greatest upon all forms of white collar crime including Ponzi schemes, other types of frauds, public corruption, etc., but all types of other criminal enterprises, organized crime/drug cartels, and even violent criminals have benefitted from the law. It is only a question of time until terrorists also learn to take advantage of this law, as they apparently have with other facets of our American laws and privileges.

The second legal issue, involving the "Quarles public safety exception," is something that I attempted to call in to some of your staffers on the eve of the Patriot Act becoming law. I also alluded to the issue in one of the footnotes to my letter. In a nutshell, here's the issue. There was a Supreme Court decision almost two decades ago, in 1984, *New York v Quarles*, 467 U.S. 649, wherein the Court decided that an exception to the Miranda rule should exist when the questioning was designed to protect the public safety. In that case, the Court found that a police officer who was concerned that a criminal subject may have left a loaded gun in a grocery store, was permitted to question the subject without first providing Miranda warnings nor obtaining a Miranda waiver. Although this "public safety exception" is taught to new FBI agents at the FBI Academy, it seems to have been largely ignored and/or forgotten by prosecutors and courts. Some courts limit the Quarles decision strictly to its facts- that is, you have to have a possibility of a loaded gun in a grocery store in order to fall under the Quarles exception when any number of other situations could pose equally dangerous consequences. There is actually a decision by a state appellate court in Illinois that refused to apply the Quarles exception to a situation wherein a kidnapper had left an 11 month old baby in a duffel bag in the middle of a forest. The baby would probably have died if the FBI agents had not deliberately disregarded the dictates of Miranda in favor of interrogating the kidnapper, but the Court was apparently not convinced and refused to apply the Quarles exception to the case. As I said in the earlier footnote, with the focus

now on preventing acts of terrorism, the law in this area needs to be clarified. It maybe possible to enact legislation amending 18 U.S.C. 3501 on the admissibility of confessions by at least providing a defense from civil liability for federal agents who must, under these type of situations, violate the Miranda rule in good faith, in order to protect public safety.

INTEGRITY

Back in the week prior to September 11th, I gave a "power point" ethics presentation twice to personnel in our Division as part of the "Back to Basics" training which the FBI's prior Director mandated for every field division in the wake of the newly discovered "OKBOMB" documents. One of the frames of the ethics presentation said, "DO NOT: Puff, Shade, Tailor, Firm up, Stretch, Massage, or Tidy up statements of fact." Another frame, entitled "Misplaced Loyalties," stated, "As employees of the FBI, we must be aware that our highest loyalty is to the United States Constitution. We should never sacrifice the truth in order to obtain a desired result (e.g. conviction of a defendant) or to avoid personal or institutional embarrassment."

To be honest, I didn't think a whole lot about the slide show at the time I was giving it, but since September 11th, I've been forced to do a lot of thinking about this. There are at least four good reasons for this tenet as it applies to the FBI.'

Foremost, we owe it to the public, especially the victims of terrorism, to be completely honest. I happen to be pretty well acquainted with the N4innesota family of a young man who was killed in the Khobar Towers terrorist bombing and have been able to glimpse a little of their feelings in the years that have transpired since that 1996 event. I know that theirs is an ongoing struggle to learn and try to understand what happened to their son/husband. I can only imagine what these crime and terrorism victims continue to go through. They deserve nothing but the complete, unfettered truth.

Secondly, as was identified in my letter, it is critical for the FBI to identify its mistakes, if it truly is to learn from them. This applies equally to the other involved federal agencies who also made mistakes. It applies to United States Attorneys Offices, Department of Justice personnel, and everyone else involved in our law enforcement/national security process who made, makes and will continue to make mistakes. We all share some of the blame. We will never eliminate mistakes; we can only minimize them. But we must try to learn from our mistakes so we can do better.

Thirdly, if the FBI does not adhere to the highest standards of integrity, it will quickly lose the best and brightest of its employees and leaders. In my 21 plus years with the FBI, I have seen tremendous agents and support employees working diligently and selflessly to thwart crimes and protect the country. I don't believe that any computer will ever match the value of human personnel and in this respect, the FBI has always been very lucky in attracting top caliber men and women. We need to avoid the climates that gave rise to Robert Hansen, Aldrich Ames and other personnel failures and adhere to complete integrity in order to retain the FBI's new "top guns" as well as the FBI's seasoned career veterans.

The fourth and final reason I can think of for the FBI to adhere to the highest standards of integrity is another self-serving one. Since joining the FBI, I can't tell you how many debates, both public and private, I've engaged in about where the line should be drawn between the needs

of effective criminal investigation and preserving the rights of innocent citizens. The trick is to be as surgical as possible in identifying the criminals and those dangerous to our country's security without needlessly interfering with everyone else's rights. From what I've seen in the last 21 12 years, I can safely assure you that the FBI usually does a pretty dam good job of this. Although such debates, (and the last one I had was with a Minnesota criminal law professor just after passage of the Patriot Act), always begin with addressing specific provisions of the policy or law in question, they almost always boil down, in the final analysis, to one thing: trust. It's hard to win the debate if the person on the other side simply refuses to trust what you're saying about how the law or policy is applied in practice. The Government, in fighting the current war on terrorism, has already asked for and received further investigative powers. Although it can be argued that many of the new powers are simply measures to apply prior law to new computer technology or (as with some of the modifications to the Attorney General Guidelines) are things that any private citizen can do, some members of the public remain apprehensive that the FBI will go too far and will end up violating the rights of innocent citizens. It may be necessary to ask for certain other revisions of policy or even law. The only way the public's distrust can be alleviated, to enable us to do our job, is for the FBI, from the highest levels on down, to adhere to the highest standards of integrity.