



Audit of the Roles and Responsibilities of the Federal
Bureau of Investigation's Office of the General Counsel
in National Security Matters



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EXECUTIVE SUMMARY

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Objective

In response to a request from then Attorney General Barr following the issuance of the Office of the Inspector General's (OIG) report entitled *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, the OIG agreed to conduct this audit to review the roles and responsibilities of the Federal Bureau of Investigation's (FBI) Office of the General Counsel (OGC) in overseeing compliance with applicable laws, policies, and procedures relating to the FBI's national security activities.

Results in Brief

The national security mission of the FBI must be carried out in a manner consistent with federal laws, regulations, and internal policies and procedures, while protecting the privacy and civil liberties of U.S. citizens. FBI's OGC and the Department of Justice's (Department or DOJ) National Security Division (NSD) have roles in ensuring that the authorities exercised by the FBI and DOJ respect the rule of law and maintain public trust and confidence. Our audit identified several instances of ineffective coordination between FBI OGC and NSD and uncertainty in the delineation of their roles that negatively impact important workflows between them. For example, we found instances of FBI OGC attorneys advising FBI investigators on topics traditionally reserved for prosecutors, disagreements between FBI OGC and NSD attorneys related to Foreign Intelligence Surveillance Act (FISA) processes, and varying interpretations by FBI OGC and NSD of key legal principles. While some of these issues are attributable to how attorneys perceive their roles in the process and to ineffective communication, we believe that without action by the DOJ, these issues will persist and affect the efficiency and effectiveness of the FBI's national security program.

Recommendations

Our report contains five recommendations to the FBI and DOJ to improve oversight of the FBI's national security activities. We requested responses to our draft report, which can be found in Appendix 2. Our analysis of that response is included in Appendix 3.

Audit Results

Within FBI OGC, the National Security and Cyber Law Branch (NSCLB) advises FBI personnel on national security activities and coordinates with NSD to ensure that these activities are carried out in accordance with applicable laws, policies, and procedures. We found that these coordination efforts need to be improved, and roles and responsibilities should be more clearly defined.

Delineation of NSCLB and NSD Roles in Providing Legal Advice and Guidance

We identified a need for Department leadership to delineate more clearly the role of NSCLB attorneys in providing legal advice and guidance in investigative matters. NSD attorneys and senior DOJ officials expressed frustration to the OIG regarding NSCLB attorneys providing advice to agents on matters that they asserted were more appropriately within the prosecutorial responsibilities of NSD attorneys and Assistant United States Attorneys (AUSA).

We found that, at times, NSCLB attorneys provided advice to agents about AUSAs' charging decisions by questioning the prosecutors' evidentiary requirements for bringing a charge. According to NSD attorneys, NSCLB has also become involved in providing advice to agents on affidavits for search warrants. We were told that NSCLB's perceived role in providing legal advice on traditionally prosecutorial functions has caused friction between NSCLB and NSD throughout the years.

NSCLB's Role in the FISA Process and Rule 13 Notices

NSCLB attorneys play a critical advisory role in assessing whether the evidence warrants the FBI requesting that NSD pursue a FISA application. Senior level NSCLB attorneys we interviewed told us more integrated involvement by NSD earlier in the FISA process could help prevent compliance incidents. NSCLB attorneys also told us that FISA compliance incidents would be reduced if NSD were able to review FISA-related documents in the FBI's IT systems.

Further, NSD reports material misstatements, omissions, and incidents of non-compliance identified in FISA applications and FISA renewals to the Foreign Intelligence Surveillance Court (FISC) in the form of Rule 13 notices. However, we found that NSCLB does not have procedures in place to ensure it receives and tracks final copies of all filed Rule 13 notices.

NSCLB's Joint National Security Reviews with the National Security Division

NSCLB and NSD conduct joint oversight of FBI national security investigations through the use of National Security Reviews (NSR). NSRs examine (1) whether sufficient predication exists for FBI preliminary and full investigations, (2) whether a sufficient authorized purpose exists for assessments, (3) whether tools utilized during or prior to the assessment are permitted, and (4) all aspects of National Security Letters issued by the FBI. Pursuant to FBI and NSD policy, NSR reports are to be issued 6 weeks from the end of the fieldwork for the review. However, we found that almost no NSR reports were timely because the FBI and NSD frequently disagreed on the results of NSRs and the NSR process lacked a procedure to resolve disagreements. We also found that the standard operating procedures for conducting NSRs assigned responsibilities to units within the FBI that no longer exist. After our audit fieldwork, NSD and FBI OGC adopted a memorandum that should greatly improve the NSR dispute process and help avoid many significant delays in issuance. However, we still believe a broader review of the structure of NSRs is necessary.

NSCLB and NSD Legal Inconsistencies

We found significant differences in the way NSCLB and NSD generally interpret two important legal principles, and that these differing interpretations affected the efficiency of the FBI's national security program. First, NSD and FBI disagreed on the query standard for queries conducted by the FBI of information acquired pursuant to the national security authority granted under Section 702 of the FISA Amendments Act, 50 U.S.C. § 1881a (702 query standards). Second, they disagreed on the definition and application of the materiality standard related to information that must be included in FISA applications submitted to the FISC.

We found that NSCLB and NSD were aware of these differences and during the pendency of this audit, they worked together to resolve the materiality issue and created updated guidance and training to help ensure uniform application of this legal principle. Additionally, at the direction of the Deputy Attorney General, NSD developed new guidance to assist FBI personnel understand the query standard and conduct compliant queries. NSD and NSCLB are satisfied that the new guidance provides clarity on these issues, and we believe the joint efforts to resolve these issues will help improve the FBI's FISA-related operations.

Declassification and Discovery Issues

NSCLB and NSD would benefit from enhanced coordination and communication with respect to discovery and declassification. According to DOJ staff, NSCLB has involved itself in discovery matters that are the responsibility of the prosecuting attorney, potentially slowing the discovery process down and necessitating the need for the prosecutor to assert authority over discovery decisions. In addition, when approval is sought to use FISA derived information in connection with a criminal prosecution, NSCLB works with NSD to prepare a FISA use request, in consultation with the United States Intelligence Community (USIC), when appropriate, which is submitted to the Attorney General for approval. However, we found that during this process misunderstandings have arisen from the USIC about NSCLB's use requests, which have delayed approval. We also found that the lack of centralization in processing FISA use requests has caused frustration and inefficiencies.

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Introduction

On August 31, 2020, following the Office of the Inspector General's (OIG) issuance of our December 2019 report entitled *Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation*, then Attorney General William P. Barr issued a memorandum with the subject: *Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation*.¹ The memorandum, among other things, authorized the FBI Director to establish an Office of Internal Auditing. In addition, this memorandum referenced a comprehensive review that the OIG agreed to conduct of the roles and responsibilities of the Federal Bureau of Investigation's (FBI) Office of the General Counsel (OGC) in overseeing compliance with applicable laws, policies, and procedures relating to the FBI's national security activities. The OIG undertook this audit as requested and provides in this report its recommendations to help clarify the roles and responsibilities of FBI OGC attorneys to help them avoid roles traditionally reserved for prosecutors and improve coordination and cooperation with Department attorneys on critical national security matters.

Organization of the FBI's Office of the General Counsel

The FBI OGC is the primary legal team for the FBI as it strives to advance the FBI's mission of protecting the American people and upholding the U.S. Constitution. OGC provides comprehensive legal advice to the Director, other FBI officials and divisions, and field offices on a wide array of investigative and administrative operations, including national security and law enforcement issues. Comprised of approximately 300 employees, FBI OGC is divided into three branches: (1) Investigative & Administrative Law Branch (IALB), (2) Litigation Branch, and (3) National Security & Cyber Law Branch (NSCLB). In this report, our focus is on the roles and responsibilities of NSCLB and its interactions with the Department of Justice's (Department or DOJ) National Security Division (NSD).

NSCLB is further divided into two sections – the Counterterrorism and Strategic Projects Law Section and Counterintelligence and Cyber Law Section. The Counterterrorism and Strategic Projects Law Section supports the FBI's counterterrorism and terrorist screening efforts with legal advice and includes the Strategic Projects Law Unit (SPLU), which centralizes national security programmatic policy, legislation, oversight, and training matters for NSCLB. It also works to identify programmatic issues and trends that may impact FBI's national security mission. The Counterintelligence and Cyber Law Section serves as a subject matter expert on the complex legal issues involved in investigations of cyber intrusions, cyber attacks, foreign intelligence operations and espionage, while ensuring compliance with the U.S. Constitution, federal law, executive orders, and FBI policy. This section includes the Foreign Intelligence Surveillance Act (FISA) Management Unit, which is responsible for providing the administrative processing of applications and application renewals pursuant to FISA. The FISA Management Unit does not have attorneys. Its staff consists of Management and Program Analysts.

The FBI's attorney workforce that supports its national security mission is not limited to NSCLB. The FBI also has field legal representatives including Chief Division Counsels and Associate Division Counsels assigned to

¹ U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), [Review of Four FISA Applications and Other Aspects of the FBI's Crossfire Hurricane Investigation](https://www.oig.justice.gov/reports/review-four-fisa-applications-and-other-aspects-fbis-crossfire-hurricane-investigation), Oversight and Review Division Report 20-012 (December 2019), www.oig.justice.gov/reports/review-four-fisa-applications-and-other-aspects-fbis-crossfire-hurricane-investigation.

each of its 56 field offices. These attorneys do not report to FBI OGC. Instead, these attorneys, who conduct important national security work, report to the field office leadership where they are located. We were told by some within the FBI that this reporting structure creates a risk that because Chief Division Counsels do not report to FBI OGC, they may provide legal advice that is contrary to that of OGC. Because our audit objective focused on FBI OGC's roles and responsibilities over national security activities, our fieldwork concentrated primarily on NSCLB and did not assess the roles and responsibilities of the Chief Division Counsels.²

Evolution of the FBI's Office of the General Counsel

In October 1993, as part of a major reorganization of how the FBI utilized its attorneys, then FBI Director Louis Freeh created the Office of the General Counsel and eliminated the FBI's Legal Counsel Division. The Legal Counsel Division had been staffed primarily with Special Agents who were also attorneys (agent attorneys). The agent attorneys rotated in and out of the division every 2 years as part of the FBI's career development program. However, with the creation of OGC under Director Freeh, many non-agent attorneys were recruited into the OGC, and agent attorneys shifted into the FBI's field offices. The creation of the OGC gave the FBI, for the first time, a General Counsel, who would serve as the chief legal officer of the FBI.

After the 9/11 terrorist attacks, the FBI announced a series of organizational changes, including the creation of a Cyber Division, Directorate of Intelligence, a chief technology officer, and a Security Division. The FBI shifted a significant number of agents and analysts from criminal matters to national security matters, most of which were counterterrorism investigations.³ Newly enacted legislation in the years following 9/11, such as the USA PATRIOT Act, expanded the FBI's national security authorities.⁴ The FBI's expanded focus on national security investigative and intelligence operations, led to growth in FBI's OGC as Congress increased resources for the FBI oversight of its revised mission.

Another shift within the FBI OGC occurred in 2016, when a former FBI General Counsel significantly reorganized NSCLB by disbanding three specialized units that supported the branch's operational units. The three eliminated units were:

- The Classified Litigation Support Unit (CLSU), which was responsible for matters such as obtaining authority from the Attorney General in order to use FISA obtained or derived information in a criminal, civil, or administrative proceeding;

² NSCLB officials notified the OIG that in December 2021, FBI OGC began managing the field legal program for the FBI and established a new "Training and Field Legal Section" for this program. Because these changes occurred after we had completed our audit fieldwork, we did not evaluate the Training and Field Legal Section.

³ U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), *The External Effects of the Federal Bureau of Investigation's Reprioritization Efforts*, Audit Division Report, 05-37 (September 2005), www.oig.justice.gov/reports/FBI/a0537/index.htm.

⁴ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001. Pub. L. No. 107-56.

- The National Security Law Policy & Legislative Review Unit (PLRU), which was responsible for legislation and policy matters and the creation of new policy; and
- The National Security Compliance, Oversight, & Training Unit (COTU), which was responsible for cross-cutting compliance issues, coordination with NSD on compliance issues, and scheduling reviews such as minimization and national security reviews.

The former General Counsel who disbanded the units told us that the decision stemmed from his time at the Department's Office of Intelligence Policy and Review (OIPR), where staff worked on matters across OIPR's portfolio and became better national security law attorneys as result of having a broader perspective and varied experience. He also said he believed that making NSCLB attorneys generalists would help retain and attract staff because specializing in a narrow area can become tedious. Several FBI OGC officials with whom we spoke confirmed what we were told by the former General Counsel and informed us that the decision was based on the belief that knowledge had become compartmentalized within the three eliminated units and information from the units was not disbursed to line attorneys who provided day-to-day operational advice. According to these officials, the former General Counsel thought that daily interaction between operational attorneys and their clients would be improved if operational attorneys had more knowledge of compliance, litigation, and policy and would allow operational attorneys to provide start-to-finish advice to agents. As discussed in the Audit Results section of the report, this 2016 reorganization created some challenges for NSCLB and NSD attorneys alike.

To mitigate the challenges created by the elimination of the three units in 2016, in September 2019, a former Deputy General Counsel of NSCLB and former General Counsel created a new unit called the Strategic Projects Law Unit (SPLU). According to its mission statement, SPLU's mission, in part, was to centralize national security programmatic policy, legislative, oversight and training matters for the branch; provide expert, engaged legal support to FBI's national security mission and corporate elements; and proactively, effectively, and efficiently identify programmatic issues and trends. According to NSCLB, the creation of SPLU was designed to help address compliance concerns raised by OGC and NSD attorneys as both the compliance and policy functions handled by the former units would now be absorbed by SPLU.

Currently, there is a staff of approximately 100 individuals working within NSCLB. Table 1 below summarizes the staffing and organization changes which have occurred within NSCLB over the years.

Table 1

The National Security and Cyber Law Branch (NSCLB) Over the Years

1994	2001	2012	2016	2019	2020
The National Security Law Unit (NSLU) had a staff of ten officials including the Associate General Counsel for National Security Affairs, a Unit Chief, three line attorneys, three intelligence assistants, and two secretaries.	After September 11, FBI Director Mueller shifted resources within OGC, and Congress allotted increases to national security staff within OGC. By 2003, the NSLU had become the National Security Affairs Branch and the staff grew to 43, including approximately 28 attorneys.	The National Security Law Branch (NSLB) (renamed from the National Security Affairs Branch) grew to approximately 90 staff and 64 attorneys. Of the 90 staff, almost one third (27) were dedicated to the compliance, policy, or classified litigation units.	Then General Counsel administered a reorganization of the National Security and Cyber Law Branch (NSCLB) to disband three units dedicated to compliance, policy, and classified litigation.	The Strategic Projects Law Unit (SPLU) was created within NSCLB to handle omnibus compliance matters and policy matters.	NSCLB had grown to approximately 102 staff, including 78 attorneys.

Source: FBI and former FBI officials

The reorganization that resulted from the 9/11 terrorist attacks was not limited to the FBI. The Department of Justice also reorganized in its efforts to prioritize and enhance its national security functions. As a result of this renewed focus, the Department created the National Security Division (NSD) in 2006.

The National Security Division

In 2005, the Silberman-Robb Commission on Weapons of Mass Destruction recommended the consolidation of DOJ’s national security functions believing it would “give the [united] office better insight into actual intelligence practices and make it better attuned to operational needs.”⁵ In response, and pursuant to Section 509 of the 2005 USA PATRIOT Act reauthorization (Patriot Act), which was signed into law by President George W. Bush on March 9, 2006, the National Security Division was formally established.⁶ Headed by an Assistant Attorney General for National Security, NSD combined the Department’s national security legal components and functions into one division, including the former OIPR and the Counterespionage and Counterterrorism sections of the DOJ’s Criminal Division.⁷ These organizational

⁵ Unclassified Version of the Report of the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction – Chapter 10 Intelligence At Home: The FBI, Justice, and Homeland Security (March 2005), www.govinfo.gov/content/pkg/GPO-WMD/pdf/GPO-WMD.pdf (accessed June 4, 2021), 471-473.

⁶ Pub. L. No. 109-177 § 509A (2006).

⁷ 28 C.F.R Parts 0, 5, 12, 17, 65, and 73 (2007).

changes were designed to strengthen the Department's efforts to combat terrorism and other threats to national security.⁸

Prior to the creation of NSD, OIPR was a component of DOJ headed by a Counsel for Intelligence Policy that reported to the Deputy Attorney General. It was the unit responsible for handling all Department requests for surveillance authorizations under the terms of the 1978 Foreign Intelligence Surveillance Act. It also advised the Attorney General and the U.S. Intelligence Community on legal issues and legislation relating to national security and surveillance and intelligence legislation coordination.⁹ After the 9/11 terrorist attacks, the demand from the U.S. Intelligence Community for requests for authority to conduct intelligence operations increased dramatically. As a result, OIPR also grew dramatically because of the steady increase in the number of applications it handled under FISA.¹⁰ For example, in 2000, OIPR was staffed by fewer than 20 attorneys but, by 2008, after becoming part of the NSD, OIPR had grown to almost 100 attorneys. Similarly, in 2000, OIPR filed 1,005 FISAs with the FISC and 1,012 were approved, while in 2008 OIPR filed 2,082 FISAs with the FISC and 2,083 were approved.¹¹

Due to the high volume of work and a small staff, the role of OIPR attorneys in the FISA process was limited in the 1990s and early 2000s. OIPR attorneys did not have a substantive role in reviewing the factual assertions in the FBI's FISA applications, nor did they have direct access to the case agent. Moreover, communication between OIPR attorneys and the FBI was strained. The OIG highlighted these issues in two reports regarding the FBI's performance in the Robert Hanssen case published in 2003 and 2007.¹² Specifically, the OIG found that,

Particularly during the 1990s, OIPR attorneys had to draft so many FISA applications that they could not devote much time to any particular case. Instead, they [OIPR attorneys] relied on the information provided by the FBI and rarely questioned the accuracy or strength of the FBI's representations. The FBI, in turn, selectively provided information to OIPR, tended not

⁸ DOJ National Security Division, Press Release, #06-136, "Department of Justice to Create National Security Division," March 13, 2006.

⁹ DOJ Justice Management Division "Organization, Mission, and Functions Manual," February 2006, Office of Intelligence and Policy Review (OIPR) – OIPR Mission and Functions Statement, www.justice.gov/archive/jmd/mps/2006omf/manual/oipr.htm#content (accessed June 4, 2021).

¹⁰ DOJ National Security Division, Press Release, #08-360, "National Security Division Launches New Office of Intelligence," April 30, 2008.

¹¹ The number of FISA applications approved may exceed the number filed in a given calendar year because those filed late in a year may not receive approval until the following year. For example, 9 of the 1,012 FISA applications approved by the FISC in calendar year 2000 were actually filed in 1999. Similarly, 2 of the 1,005 FISAs applied for in 2000 were not approved until January 2001.

¹² (1) U.S. Department of Justice (DOJ) Office of the Inspector General (OIG), [*A Review of the FBI's Performance in Deterring, Detecting, and Investigating the Espionage Activities of Robert Philip Hanssen*](#), Oversight and Review Division Unclassified Executive Summary Report (August 2003), www.oig.justice.gov/reports/review-fbis-performance-deterring-detecting-and-investigating-espionage-activities-robert; (2) DOJ OIG, [*A Review of the FBI's Progress in Responding to the Recommendations in the Office of the Inspector General Report on Robert Hanssen*](#), Oversight and Review Division Special Report (September 2007), www.oig.justice.gov/reports/review-fbis-progress-responding-recommendations-office-inspector-general-report-robert.

to volunteer facts that reflected negatively on the investigation, and generally did not consult with OIPR on substantive investigative decisions.¹³

Based upon these issues, the OIG recommended in 2003 that, “OIPR play a more substantive role in reviewing the FBI’s FISA-related applications” and “have direct access to the case agent and the source information relied on in the [FISA] application.” In 2007, the OIG reviewed the FBI’s progress in responding to this recommendation and found that OIPR not only had, “the occasional difficulty for the mostly Washington D.C.-based OIPR attorneys to establish cooperative and trusting working relationships with case agents located in FBI field offices throughout the country” but also had to contend with the, “natural tension between OIPR’s oversight and intelligence-gathering functions and the FBI’s interest in investigation that can cause the FBI...to resist OIPR’s substantive involvement in cases.” Despite these challenges, the OIG concluded actions taken by the FBI and OIPR addressed the recommendation.

After the Department’s national security responsibilities were consolidated in NSD, the Department created an Office of Intelligence (OI), OIPR’s successor, and gave it the mission to conduct oversight of the FBI’s intelligence and counterintelligence activities. The Department also gave NSD attorneys comprehensive authority to examine the FBI’s national security program for adherence to all applicable laws, regulations, and guidelines. The mandate to perform this oversight, in addition to NSD’s traditional FISA oversight functions, required the formation of an Oversight Section dedicated to this mission in order to develop a stronger oversight capacity. As noted above, in 2000, OIPR had fewer than 20 lawyers. Currently, OI has approximately 100 lawyers and is divided into three specific sections aligned with the office’s core functions: operations, oversight, and litigation.¹⁴

As described above, NSD has a formal oversight role in the national security investigations conducted by the FBI, which may overlap with aspects of NSCLB’s role in overseeing compliance with laws, policies, and procedures. Although there is no formal operational requirement for FBI attorneys to report to NSD staff, NSD and United States Attorney’s Offices are responsible for making prosecutorial and certain other legal determinations in national security cases brought by the FBI, and NSD appears in all matters before the U.S. Foreign Intelligence Surveillance Court (FISC). We discuss the relationship between NSD and NSCLB in the Audit Results section of the report.

Office of the Inspector General Audit Approach

We initiated this audit at the request of the former Attorney General, as described in his memorandum, *Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation*, issued on August 31, 2020. The objective of this audit was to review the roles and responsibilities of the FBI OGC in overseeing compliance with applicable laws, policies, and procedures relating to the FBI’s national security activities.

To address this objective, we interviewed 84 officials and former officials, including current and former FBI OGC employees, former FBI General Counsels, FBI Chief Division Counsels, current and former National Security Division employees, and National Security/Antiterrorism Advisory Council Coordinators from five

¹³ DOJ OIG, *FBI’s Progress in Responding to Recommendations in the OIG Report on Robert Hanssen*, 8.

¹⁴ DOJ National Security Division, Press Release, #08-360, “National Security Division Launches New Office of Intelligence,” April 30, 2008.

U.S. Attorney's Offices.¹⁵ In addition, we reviewed documentation including relevant Attorney General Guidelines, the United States Justice Manual, the FBI's Domestic Investigations and Operations Guide, FBI Policy Guides, and current and past FBI OGC organizational charts.

¹⁵ The current Deputy Attorney General and the Principal Assistant Deputy Attorney General both declined to be interviewed for this audit because they did not want their input to unduly influence the outcome of the audit.

Audit Results

The national security mission of the FBI must be carried out in a manner consistent with federal laws, regulations, and internal policies and procedures, while protecting the privacy and civil liberties of United States citizens. FBI's OGC and the Department of Justice's (Department or DOJ) National Security Division (NSD) have roles in ensuring that the authorities exercised by the FBI and DOJ respect the rule of law and maintain public trust and confidence. However, we found several instances of ineffective coordination between FBI OGC's National Security and Cyber Law Branch (NSCLB) and NSD, and uncertainty in the delineation of roles, that negatively affect important workflows between these critical national security units. For example, we found instances of NSCLB attorneys advising FBI investigators on topics traditionally reserved for prosecutors, disagreements between the groups related to FISA processes, varying interpretations by NSCLB and NSD attorneys of key legal principles leading to differing views on application of the principles, and disagreements on discovery and declassification decisions. While some of these issues are likely attributable to differences among attorneys in how they perceive their roles and ineffective communication, we believe that without action by the Office of the Deputy Attorney General (ODAG) to clarify certain roles and responsibilities, these issues between NSCLB and NSD will persist and affect the efficiency and effectiveness of the FBI's national security program.

Delineation of NSCLB and NSD Roles in Providing Legal Advice and Guidance

As noted in the introduction, NSCLB provides direct support and legal advice to the FBI's Counterterrorism Division, Cyber Division, Weapons of Mass Destruction Directorate, Directorate of Intelligence, and Counterintelligence Division. The NSD's Counterintelligence and Export Control Section (CES) attorneys supervise the investigation and prosecution of cases affecting national security, foreign relations, and the export of military and strategic commodities and technology. NSD Counterterrorism Section (CTS) attorneys seek to assist, through investigation and prosecution, in preventing and disrupting acts of terrorism anywhere in the world that has impact on significant United States interests and persons. NSD and United States Attorney's Offices (USAO) are responsible for making prosecutorial and certain other legal determinations in national security cases brought by the FBI, and NSD appears in all matters before the U.S. Foreign Intelligence Surveillance Court (FISC).

In general, the NSD and NSCLB attorneys we spoke with described having a professional and cordial working relationship. Nevertheless, we found that disagreements existed within both entities related to the proper role of, and input from, NSCLB attorneys in certain legal determinations typically reserved for prosecutors. We also found examples of ineffective communication on important internal processes, such as the review of draft court documents for sensitive information prior to their filing. Although we could not determine that these issues were indicative of systemic problems between NSD and NSCLB, we believe the examples we found suggest that additional or revised Department-level guidance is needed to more clearly define the roles and responsibilities of NSCLB and NSD attorneys. We also believe that such guidance should improve the overall relationship and coordination between the FBI and NSD on these critical national security matters.

NSCLB's Role in Legal Determinations Usually Reserved for Prosecutors

One of the concerns raised by NSD attorneys during our field work was the role that NSCLB attorneys sometimes play in advising FBI investigators on legal matters that are traditionally reserved for prosecuting

attorneys. Specifically, some NSD officials and attorneys told us that NSCLB attorneys have inappropriately opined on matters related to sufficiency of evidence, certain charging decisions, and discovery obligations.¹⁶ Although these NSD personnel emphasized that they did not believe NSCLB's attempted involvement in prosecutorial decisions was part of organizational effort to have greater influence on those decisions, they did believe that these issues may arise when NSD attorneys and more aggressive NSCLB attorneys differ on certain legal judgments. In these instances, these NSD attorneys believed that the more aggressive NSCLB attorneys are more likely to try to influence prosecutorial decision making.

When we raised the issue of differing legal advice with FBI OGC leadership, they told us that different perspectives were part of the process and should not be surprising or necessarily be viewed as confrontational. For instance, as it related to disagreements related to charging decisions, FBI OGC leadership recognized that in some circumstances NSCLB attorneys have expressed frustration with NSD's decision not to bring certain cases under statutes like the Foreign Agents Registration Act.¹⁷ In contrast, one NSD senior official stated that trial attorneys who worked in this official's section reported that NSCLB attorneys sometimes told agents "what they wanted to hear" about what charges were reasonable. This NSD official believed that, in cases like this, it was likely that the evidence did not support such charges. The following are some more specific examples of the types of concerns raised during our review:

- An NSD trial attorney told us of an occurrence when NSCLB informed an agent that there was sufficient evidence to charge a target with espionage, when it was the NSD trial attorney's view that the evidence supported only lesser charges, such as unauthorized disclosure of national security information or retention or transmission of classified data. NSD stated that this type of advice from NSCLB may set unrealistic expectations for case agents on what charges can or should be brought. Such instances can negatively impact the working relationship between the agent and the prosecutor.
- An NSD senior official cited an example where NSCLB determined there was sufficient evidence to establish probable cause to obtain a search warrant, but NSD later disagreed. This official explained that in such circumstances case agents may initiate operational plans for a sensitive investigation based on the NSCLB advice only to learn later about NSD's different assessment of the evidence to show probable cause, potentially disrupting the investigation.

Despite the examples noted above, we were advised by an NSD senior official that, in their view, FBI OGC leadership has set the correct tone and that FBI OGC leadership would agree that NSCLB attorneys should be focused on FBI policy and investigative matters. The same NSD official stated that NSD generally

¹⁶ Throughout the report the term "senior official" is used as a designation for someone who is in the Senior Executive Service which consists of executive positions including managerial, supervisory, and policy positions classified above General Schedule grade 15 or equivalent.

¹⁷ U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), [Audit of the National Security Division's Enforcement and Administration of the Foreign Agents Registration Act](https://www.oig.justice.gov/reports/audit-national-security-divisions-enforcement-and-administration-foreign-agents), Audit Division Report, 16-24 (September 2016), www.oig.justice.gov/reports/audit-national-security-divisions-enforcement-and-administration-foreign-agents. In this report, the OIG concluded that the DOJ lacked a comprehensive FARA enforcement strategy and that such a strategy should be developed and integrated with the DOJ's overall national security efforts. The Department has addressed all 14 recommendations the OIG made in the report.

encourages FBI personnel at all levels to raise issues that may be problematic to a successful prosecution. Further, NSD attorneys consistently told us that NSCLB adds value in key areas such as the FISA use process; Classified Information Procedures Act (CIPA) procedures; providing clearance to carry out certain counterintelligence operations; providing legal advice regarding FBI policy, such as the Domestic Investigations and Operations Guide (DIOG); and reviewing Attorney General Exemptions (AGE) and Otherwise Illegal Activity (OIA) requests.

Overall, we were unable to conclude that the concerns raised by some NSD attorneys about inappropriate influence on prosecutorial decisions by NSCLB attorneys were indicative of a systemic problem. Nevertheless, we believe that the examples discussed above, as well as the additional areas of concern discussed below, strongly suggest that improvements can be made in the collaboration, coordination, and communication efforts between NSD and NSCLB attorneys.

Process, Communication, and Role Perception Issues

Similar to the issues discussed above, we did not conclude that there were systemic process and communication issues between NSD and NSCLB. However, NSD lawyers highlighted some generalized examples which emphasized the importance of addressing such issues when they arise.

For instance, we were told that NSD relies on NSCLB to review documents such as search warrants and criminal complaint affidavits for law enforcement or other sensitivity concerns before they are filed with the court by prosecutors. When this process is not followed, it can become particularly problematic if NSCLB later finds that sensitive information was contained in the court filing. For example, if the FBI used a sensitive platform to obtain information, prosecutors may decide that a description of the platform is needed to support the search warrant or complaint. In such instances, NSCLB may ask prosecutors to anonymize that information. However, if NSCLB does not review the case agent's draft affidavit in support of a search warrant or complaint before the agent provides it to the prosecutor, sensitive information may be exposed. Also, senior NSCLB officials told us that including an NSCLB attorney early in this process can provide an effective means of ensuring prosecutors have information necessary to support their case. Specifically, NSCLB can help identify which information may be difficult to use from a classification and sensitivity perspective and provide suggestions to obtain the information from an independent source without implicating sensitive techniques.

We were told by an NSD senior official that prosecutors typically expect that case agents have sought NSCLB advice on sensitivity in advance of presenting materials to the prosecutors. According to this official, this is an important process issue for the FBI and asking NSD to monitor NSCLB's internal workflow process for them would be inappropriate. In the view of NSD attorneys and this official, when an agent provides a document to prosecutors that has been approved by an FBI field office, the prosecutors view it as having been approved by the FBI for all uses. When we inquired further about this process with senior NSCLB officials, we were told that USAOs are required by policy to contact NSD regarding national security matters and that in the vast majority of national security cases NSD already coordinates with NSCLB. Nevertheless, NSCLB officials opined that there may be instances where smaller FBI field offices and USAOs that infrequently deal with national security matters might be unfamiliar with the requirements to seek NSCLB review or coordinate with NSD. We believe potential process break downs in areas such as sensitivity can unnecessarily challenge the working relationship between NSD and the NSCLB.

In addition, several NSD attorneys informed us of what they believed to be important communication problems. For example, some NSD attorneys said they have been told to not reach out directly to FBI agents without including NSCLB in the communication.¹⁸ While we found no evidence that shows NSCLB attorneys are resistant to NSD attorney's substantive involvement in cases, some NSCLB attorneys we spoke with expressed their desire to be included whenever the FBI interacts with NSD. For example, one NSCLB attorney stated that he informs agents that they should contact NSCLB on all FISA matters prior to contacting NSD. In this NSCLB attorney's view, NSD attorneys often too quickly categorize an issue as a FISA compliance incident without hearing an explanation or receiving input from FBI. This same NSCLB attorney stated that NSCLB attorneys often feel unfairly cut out of the process when NSD goes directly to FBI agents with questions or case-related matters. NSCLB officials stated that NSCLB needs to be included in these interactions to ensure that the equities of the FBI, as a separate entity from the prosecutors, are protected.

In contrast, an NSD senior official told us that it has been a long-standing practice to include NSCLB attorneys on emails when discussing FISA applications or compliance issues, and NSD has always been instructed to copy NSCLB on those emails. However, this NSD official was told that some NSCLB attorneys have instructed agents not to reach out to NSD without NSCLB present. The NSD official believes such an instruction weakens the FBI-NSD relationship. Some of the NSD attorneys we spoke with said that although it is their general practice to include NSCLB whenever they reach out to case agents, there are times when they do not do so due to heavy caseloads. Although we cannot definitively state that NSCLB attorneys are preventing communication between FBI agents and NSD attorneys on a widespread basis, we are concerned that issues like those described above could adversely affect national security investigations and the effective and collaborative working relationships between NSCLB and NSD.¹⁹

NSD prosecutors and senior level officials also communicated to us a desire that prosecuting attorneys be brought into national security investigations as soon as possible. They believed that when prosecutors get involved later in the case it typically means that NSCLB attorneys have been advising the case agent on investigative steps and other potential decision making. This often results in the case not being presented to the NSD attorney for a charging decision until the end of the investigative process. According to the NSD attorneys we interviewed, NSD should be an early participant to help assess the quality of evidence and litigation risk, and to ensure that agents are adequately pursuing operational activity consistent with U.S. law and Department policy. According to these NSD officials, early entry helps their ability to bring charges that are strongly supported by evidence, and that are, therefore, warranted. For example, one NSD attorney pointed to the use of certain undercover operations by the FBI in conducting espionage investigations without first consulting with NSD. This attorney said that there are times when even though NSCLB is aware and involved, NSD is not looped in on the operation, thereby creating a risk of potential issues with the admissibility of evidence that could result from the manner in which the evidence was

¹⁸ This request was made to NSD attorneys working on compliance matters, along with those NSD attorneys who work on criminal matters.

¹⁹ Notably, and as discussed earlier in this report, in our 2007 report entitled *A Review of the FBI's Progress in Responding to the Recommendations in the Office of Inspector General Report on Robert Hanssen*, we reviewed the FBI's progress in responding to our recommendation made in 2003, in part, that "OIPR attorneys...have direct access to the case agent and the source information relied on in the [FISA] application." This 2007 review also described how the "natural tension" between OIPR's oversight and intelligence-gathering functions and the FBI's interest in the investigation could cause the FBI and prosecutors to resist OIPR's substantive involvement in cases.

obtained. This circumstance can lead to unnecessary frustration on the part of the case agents and contributes to friction between NSD and FBI.

We also learned during our review that there is frequently a difference in perception between NSD attorneys and NSCLB attorneys about their client responsibilities and investigative goals. We heard that NSCLB attorneys provide advice that is focused on advancing the operational objectives of their primary client, the FBI, which at times can differ from NSD's prosecutorial goals. Indeed, NSCLB senior officials highlighted the fact that criminal prosecution is not necessarily the FBI's aim in every national security investigation and that the FBI sometimes appropriately pursues investigations with the aim of disrupting threats or collecting intelligence.²⁰ These officials added that although NSCLB attorneys' advice to their clients may differ from the advice NSD might provide, NSD should not assume that NSCLB advice that is based on non-prosecutorial goals is intended to be adversarial in nature. NSCLB senior officials emphasized to us that it is not their intent to purposely disagree with NSD, but they believed that the difference in their roles can be a cause for disagreements.

Need for Guidance Delineating NSCLB and NSD Responsibilities

We found there is no comprehensive Department-level guidance that defines the scope of the NSCLB's responsibilities vis-à-vis NSD attorneys. Although there is some limited guidance that outlines the roles and responsibilities of the NSCLB attorneys versus those of NSD attorneys, the guidance is contained in various locations and, in some cases, exists only in the form of memoranda. For example, in the FISA realm, there is the 2021 Accuracy memo containing guidance on FBI and NSD roles and responsibilities for ensuring the accuracy and completeness of FISA applications, conducting accuracy and completeness reviews, and reporting compliance incidents to the FISC.²¹ Additionally, guidance exists in a June 2021 memo covering national security reviews and the national security investigation notice review process.²² Further, a senior NSCLB official highlighted that the roles of NSCLB attorneys in national security matters are also outlined in the Attorney General Guidelines for Domestic FBI Operations and the DIOG. A senior NSCLB official told us that although the guidance described above governs some of the different processes carried out by NSCLB and NSD, it would make sense to have more centralized guidance that comprehensively outlines the roles and cross functions of the two offices.

²⁰ The FBI is identified as the member of the USIC on behalf of the Attorney General in Executive Order 12333. As a member of the USIC, the FBI has obligations to gather and share foreign intelligence and national security information. These investigations are designed to collect intelligence that is shared by the FBI with the USIC and to include intelligence shared with the FBI by the USIC.

²¹ John C. Demers, Assistant Attorney General, NSD, Department of Justice and Jason A. Jones, General Counsel, FBI, Department of Justice, memorandum to all Office of Intelligence Attorneys and all Federal Bureau of Investigation Personnel, 2021 Guidance to Ensure the Accuracy and Completeness of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act, July 2021. We discuss the 2021 Accuracy Memorandum in further detail in the Legal Inconsistencies section of our audit report.

²² Recommendation memorandum approved by the Assistant Attorney General for National Security and General Counsel, FBI, regarding the resolution of issues pertaining to the oversight of FBI national security investigations and assessments, June 2021. We discuss this memorandum in further detail in the National Security Review section of our report.

We believe that there exist disagreements and communication issues between NSCLB and NSD of the nature discussed above, and that such issues show that improvements must be made to ensure an effective and collaborative working relationship between the two offices. To facilitate better coordination between FBI and NSD regarding national security activities, we recommend the ODAG evaluate whether the Attorney General Guidelines and other existing criteria can be improved by clarifying responsibilities in areas of overlap and more clearly delineating lines of authority between NSCLB, as agency counsel, and NSD, as counsel representing the United States in national security-related proceedings. In instances where the ODAG identifies ambiguity on certain roles and responsibilities, it should clearly define and delegate the authority to the appropriate entity, especially in areas related to the roles, responsibilities, coordination, and communication pertaining to prosecutorial decision-making.

Coordination between NSCLB and NSD in the FISA Process

According to FBI OGC, the differing roles of NSCLB and NSD attorneys in FISA matters are defined in regulatory provisions related to the FISA process.²³ Nevertheless, both NSCLB and NSD officials told us about aspects of the FISA process where they believe clarity or improvement is needed, such as whether NSD should have access to the FBI's case file system, whether NSD should assist with the identification of the facts requiring supporting documentation contained within a FISA application, and issues surrounding the timeliness of FISA applications sent to the FISC. We found that there was a general consensus across NSCLB that NSD should participate in more front-end accuracy review in order to reduce the number of compliance incidents that must be reported to the FISC.

While FISA applications are presented to the FISC by NSD, the process of obtaining a FISA order begins with the FISA request authored by a case agent who has identified the need for this investigative technique. NSCLB attorneys play a critical role in advising FBI agents whether a FISA order is an appropriate tool at a particular stage of an investigation. If so, they may advise case agents on the steps needed to obtain sufficient evidence to meet the standard for obtaining a FISA order or in the alternative, they may suggest ways to advance the investigation without a FISA order.

Once an agent has decided to pursue a FISA order, NSCLB attorneys: (1) provide guidance on the information that should be included in the initial FISA initiation request, (2) review the predicated information outlined in the request, (3) consult with NSD attorneys about questions related to the case, and (4) approve the transmission of the request to NSD if the NSCLB attorney assesses that the request meets the applicable legal standard. Before an initiation request reaches an NSCLB attorney, the requesting agent's supervisor and a Chief Division Counsel or an Associate Division Counsel, among others, must first approve the request at the field office level. NSCLB attorneys do not review the documents containing the underlying facts presented in a FISA request. Instead, they assess whether the facts, as presented, appear to satisfy the relevant legal threshold for the authorities sought.

After NSCLB attorneys approve FISA requests for transmission to NSD, from that point forward NSD generally works with the requesting agent to finalize the application. However, as noted in the previous

²³ According to Section 28 CFR § 0.72(a)(6) & (b)(2) of the Code of Federal Regulations, it is "...the Assistant Attorney General for National Security who ...administer(s) the Foreign Intelligence Surveillance Act," including "supervising the preparation of certifications and applications for orders under the Foreign Intelligence Surveillance Act of 1978, as amended, and the representation of the United States before the United States Foreign Intelligence Surveillance Court."

section, in instances where the NSD attorney and the agent encounter problems, such as potential compliance matters or technical questions, NSCLB attorneys may work with FBI case agents and their supervisors or NSD attorneys to help resolve them.

After a FISA application has been approved by the FISC, internal oversight of the FISA application continues. Standards for this continuing oversight were issued on February 11, 2009, in a joint NSD and FBI memorandum entitled *Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the FISA*, also referred to as the "2009 Accuracy Memorandum."²⁴ The purpose of this memorandum was to provide guidance on the procedures to be followed to ensure accuracy of the facts included in the FISA applications submitted to the FISC, and during accuracy reviews. During an accuracy review, attorneys from NSD check the support for information in the FISA application that establishes probable cause, U.S. person status, and related criminal matters. According to the 2009 Accuracy Memorandum, NSD was to determine, in consultation with the FBI, whether a misstatement or omission of fact identified during an accuracy review was material. In July 2021, NSD and NSCLB revised the 2009 Accuracy Memorandum, which now requires that NSD report FISA misstatements or omissions to the Court that are non-material in nature in addition to those that are deemed material.

NSCLB attorneys expressed their concern that although NSD attorneys assist agents in drafting the FISA applications submitted to the FISC, they do not share accountability when compliance incidents are reported to the FISC. Although NSCLB officials acknowledged the oversight role that NSD has related to FISA, they emphasized the need for FISA to be a team effort and not an adversarial relationship and stated their belief that the number of compliance incidents would be reduced if NSD would review the FISA-related documents housed in the FBI's IT systems. However, according to NSCLB attorneys, NSD has expressed disinterest in ensuring FISA compliance on the front end and has said that it is the agent's responsibility to identify in the first instance, anything that is necessary to be reported to the FISC. We were also told by NSCLB attorneys that NSD has said that it is concerned that an appearance of NSD attorneys having knowledge of the underlying documents would imply that they have full knowledge of all of the supporting documents, which would not be practicably feasible for them to have.

A senior NSD official that we spoke with told us that NSD has limited resources, and it does not have direct access to FBI systems.²⁵ This official believed that the FBI should have an internal compliance function that would have more objectivity than the ad hoc reviews currently conducted by attorneys within FBI OGC. This NSD official said that in NSD's view, this was the reason for the August 31, 2020, Attorney General Memorandum requiring the FBI Director to establish an Office of Internal Auditing within the FBI. According to the former Assistant Attorney General (AAG) for NSD, the FBI should perform more of its own internal compliance reviews, and he emphasized that NSD relies on what is stated in a FISA application because NSD

²⁴ Matthew G. Olsen, Acting Assistant Attorney General, NSD, Department of Justice and Valerie Caproni, General Counsel, FBI, Department of Justice, memorandum to all Office of Intelligence Attorneys, all National Security Law Branch Attorneys, and all Chief Division Counsels, *Guidance to Ensure the Accuracy of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act*, February 11, 2009. We discuss the 2009 Accuracy Memorandum in further detail in the Legal Inconsistencies section of our audit report.

²⁵ Although NSD does not have direct access to FBI systems, according to senior NSCLB officials, technical capabilities exist in most instances to make information available to NSD. In addition, some NSD attorneys may have access to FBI systems in order to advance certain investigations.

is not in a position to have direct knowledge of the universe of facts. Also, he believed that the more appropriate role for NSD is to protect FISA as a tool so that the FBI can continue to use it.

Overall, NSCLB senior officials expressed a desire for more of a partnership with NSD versus the current relationship where NSD is the oversight entity reporting FBI compliance incidents to the FISC. NSCLB senior officials stated that they would rather see NSD help them identify areas for improvement and explore other ways to help them work within the rules that are in place and ensure that they are protecting the United States within the confines of the guidelines and procedures both NSD and NSCLB have created regarding the FISA oversight process. At the conclusion of our audit, NSD emphasized to us that it has shown a significant interest in front-end compliance directed activities, including extensive and ongoing training, development of checklists and questionnaires designed specifically to enhance accuracy and completeness, and one-on-one interaction with agents and NSCLB attorneys as FISA applications are drafted. However, NSD also noted that when it comes to NSD attorneys directly reviewing FBI files on FBI IT systems it has practical concerns such as the potential for misallocation of responsibilities in the FISA process and implementing such a process in a fast-paced operational environment where emergency or expedited authorities are often sought. Nevertheless, NSD told us that it remains committed to working with FBI on practical and implementable ways to enhance front-end compliance.

Rule 13 Notices

Rule 13 of the Foreign Intelligence Surveillance Court (FISC) Rules of Procedure requires a written notice to the FISC when a submission to the Court, such as a Foreign Intelligence Surveillance Act (FISA) application, is discovered to have contained a misstatement or omission of material fact or to report a disclosure of non-compliance.²⁶ Based on discussions with NSCLB and NSD officials, material misstatements or omissions and compliance incidents may be identified in a variety of ways, including oversight reviews, by the investigative team during the course of the investigation, or by FBI Operational Technology Division (OTD) personnel who provide support in the service and collection of FISA material.²⁷ Compliance incidents may be limited to an individual case or be systemic issues affecting multiple cases. When FBI or NSD officials discover material misstatements or omissions and compliance incidents, NSD sends a written Rule 13 notice to the FISC.

According to an NSCLB official, the priority in reporting under Rule 13 has been on filing timely notices with the FISC rather than disseminating the notices thereafter. Consequently, multiple NSCLB officials said the FBI needs to develop a system to track and disseminate Rule 13 notices provided to the FISC. Without a repository of Rule 13 notices to review or search previously reported compliance incidents, it can be difficult for NSCLB attorneys to determine whether the circumstances of a potential incident meet the threshold for reporting because they may not be aware of whether a similar incident has been reported previously or a precedent has been set. The absence of a repository of Rule 13 notices also makes it difficult to identify trends, which may have been a contributing factor for NSCLB and NSD operating under different standards

²⁶ If the government discovers that a submission to the Court contained a misstatement or omission of material fact, the government, in writing, must immediately inform the Judge to whom the submission was made of: (1) the misstatement or omission; (2) any necessary correction; (3) the facts and circumstances relevant to the misstatement or omission; (4) any modifications the government has made or proposes to make in how it will implement any authority or approval granted by the Court; and (5) how the government proposes to dispose of or treat any information obtained as a result of the misstatement or omission. See Rule 13(a), FISC Rules of Procedure.

²⁷ NSD conducts FISA accuracy, completeness, and minimization reviews at FBI field offices.

for FISA Section 702 queries and materiality (issues discussed further in the Legal Inconsistencies section of this report). A system consolidating Rule 13 notices could be used as a resource for NSCLB to review historical compliance incidents, increase consistency between notices, and identify trends to drive areas for improvement and opportunities for training.

A senior NSD official had no objections to NSCLB building a searchable repository of FBI Rule 13 notices and agreed that it would be beneficial. Further, this official stated NSD provides both electronic and paper copies of all FBI court-stamped Rule 13 notices to the FBI FISA Management Unit housed within NSCLB on a weekly basis. While an NSCLB official acknowledged that NSCLB receives hard copies of final Rule 13 notices from NSD, this official could not confirm that the hard copies received encompass all final Rule 13 notices submitted to the FISC on behalf of the FBI. As a result, NSCLB does not know if it has the complete universe of issued Rule 13 notices from NSD.

Further, an NSCLB attorney told us that when NSCLB attorneys became generalists back in 2016, the branch lost consistency in litigation and compliance matters. This attorney believed that a loss of consistency in the compliance area could result in an attorney signing off on a Rule 13 notice which could set a precedent that binds NSCLB attorneys to this decision in similar situations in the future. According to an NSCLB official, the SPLU, which was formed in 2019 in response to the elimination of three units in 2016, plans to create a spreadsheet or data system that tracks key information from Rule 13 notices to provide NSCLB attorneys with some essential data about prior Rule 13 notices. The SPLU anticipates the spreadsheet or system could be used to identify trends for areas of non-compliance or field offices that have a high volume of incidents. However, as of May 2021, this repository has not been developed due to other priorities. Accordingly, we recommend that the FBI coordinate with NSD to ensure that it is receiving a final copy of each Rule 13 notice filed with the FISC and develops and implements a method to track these notices and make their contents searchable.

NSCLB's Joint National Security Reviews with the National Security Division

In April 2007, in response to the OIG report on the FBI's Use of National Security Letters (NSL), the Attorney General directed the FBI OGC, NSD, and the Department's Office of Privacy and Civil Liberties to conduct National Security Reviews (NSR) to enhance compliance with applicable laws, Attorney General Guidelines, and FBI policy through on-site reviews of the FBI's national security activities.²⁸ NSD and NSCLB conduct NSRs at 15 field offices annually and review open and closed counterintelligence and counterterrorism cases. The program is conducted jointly by NSD and NSCLB and examines: (1) whether sufficient predication exists for preliminary and full investigations, (2) whether a sufficient authorized purpose exists for assessments, (3) whether tools utilized during or prior to the assessment are permitted, and (4) all aspects of NSLs.²⁹ The purpose of the program is to determine whether the FBI is meeting its legal

²⁸ U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), [A Review of the Federal Bureau of Investigation's Use of National Security Letters](https://www.oig.justice.gov/reports/review-federal-bureau-investigations-use-national-security-letters-march-2007-february-2016), Oversight and Review Report (issued March 2007 and re-released February 2016), www.oig.justice.gov/reports/review-federal-bureau-investigations-use-national-security-letters-march-2007-february-2016.

²⁹ National Security Letters are effectively a type of administrative subpoena that allows the FBI to obtain certain types of information from third parties in national security investigations that does not otherwise require a warrant or court order. The types of information can include consumer transactional information from communications providers, financial institutions, and consumer credit agencies.

obligations, identify areas requiring corrective action, educate FBI personnel, and identify trends so the FBI can address systemic compliance issues.

NSCLB's Role in National Security Reviews

NSRs are the only oversight reviews that NSD and NSCLB conduct jointly.³⁰ While NSCLB participates in other NSD oversight reviews, such as FISA accuracy and minimization reviews, NSD has final authority for determining findings and issuing reports relating to these reviews.³¹ Senior NSD officials and others expressed concerns with NSCLB's role as a joint partner in NSRs. For example, a senior NSD official stated that NSD conducts these reviews objectively as a component independent from the FBI and believes the reviews should be conducted by compliance officials rather than FBI counsel. Several other NSD officials said that NSCLB attorneys are not always objective in their assessment of issues that arise during NSRs and voiced concerns that NSCLB attorneys often try to minimize findings rather than conduct independent oversight. After we raised this concern with NSCLB, a senior NSCLB official disagreed that NSCLB's approach is to minimize findings and stated that NSCLB shares oversight responsibility with NSD. Further, this official stated that, as agency counsel, NSCLB brings a different perspective to these reviews because its attorneys are well-versed in FBI policy.³² As a result, NSCLB officials believe that its attorneys can provide additional insight from their role in advising agents on opening investigations and issuing NSLs.

We found that the joint NSR process does not appear to have been effective. Without a sole owner of the NSR program, disagreements arising between NSCLB and NSD during NSRs have remained unresolved for extended periods of time delaying the issuance of final reports, as described further in the next subsection, thereby delaying correction of issues identified in the reviews.

Delays in Reporting Process for National Security Reviews

At the conclusion of each NSR, NSD drafts a detailed report of all findings, including those about which NSD and NSCLB disagree. The NSR standard operating procedures (SOPs) require NSD to provide the draft report to NSCLB within 3 weeks of completing the review. When there is disagreement about a finding, the issue is referred to NSD or NSCLB management for resolution. The SOPs also state that NSCLB has 2 weeks to review and comment on the draft report and, absent extenuating circumstances, the report is issued within 6 weeks. Because the NSR program is a joint program, NSD and NSCLB must agree on the report's findings to enable issuance of the final report. Accordingly, when disagreements between NSD and NSCLB remain unresolved, issuance of the report is delayed.

Senior NSD and FBI OGC leadership identified the timeliness of NSR reports as an area for improvement. As a result, we examined NSD timeline data for the 68 NSRs conducted from July 31, 2015, to February 7, 2020, including information such as the date each review ended and the date the corresponding report was

³⁰ According to the Attorney General's Guidelines for Domestic FBI Operations, the NSD, in conjunction with the FBI OGC, is responsible for conducting regular reviews of all aspects of FBI national security and foreign intelligence activities.

³¹ NSD conducts accuracy and minimization reviews of the FBI's FISA activities to review the FBI's compliance with its standard minimization procedures and verify the accuracy of its FISA applications.

³² According to the NSR SOP, questions related to FBI policy are to be addressed by NSCLB.

issued.³³ Based on the data provided, we found that it took an average of 629 days, or approximately 21 months, to issue an NSR report. As shown in Table 2, on average, issuance of an NSR report took 587 days more than the 6-week due date required in the SOP.

Table 2

Timeliness of National Security Reports for Reviews Ended Between July 31, 2015, and February 7, 2020

Organization	Responsibility	Target Number of Days	Actual Number of Days (Average)	Days Late (Average)	Total Completed on Time (of 68 Total Reports)	Percentage on Time
NSD	Drafting Report	21	25	4	46	68%
NSCLB	Reviewing Report and Providing Comments	14	249	235	18	26%
NSD & NSCLB	Resolving Comments and Issuing Report	7	355	348	1	1%
Total		42	629	587	1	1%

Source: National Security Division, Office of Intelligence

As shown above, we found that NSD drafted 46 of 68 reports (68 percent) within the required timeframe. For all 68 reports, NSD took an average of 25 days to deliver the reports to NSCLB, making the reports an average of 4 days late. NSCLB provided its comments on time for 18 of the 68 reports, or 26 percent of the time, and was late an average of 235 days. After the report was drafted by NSD and NSCLB comments were provided on the report, it took an average of an additional 355 days to issue the final report. Overall, we found only 1 of the 68 reports within our review was issued within the 6-week timeframe.

One cause for late reporting stemmed from disagreement between NSCLB and NSD about review findings where the two organizations were unable to arrive at a timely resolution. Disagreements between NSD and NSCLB have included, for example, whether the FBI complied with The Attorney General’s Guidelines for Domestic FBI Operations (AG Guidelines) and the DIOG for opening a national security-related assessment, preliminary, or full investigation; or issues with NSLs, such as an overproduction.³⁴ As a result, NSD and NSCLB officials told us that there was a backlog of reports, several of which were outstanding for more than 4 years. These backlogged reports were issued in batches between November 2020 and February 2021, when NSD and NSCLB agreed to include both NSD’s and NSCLB’s viewpoints in the reports with findings that

³³ Due to the COVID pandemic, NSD halted its NSR reviews after March 13, 2020. We did not include the two reviews conducted in March 2020 in our analysis because they were delayed due to the COVID-19 pandemic and the reports were not issued as of the date NSD provided this data.

³⁴ An overproduction occurs when the FBI obtains information in response to an NSL that the FBI has no right to seek or retain or when information provided exceeds what the NSL requested.

were not related to any open investigations.³⁵ NSD recognized this approach was not a best practice because providing two viewpoints does not clearly communicate expectations to the field offices under review.

In June 2021, after we completed our audit fieldwork, the AAG for National Security and the General Counsel for the FBI adopted joint recommendations from their staffs to address the dispute resolution process for NSRs.³⁶ The memorandum established steps that NSD and FBI need to take to improve the NSR program and to resolve disagreements about investigations, assessments, and related matters found not to meet the standards established by the AG Guidelines and applicable laws. Specifically, the memorandum describes the path taken by NSD and NSCLB to reach a point of final decision on the NSR reports and clarifies that the decision of the AAG for NSD will be final unless appealed to the Deputy Attorney General.³⁷ The memorandum also states, that if no request for review is received on behalf of the FBI within the established timeframes set forth in the memorandum, NSD's decision will be considered final.³⁸ We applaud this cooperation and believe that the June 2021 agreement should greatly improve the NSR dispute process and help avoid many significant delays in issuance.

However, disputed NSRs were not the sole cause for delay in issuance. A second area that we believe may have contributed to the lack of timely reports was the FBI OGC's decision in 2016 to disband NSCLB's Compliance, Oversight, and Training Unit (COTU). This action eliminated the centralized unit for compliance matters and spread compliance work across the operational units within NSCLB. An NSCLB official informed us that NSCLB stopped providing NSR training to its attorneys on a regular basis after the 2016 reorganization.³⁹ Further, NSD has historically shared its NSR tracking spreadsheet with COTU, but we were told this practice was stopped after COTU was disbanded in 2016, and NSCLB did not implement its own system for tracking NSR reports.

In addition to these concerns, we also found that the NSR SOPs have not been updated since December 2015, over 6 years ago. The SOP provides some outdated guidance, such as procedures for NSD to coordinate with COTU when planning and finalizing the NSR schedule and checklists. Further, the SOP states that after NSR fieldwork, NSCLB attorneys should present their findings to the COTU Unit Chief or Policy, Training, Oversight, and Litigation Section Chief, but both positions were eliminated after NSCLB's reorganization in 2016. The lack of up-to-date procedures and consistent NSR trainings are not conducive to an effective NSR process.

³⁵ A senior NSD official told us the late reports were issued after being made a higher priority following a change in NSD leadership in early 2020. These reports were finalized and issued as a result of senior leadership at NSD and NSCLB working together on dispute resolution.

³⁶ Recommendation memorandum approved by the AAG for National Security and General Counsel, FBI, June 2021.

³⁷ Absent unique circumstances, decisions about predication should generally be made at a level lower than the Deputy Assistant Attorney General, NSD and Deputy General Counsel, FBI.

³⁸ If NSCLB disagrees with any determination reflected in the draft report, NSCLB shall submit the disagreement in writing to NSD within 14 days. Otherwise, the report will be finalized and issued.

³⁹ In contrast, NSD attorneys are required to complete an exhaustive eight-hour training which includes a review of applicable standards and statutes and a mock review of a case example prior to participating in an NSR.

NSCLB's Strategic Projects Law Unit (SPLU), established in 2019, is responsible for identifying programmatic issues and trends in FBI national security compliance matters. It is working to address some of these concerns. For example, an NSCLB official stated that the NSR training was updated in October 2020 and the SPLU is planning to reimplement NSR training for NSCLB team leaders prior to participating in reviews. According to the updated training materials, the SPLU can be used as a resource for NSCLB attorneys for any general questions related to NSRs. Also, an NSCLB official said the SPLU is creating an internal spreadsheet to track NSR reports from NSD. The SPLU has also requested NSD to reimplement sharing of its tracking spreadsheet for NSRs to be used in concert with NSCLB's internal spreadsheet.

Timely reporting is important because NSR findings may be based on open investigations that affect the privacy and civil liberties of U.S. persons, making the speedy resolution of any disputes a high priority. Further, late reports hinder a field office's ability to take corrective actions in a timely manner. It is also important to ensure NSR procedures are updated regularly, and training is provided to NSCLB attorneys to ensure they understand their roles and responsibilities and are provided clear guidance for conducting NSRs. Although, the June 2021 memorandum may improve the timeliness of NSR report issuances by clarifying the process for resolution of disputes between NSD and NSCLB, we still believe a broader review of the structure of NSRs is necessary. We recommend that the ODAG examine the current distribution of roles and responsibilities for conducting NSRs. If the ODAG determines that an alternative oversight structure would be more effective, ensure all stakeholders receive training on their roles and responsibilities and that the outdated NSR standard operating procedures are updated accordingly.

Legal Inconsistencies

During our audit, we found NSCLB and NSD have held differing legal interpretations of two important principles applied to the FBI's national security activities. These differences have caused confusion and frustration for both organizations. Specifically, NSCLB and NSD held differing views on the materiality standard for the FBI's submissions to the FISC and the FISA Section 702 query standard, both of which are vital to ensure that the Department and the FBI comply with authorities or approvals granted by the FISC.⁴⁰ After our audit fieldwork, the FBI and NSD implemented new guidance to ensure uniform application of these principles and administered training to relevant FBI personnel. NSD and NSCLB are satisfied that the new guidance provides clarity on these issues, and we believe the joint efforts to resolve these issues will help improve the FBI's FISA-related operations.

Standard of Materiality in Submissions to the FISC

According to the aforementioned jointly issued 2009 Accuracy Memorandum, NSD is required to determine, in consultation with the FBI, whether a misstatement or omission of fact identified during an accuracy review is material. Although NSD makes the final decision whether to file a Rule 13 notice with the FISC, to ensure accuracy and maintain good relations between the two components, NSD officials said they strive to reach a consensus with NSCLB on the facts submitted through Rule 13 notices. However, several NSD and NSCLB officials said the two organizations had interpreted the definition of "materiality" differently, leading

⁴⁰ The 2008 Amendments Act added Section 702 to FISA which was intended to create a framework for the government to be authorized to conduct certain surveillance targeting the communications of non-United States person located abroad.

to disagreements about whether some incidents require reporting. These disagreements could have been the cause of delays in reporting incidents to the FISC.

The 2009 Accuracy Memorandum defined material facts as, “those facts that are relevant to the outcome of the probable cause determination.” The FBI had interpreted this standard as facts that are outcome determinative, or facts that would invalidate the legal determination. However, NSD had applied a broader standard than the FBI, with NSD’s interpretation of material facts being facts that are capable of influencing the requested legal determination. An NSD senior official told us that the FBI’s viewpoint was based on the FBI’s involvement in the criminal law enforcement arena where the threshold for materiality in a criminal search warrant is outcome determinative. This official also stated that most material errors reported to the FISC do not invalidate the legal determination, and that the FISC still expects for these types of errors to be reported to them.

Senior NSD officials stated NSD had applied the same standard for at least 15 years and NSCLB had known of NSD’s application of the standard because it was reflected in previous Rule 13 notices filed with the FISC. For example, in the OIG’s report on the FBI’s Crossfire Hurricane Investigation, NSD supervisors stated that “NSD will consider a fact or omission material if the information is capable of influencing the court’s probable cause determination, but NSD will err on the side of disclosure and advise the court of information that NSD believes the court would want to know.”⁴¹ Similarly, in a FISC filing on January 10, 2020, NSD referred to this statement in the OIG report while describing its oversight and reporting practices when errors or omissions are identified.⁴² However, senior NSCLB officials told us that NSCLB was first made aware of NSD’s interpretation of the materiality standard in the OIG’s Crossfire Hurricane Investigation report and NSD’s subsequent January 2020 FISC filing.⁴³

Based on our interviews, it was evident that there was a lack of clear communication between NSCLB and NSD about the materiality standard and that the two entities interpreted the standard differently. It is important that NSCLB and NSD have a shared understanding of the standard so FBI personnel can be trained appropriately to identify material facts and the FBI and NSD can work together to ensure transparent and timely reporting as required by Rule 13. To address these concerns, NSD and NSCLB collaborated to develop and issue a memorandum entitled *2021 Guidance to Ensure the Accuracy and Completeness of Federal Bureau of Investigation Applications under the Foreign Intelligence Surveillance Act*. As part of that process, NSD and NSCLB sought the FISC’s view as to the substance of the materiality definition in the FISA context. Based on the FISC’s feedback, the memorandum defined material facts as those facts “that are assessed to be capable of influencing the requested legal determination,” which is the

⁴¹ DOJ OIG, *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*, 230.

⁴² U.S. Foreign Intelligence Surveillance Court (FISC), Response to the Court’s Order Dated December 17, 2019, Docket No. Misc. 19-02 (January 10, 2020), www.fisc.uscourts.gov/sites/default/files/Misc%2019%2002%20Response%20to%20the%20Court%27s%20Order%20Dated%20December%2017%202019%20200110.pdf.

⁴³ (1) DOJ OIG, *Review of Four FISA Applications and Other Aspects of the FBI’s Crossfire Hurricane Investigation*; (2) FISC, Response to the Court’s Order Dated December 17, 2019, Docket No. Misc. 19-02.

standard the NSD told us it had applied for at least the past 15 years.⁴⁴ Further, the memorandum provides several examples to illustrate the concept of materiality in practice. The FBI began training its personnel in advance of the implementation of the memorandum, which was effective as of July 6, 2021. Specifically, the FBI provided training to both NSCLB attorneys and attorneys in the field offices and launched an updated FISA training course in May 2021 that included training on the new guidance.

FISA Section 702 Query Standard

Section 702 is a provision of the FISA Amendments Act of 2008, 50 U.S.C. § 1881a, that governs targeted surveillance of foreign persons reasonably believed to be located outside the United States with the compelled assistance of electronic communications service providers. The information collected pursuant to Section 702 is used by the government to protect the United States and its allies from hostile foreign adversaries and to inform cybersecurity efforts. An acquisition authorized under Section 702 may not intentionally target a United States person or any person known at the time of the acquisition to be located in the United States.⁴⁵

To ensure the requirements of Section 702 are appropriately met, the Attorney General, in consultation with the Director of National Intelligence (DNI) adopts: (1) targeting procedures designed to ensure the FBI targets foreign persons outside the United States, (2) minimization procedures designed to ensure the FBI safeguards United States person information incidentally acquired, and (3) querying procedures containing a query standard that sets the requirements for the FBI to query, or search, its unminimized, or raw, Section 702-acquired information.⁴⁶ Minimization is a process applied by the agencies who conduct such queries and is designed to ensure the appropriate acquisition, retention, and dissemination of information concerning U.S. persons that is acquired under Section 702 and other surveillance authorities. Minimization is necessary, in part, because targeting processes may result in the acquisition of communications that are irrelevant to the purpose of the surveillance.⁴⁷ Conducting a query of lawfully acquired information is a basic investigative step to search whether the government already knows something about a person or

⁴⁴ The memo defined material omissions as omissions of facts or negative inferences capable of negatively influencing the requested legal determination by contradicting or casting doubt upon the factual assertion or assessments submitted in an application. Material misstatements are deviations between the substance, attribution, or text of a factual assertion contained in an application and the supporting documentation that are assessed to be capable of negatively influencing the requested legal determination.

⁴⁵ Attorney General and Director of National Intelligence, *Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the FISA*, (November 2020), www.intelligence.gov/assets/documents/702%20Documents/declassified/20th%20Joint%20Assessment%204.2.2021.pdf (accessed May 4, 2021).

⁴⁶ A query is the equivalent of an Internet search where data is searched using a specific term or terms with the purpose of finding or retrieving information. The ability to query Section 702 information as opposed to reviewing each individual communication increases the FBI's ability to assess and respond to potential national security threats.

⁴⁷ U.S. Department of Justice (DOJ), Office of the Inspector General (OIG), *A Review of the Federal Bureau of Investigation's Activities Under Section 702 of the Foreign Intelligence Surveillance Act Amendments Act of 2008*, Oversight and Review Report (issued September 2012 and re-released January 2016), www.oig.justice.gov/reports/report-activities-under-section-702-fisa-amendments-act-2008-september-2012-january-8-2016.

group. Querying is less intrusive than other investigative techniques and can rule out potential subjects and eliminate the need for further investigation.⁴⁸

We found that NSCLB and NSD held differing interpretations on the query standard as found in the FBI's Section 702 Querying Procedures. In 2015, DOJ told the FISC that the FBI's standard for querying was "reasonably likely to return foreign intelligence information or evidence of a crime." However, the language in the FBI's querying rules at that time was "to the extent reasonably feasible, authorized users...must design such queries to find and extract foreign intelligence information or evidence of a crime." During our interviews, senior NSCLB officials told us that NSD shifted its interpretation of the query standard without effectively communicating it to FBI at that time. Consequently, we were told by NSCLB that FBI and NSD operated under different query standards. One senior NSCLB official stated that this led to numerous compliance incidents and resulted in the FBI almost losing its Section 702 authorities. We also were told that NSCLB has significant concerns that this NSD interpretation of the FBI's query standard, which NSCLB says has a heightened threshold, creates limitations and operational risks that may prevent the FBI from identifying threats through methods that were available prior to implementation of the new interpretation of the query standard in 2015.

In contrast, NSD told us that the query standard has been the same since 2008. A senior NSD official stated that the FBI had a fundamental misunderstanding of the standard and that compliance incidents were not identified sooner because NSD can only review a limited sample of the FBI's queries and NSD improved upon its ability to identify non-compliant queries over time.

Following numerous query-related compliance incidents identified since 2015, the FBI clarified the query standard in its 2018 Section 702 Querying Procedures to the extent that prior language caused confusion.⁴⁹ The FBI's amended Section 702 Querying Procedures define the query standard as:

"Each query of FBI systems containing unminimized contents or noncontents (including metadata) acquired pursuant to section 702 of the Act must be reasonably likely to retrieve foreign intelligence information, as defined by FISA, or evidence of a crime, unless otherwise specifically excepted in these procedures."⁵⁰

To help ensure implementation of the amended query procedures occurred, in consultation with NSD, the FBI developed mandatory training on the query standard and required that all personnel with access to raw

⁴⁸ Office of the Director of National Intelligence, [Section 702 Overview](https://www.intelligence.gov/assets/documents/702%20Documents/Section702-Basics-Infographic.pdf), www.intelligence.gov/assets/documents/702%20Documents/Section702-Basics-Infographic.pdf (accessed July 7, 2021).

⁴⁹ The FISA Amendments Reauthorization Act of 2017 required the DOJ to adopt querying procedures. Prior to this act, the FBI's querying rules were contained within its minimization procedures. The FBI's 2018 Section 702 Querying Procedures were amended in August 2019 and approved by the FISC in September 2019.

⁵⁰ Unminimized contents, or raw FISA information, is defined as section 702-acquired information that (1) is in the same or substantially the same format as when the FBI acquired it, or (2) has been processed only as necessary to render it into a form in which it can be evaluated.

FISA-acquired information to complete the training by December 2019.⁵¹ However, despite these efforts, we learned that there were still disputes between NSD and NSCLB on query-related compliance incidents.

For example, we were told disputes occurred related to queries conducted for vetting purposes.⁵² Specifically, according to the FBI, it was concerned that as a result of the change to the query standard it could no longer perform vetting queries on raw FISA information before developing a confidential human source (CHS). FBI officials told us that it was important for agents to be able to query all of its databases, including FISA data, to determine whether the FBI has any derogatory or nefarious information about a potential CHS. However, because of the implementation of the 2018 standard, the FBI is no longer able to conduct these queries because they would violate the standard (unless the FBI has a basis to believe the subject has criminal intent or is a threat to national security). According to the FBI, because its goal is to uncover any derogatory information about a potential CHS prior to establishing a relationship, many agents continue to believe that it is irresponsible to engage in a CHS relationship without conducting a complete query of the FBI's records as "smoking gun" information on a potential CHS could exist only in FISA systems. Nevertheless, these FBI officials told us that they recognize that they have been unsuccessful when presenting these arguments to NSD and the FISC and, as noted below, they follow NSD's latest revision of query standard guidance.

A senior NSCLB official stated NSCLB has recently redoubled its efforts to ensure compliance with the query standard after concerns were raised about FBI query incidents in a November 2020 FISC opinion, a semiannual assessment conducted jointly by NSD and the Office of the Director of National Intelligence (ODNI) released in November 2020, and an Attorney General (AG) Memorandum issued on April 22, 2021.⁵³ This senior NSCLB official said the FBI is currently focused on addressing its query-related compliance incidents through a variety of methods, including database changes, an audit, and training.

According to NSCLB, Deputy Attorney General Lisa O. Monaco instructed NSD to develop new query guidance regarding the query standard. We obtained and reviewed a copy of the new guidance titled "FBI FISA Query Guidance" which was issued to the FBI on November 1, 2021. This new guidance is designed to assist FBI personnel in understanding the querying standard and in conducting queries of raw FISA collection that comply with applicable requirements. Further, the guidance provides illustrative examples of both compliant and noncompliant queries. In response to the new guidance, the FBI developed and

⁵¹ All personnel who subsequently require access to raw FISA-acquired information in systems storing such information are also required to complete this training prior to being granted access.

⁵² We were told that FBI personnel may conduct a query of the FBI's holdings that do not contain raw FISA information for the purposes of vetting a potential Confidential Human Source prior to establishing a relationship. However, conducting a query of raw FISA information for vetting purposes is not compliant with the standard unless the query is reasonably likely to retrieve foreign intelligence information or evidence of a crime.

⁵³ (1) U.S. Foreign Intelligence Surveillance Court (FISC), Memorandum Opinion and Order (November 18, 2020), www.intel.gov/assets/documents/702%20Documents/declassified/20/2020_FISC%20Cert%20Opinion_10.19.2020.pdf; (2) Attorney General and Director of National Intelligence, Semiannual Assessment of Compliance with Procedures and Guidelines Issued Pursuant to Section 702 of the FISA, November 2020, www.intelligence.gov/assets/documents/702%20Documents/declassified/20th%20Joint%20Assessment%204.2.2021.pdf; (3) Attorney General Memorandum for the Deputy Attorney General, FBI Director, and Assistant Attorney General for National Security, Further Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation, April 22, 2021.

deployed an updated training course on the query standard which FBI personnel with access to raw FISA were required to complete by January 2022. We verified that all FBI personnel with access to raw FISA either completed the required training or had their access to this information revoked by the end of January 2022.

Discovery and Declassification Issues

When FISA-derived material is determined to be necessary for use at trial, the prosecution team must receive authorization from the Attorney General to use the information in a judicial proceeding, including grand jury proceedings, arrest and search warrants, and indictments. This is known as a FISA use request. Receiving the authority to use FISA or FISA-derived material allows the U.S. Government to pursue a criminal prosecution while fulfilling its obligations to inform defendants that they were subject to FISA coverage. As part of the FISA use request process, the request is submitted to NSCLB for its consideration and recommendation on whether to approve the request.⁵⁴

To prepare the FISA use request, an NSCLB attorney works with the investigative agent to answer all the questions on the FBI's FISA use template and provides the request to NSD. When sources, methods, or collections involve U.S. Intelligence Community (USIC) agencies other than the FBI, consultation with USIC agencies is required. An NSD attorney told us there may be some misalignment between the FBI's FISA use request template, which was created by NSCLB, and the USIC's understanding of its contents. This NSD attorney said that during discussions they had with members of the USIC it was apparent that USIC agencies often do not understand the FISA use requests they receive, which can create questions and delays in their processing. This NSD attorney believed that it would be advantageous if the FBI's FISA use request template explained how the information would assist the prosecution team in achieving its goals.

We reviewed an annotated version of the FISA use template in use at the time of our audit, which was issued in March 2017, and found that it includes a section for a narrative of the intended use and one example of why it may be beneficial to make the request broad rather than narrow. Given the USIC's reported concerns about the current form and contents, we believe this illustrates the need for a revised template or enhanced training that make it easier for the USIC to process. Therefore, we recommend that the FBI coordinate with NSD to determine whether revisions to the current FISA use request template or training are necessary in order to enhance clarity and more effectively convey how the information would help the prosecution team achieve its goals and facilitate effective processing of FISA use requests.

In addition, we were told by two senior NSD officials that NSCLB's review of FISA use requests has been delayed due to the 2016 elimination of the Classified Litigation Support Unit (CLSU). These officials said that, without CLSU, attorneys in NSCLB's operational units have worked on FISA use requests without necessarily having the same level of expertise as the former CLSU staff, thereby creating inefficiencies. Another senior NSD official had similar concerns, saying that NSCLB had lost all its specialized expertise related to FISA use

⁵⁴ According to the Attorney General Memorandum entitled, "Revised Policy on the Use or Disclosure of FISA Information" dated January 10, 2008, FISA information is almost always classified, the use or disclosure of such information will normally require declassification by the originating agency in accordance with the originating agency's policies and procedures. Consultation with the FBI (or other Intelligence Community agencies as appropriate) must be taken by the federal prosecutor with respect to the use or disclosure of the FISA information. According to senior NSCLB officials, consultation with the FBI or an appropriate IC agency is also necessary to ensure that operational considerations are taken and that there are no potential disclosures of classified sources and methods.

requests and authorizations after the disbanding of the CLSU unit. This NSD official also stated that delays in receiving FISA use requests have become a source of frustration because there have been instances where NSCLB appeared to know about cases where a FISA use request was likely, but it did not provide NSD with adequate time to respond to emergency situations or court-imposed deadlines. This NSD official surmised that the FISA use requests were not a top priority of NSCLB attorneys because of higher-priority operational issues.

Additionally, we heard from NSD lawyers that the current practice of distributing responsibility throughout NSCLB has made it more difficult for NSCLB to track the FISA use requests because the processing is no longer centralized. At the time of our audit, there was no plan for NSCLB's Strategic Projects Law Unit to absorb the responsibilities of the former CLSU unit. When we asked NSCLB leadership whether they had considered reconstituting CLSU because these specific functions were not included in the SPLU mission, we were told that NSCLB did not reconstitute CLSU because the attorneys who support operations have all developed expertise in this area and handle the classified litigation needs of their client groups. However, based on the concerns shared by NSD staff we believe that further examination of the issue is appropriate. We recommend that the FBI centrally track FISA use requests and consider whether all FISA use requests should be assigned to one NSCLB unit.

Furthermore, in addition to concerns related to the processing time of FISA use requests, we learned of disagreements between prosecutors and NSCLB officials about NSCLB's role and involvement in criminal discovery matters concerning non-FISA information classified by the FBI. When FBI classified information may be needed in connection with criminal proceedings, either to satisfy the prosecution's discovery obligations or to be introduced as evidence by the prosecution, NSCLB works with the AUSA and NSD to determine whether the classified information can be disclosed through discovery, used as evidence at trial, and be declassified prior to such disclosure or use.⁵⁵ DOJ prosecutors rely on the mechanisms provided in the Classified Information Procedures Act (CIPA) to obtain court rulings on the discoverability of classified information, and the admissibility of classified information in advance of its use in open court.⁵⁶

According to the FBI's Declassification of Classified National Security Information Policy Guide, NSCLB must participate in the approval of discretionary declassification decisions concerning FBI classified information.⁵⁷ NSCLB assists in ensuring that the declassification of either FISA derived material or other FBI classified information is: (1) necessary to protect threats against national security; (2) will not include classified materials obtained from foreign governments; (3) will not include classified materials obtained from other U.S. agencies (unless authorized by the originating agency); (4) will not reveal any sensitive or special techniques; and (5) will not adversely impact other FBI investigations.⁵⁸ An NSCLB Section Chief told us that

⁵⁵ FBI Counterintelligence Division Policy Directive and Policy Guide, Section 4.8, Classified Information Procedures Act, October 17, 2014.

⁵⁶ When making declassification determinations, FBI declassification authorities are only able to declassify information originally classified by the FBI. Information that originates with another government agency, even when it is located within an FBI originated document, cannot be unilaterally declassified by the FBI. Only the originating agency can declassify information it determined was classified. See the Declassification of Classified National Security Information Policy Guide at Section 4.9 – Declassification Limitations and Prohibitions.

⁵⁷ Declassification of Classified National Security Information Policy Guide, Section 2.13.

⁵⁸ Declassification of Classified National Security Information Policy Guide, Section 4.7.

declassification is a critical NSCLB role and that NSCLB attorneys balance the needs of prosecutors with the need to protect national security. However, decisions on discovery requirements are the responsibility of the AUSA prosecuting the case and when an AUSA determines that classified information is discoverable, NSD works with the prosecutor to arrive at a method to provide discovery to the defense while protecting the information through CIPA. NSCLB officials informed us that although its classification review process is intertwined with the discovery process, requiring appropriate coordination and consultation, it does not mean that NSCLB is making discovery determinations.⁵⁹ We did not identify a defined role for the FBI in discovery beyond that found in its Domestic Investigations and Operations Guide dated March 31, 2020, which states that OGC “supports federal criminal prosecutions by assisting in criminal discovery.”

Despite the FBI’s limited support role, NSD and DOJ staff we spoke with told us that they believe NSCLB has involved itself inappropriately in discovery matters. For example, an NSD senior official told us that NSCLB has attempted to second guess discovery decisions made by prosecutors. This NSD official believed that NSCLB’s role is not to participate in the determination of how the prosecutors choose to protect a piece of classified information, but instead to identify information that is classified, its level of classification, and how a declaration from the owner of that information would explain to a court why the information presents a national security concern. According to this official, NSCLB may rightfully conclude the information is too sensitive to provide in discovery and, as a result, prosecutors may have to dismiss that case. However, we were told that discovery issues do not generally reach that point. We also were told by some AUSAs that they have had to remind NSCLB attorneys that AUSAs have the discovery obligations to courts and will make discoverability determinations.

An official from one USAO told us that, while it is understood that satisfying discovery obligations is the responsibility of the prosecutor, the FBI’s interest in protecting its equities may justify challenging a prosecutor’s discovery decisions. The official explained that such back and forth may be necessary to reach a balance between the needs of discovery and the protection of sensitive information; however, when the FBI’s role in the process extends into making assessments of what is discoverable it can slow the process down and necessitate the prosecutor asserting authority over discovery decisions. Additionally, an NSD official relayed that some USAOs were taking the position that they would not file charges until they had the necessary discovery in hand because of NSCLB delays in the declassification process. This same NSD official expressed frustration over the delays, and explained that at times, the delays have impeded adherence to court deadlines and slowed down the plea bargain process because defense counsel cannot properly advise the client on whether to accept a plea offer until counsel has thoroughly completed their due diligence, which includes a review of discoverable information.⁶⁰

By contrast, senior NSCLB officials noted that several factors outside of NSCLB’s control can cause the declassification process to take a considerable amount of time. According to these officials, the FBI addresses the risk of disclosing information that could cause significant harm to the American public by using a thorough, deliberate process which can be impacted by the volume of information, the sensitivities involved, and the resources available to conduct a review. In defending NSCLB’s role in the discovery

⁵⁹ Later in this section, we discuss the Department’s policy for addressing matters related to declassification and protecting the equities of the FBI and the USIC.

⁶⁰ Department officials told us that some USAOs may require the completion of discovery before offering a plea bargain while others may allow a waiver of additional discovery in order to reach a plea agreement.

process, a senior NSCLB official expressed the view that AUSAs tend to err on the side of making material discoverable, even when it involves national security information, and do not appreciate how the disclosure of information may affect other FBI or USIC operations. This official told us that NSD often prefers to declassify all information that could be relevant, necessary, or discoverable to ease the prosecution of the case or the discovery process.

According to an NSCLB senior official, disagreement between NSCLB and NSD about declassification issues affects hundreds of cases. NSCLB officials told us that on matters related to declassification they follow the Deputy Attorney General Rosen Memorandum (DAG Rosen Memorandum) to try to protect the equities of both the FBI and the USIC.⁶¹ According to this memorandum, disclosure of classified or unclassified information poses a risk if the information reveals investigative steps taken, investigative techniques or tradecraft used, or the identities of witness interviewed during a national security investigation. Decisions regarding the scope, timing, and form of discovery disclosures involving national security information- including whether the protections of CIPA should be invoked- must be made based on the specific circumstances in each case and with these risks in mind, taking full account of the need to protect against unnecessary disclosure of classified information or unclassified information relating to national security.

We believe misunderstandings such as those identified above point to a need for enhanced communication, coordination, and clarity on roles and responsibilities, especially in the early stages of an investigation. As we noted in our recommendation above, we believe an evaluation of existing guidelines and other existing criteria will help clarify NSD and NSCLB responsibilities in critical matters like discovery and the protection of classified information by more clearly delineating lines of authority between NSCLB attorneys and those charged with prosecuting national security cases.

⁶¹ Jeffrey A. Rosen, Deputy Attorney General, Department of Justice, Memorandum for the Associate Attorney General and the Assistant Attorneys General for the Criminal Division, National Security Division, Civil Rights Division, Antitrust Division, Environment and Natural Resource Division, Tax Division, Policies, Procedures, and Guidance Regarding Discoverable Information in Criminal Investigations Possessed by the Intelligence Community or Military, September 11, 2020.

Conclusion and Recommendations

The FBI OGC, primarily through NSCLB, plays a critical role in ensuring the FBI's compliance with laws, policies, and procedures pertaining to national security activities. As part of this effort, NSCLB regularly interacts with NSD and its components to ensure the FBI's national security and foreign intelligence activities are consistent with all federal laws, regulations, and internal policy, while protecting the civil liberties of United States citizens. While we did not identify any violations of laws or regulations, our audit revealed a relationship between NSCLB and NSD that is historically strained and hindered by overlapping or undefined responsibilities and miscommunication. To ensure that these critical national security entities within the Department and FBI work together as efficiently and effectively as possible, we believe the ODAG must reexamine and, if necessary, clarify the roles and responsibilities of these two entities. As it relates to oversight of FISA and other critical national security tools, NSCLB and NSD must take steps to improve communication and coordination. This includes working together to ensure that the FBI has a copy of all of the Rule 13 notices submitted to the FISC in order to better identify trends and continually strive to reduce compliance incidents and eliminate unnecessary delays in receipt of information such as FISA use requests. In all, we make a total of five recommendations to help clarify the roles and responsibilities of NSCLB to help it avoid roles traditionally reserved for prosecutors, improve cooperation with NSD on crucial oversight of FISA and other national security operations, and improve the discovery process involving classified information.

We recommend that the FBI:

1. Coordinate with NSD to ensure that it is receiving a final copy of each FBI Rule 13 notice filed with the FISC and develops and implements a method to track these notices and make their contents searchable.
2. Coordinate with NSD to determine whether revisions to the current FISA use request template or training are necessary in order to enhance clarity and more effectively convey how the information would help the prosecution team achieve its goals and facilitate effective processing of FISA use requests.
3. Centrally track FISA use requests and consider whether all FISA use requests should be assigned to one NSCLB unit.

We recommend that the Office of the Deputy Attorney General:

4. Evaluate whether the Attorney General Guidelines and other existing criteria can be improved by clarifying responsibilities in areas of overlap and more clearly delineating lines of authority between NSCLB, as agency counsel, and NSD, as counsel representing the United States in national security-related proceedings. In instances where the ODAG identifies ambiguity on certain roles and responsibilities, it should clearly define and delegate the authority to the appropriate entity, especially in areas related to the roles, responsibilities, coordination, and communication pertaining to prosecutorial decision-making.

5. Examine the current distribution of roles and responsibilities for conducting NSRs. If the ODAG determines that an alternative oversight structure would be more effective, ensure all stakeholders receive training on their roles and responsibilities and that the outdated NSR standard operating procedures are updated accordingly.

APPENDIX 1: Objective, Scope, and Methodology

Objective

The objective of our audit was to review the roles and responsibilities of the Federal Bureau of Investigation's (FBI) Office of the General Counsel (OGC) in overseeing compliance with applicable laws, policies, and procedures relating to the FBI's national security activities. This audit was mandated by the former Attorney General William P. Barr in the Augmenting the Internal Compliance Functions of the Federal Bureau of Investigation Memorandum issued on August 31, 2020.

Scope and Methodology

We performed a review of the FBI OGC's roles and responsibilities in overseeing compliance with national security activities from September 2020 through May 2021. We focused our work within the National Security and Cyber Law Branch within the OGC and the Department of Justice's (DOJ) National Security Division (NSD) based upon the national security focus of this audit and the coordination efforts between these offices which is necessary to carry out various national security activities.

We gained an understanding of the processes, systems, and controls in place surrounding the Office of the General Counsel's oversight and compliance of national security activities by reviewing Attorney General Guidelines, the FBI's Domestic Investigations and Operations Guide, and the United States Justice Manual and by interviewing current and former FBI OGC and DOJ NSD officials.

As a result of the COVID-19 pandemic response, we performed our audit fieldwork exclusively in a remote manner.

Statement on Compliance with Generally Accepted Government Auditing Standards

We conducted this performance audit in compliance with generally accepted government auditing standards (GAGAS). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Internal Controls

In this audit, we performed testing, as appropriate, of internal controls significant within the context of our audit objectives. A deficiency in internal control design exists when a necessary control is missing or is not properly designed so that even if the control operates as designed, the control objective would not be met. A deficiency in implementation exists when a control is properly designed but not implemented correctly in the internal control system. A deficiency in operating effectiveness exists when a properly designed control

does not operate as designed or the person performing the control does not have the necessary competence or authority to perform the control effectively.⁶²

As noted in the Audit Results section of this report, we identified deficiencies that we believe could affect the FBI's ability to effectively and efficiently operate and to ensure compliance with laws and regulations. However, our review may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

⁶² We did not evaluate the internal controls of the FBI to provide assurance on its internal control structure as a whole. FBI management is responsible for the establishment and maintenance of internal controls. Because we do not express an opinion on the FBI's internal control structure as a whole, we offer this statement solely for the information and use of the FBI. This restriction is not intended to limit the distribution of this report, which is a matter of public record.

APPENDIX 2: The Federal Bureau of Investigation and the Office of the Deputy Attorney General Response to the Draft Audit Report



U.S. Department of Justice

Washington, D.C. 20530

September 16, 2022

The Honorable Michael E. Horowitz
Inspector General
U.S. Department of Justice
Washington, D.C. 20530

Dear Inspector General Horowitz,

Thank you for the opportunity to review and comment on the Office of the Inspector General's (OIG) draft audit report entitled *Audit of the Roles and Responsibilities of the Federal Bureau of Investigation's Office of the General Counsel in National Security Matters* (the Report).

The Office of the General Counsel (OGC) of the Federal Bureau of Investigation (FBI) and the Office of the Deputy Attorney General (ODAG) would like to express our shared appreciation to your office for undertaking this review. The Department of Justice's ability to execute its national security missions in accordance with applicable laws, policies, and procedures benefits from the effective collaboration between the FBI and other Department components, including the National Security Division (NSD). Thus, we concur with the OIG's recommendations as set forth in the Report.

OGC, NSD, and ODAG are committed to ensuring that our offices and personnel continue to maintain a strong partnership. In the coming weeks, we will coordinate together to timely implement our actions in response to your recommendations. In some instances, actions have already been completed. For example, as recently discussed and responsive to Recommendation 2, OGC, in close coordination with NSD, has already implemented revisions to the FISA Use Request Template to enhance clarity and to better convey how the information would help the prosecution team achieve its goals and facilitate effective processing of the FISA Use Request.

The FBI and ODAG look forward to providing your office with the results of our implementation of actions in response to your recommendations upon completion.

Sincerely,

Bradley Weinsheimer

Bradley Weinsheimer
Associate Deputy Attorney General
Department of Justice

Handwritten signature of Jason A. Jones in black ink.

Jason A. Jones
General Counsel
Federal Bureau of Investigation

APPENDIX 3: Office of the Inspector General Analysis and Summary of Actions Necessary to Close the Audit Report

The OIG provided a draft of this audit report to the Federal Bureau of Investigation (FBI) and the Office of the Deputy Attorney General (ODAG). The FBI and ODAG joint response is incorporated in Appendix 2 of this final report. In response to our audit report, the FBI and ODAG concurred with all of our recommendations. As a result, the status of the audit report is resolved. The following provides the OIG analysis of the response and summary of actions necessary to close the report.

Recommendations for the Federal Bureau of Investigation:

1. **Coordinate with NSD to ensure that it is receiving a final copy of each FBI Rule 13 notice filed with the FISC and develops and implements a method to track these notices and make their contents searchable.**

Resolved. The FBI concurred with our recommendation. As a result, this recommendation is resolved.

This recommendation can be closed when we receive evidence that the FBI has coordinated with NSD to ensure that it receives a final copy of each FBI Rule 13 notice filed with the FISC and has developed and implemented a method to track these notices and make their contents searchable.

2. **Coordinate with NSD to determine whether revisions to the current FISA use request template or training are necessary in order to enhance clarity and more effectively convey how the information would help the prosecution team achieve its goals and facilitate effective processing of FISA use requests.**

Resolved. The FBI concurred with our recommendation. As a result, this recommendation is resolved. In the joint response, it was indicated that close coordination and activities related to FISA Use Request Templates had been taken.

This recommendation can be closed when we receive additional evidence that the updated FISA Use Request Template has been reviewed, approved, and finalized for use throughout the FBI. This evidence should show who approved the revised template, the approval date, and evidence that the template was disseminated to affected FBI personnel.

3. **Centrally track FISA use requests and consider whether all FISA use requests should be assigned to one NSCLB unit.**

Resolved. The FBI concurred with our recommendation. As a result, this recommendation is resolved.

This recommendation can be closed when we receive evidence that the FBI OGC has developed a method to centrally track FISA use requests and provides evidence that it has either: a) assigned the tracking of FISA use requests to one unit within the National Security and Cyber Law Branch (NSCLB), or b) evaluated the current process of FISA use request tracking and documented the basis for the determination that the non-centralized process of tracking FISA use requests by NSCLB does not need to be revised.

Recommendations for the Office of the Deputy Attorney General:

- 4. Evaluate whether the Attorney General Guidelines and other existing criteria can be improved by clarifying responsibilities in areas of overlap and more clearly delineating lines of authority between NSCLB, as agency counsel, and NSD, as counsel representing the United States in national security-related proceedings. In instances where the ODAG identifies ambiguity on certain roles and responsibilities, it should clearly define and delegate the authority to the appropriate entity, especially in areas related to the roles, responsibilities, coordination, and communication pertaining to prosecutorial decision-making.**

Resolved. The ODAG concurred with our recommendation. As a result, this recommendation is resolved.

This recommendation can be closed when we receive evidence that the ODAG has evaluated whether the Attorney General Guidelines and other existing criteria can be improved by clarifying responsibilities in areas of overlap and more clearly delineating lines of authority between NSCLB and NSD. In instances where criteria can be improved, the ODAG should provide its prescribed course of action in clarifying these criteria and a timeframe by which clarification will be made. This evidence should also demonstrate that the ODAG has reviewed guidance for ambiguity of roles and responsibility between NSCLB and NSD and has clearly defined and delegated the authority to the appropriate entity, especially in areas related to the roles, responsibilities, coordination, and communication pertaining to prosecutorial decision-making. The ODAG should provide the OIG with evidence that this guidance has been approved and finalized for use across both the Department and the FBI.

- 5. Examine the current distribution of roles and responsibilities for conducting NSRs. If the ODAG determines that an alternative oversight structure would be more effective, ensure all stakeholders receive training on their roles and responsibilities and that the outdated NSR standard operating procedures are updated accordingly.**

Resolved. The ODAG concurred with our recommendation. As a result, this recommendation is resolved.

This recommendation can be closed when we receive evidence that the ODAG has examined the current distribution of roles and responsibilities for conducting NSRs and decided whether an alternative oversight structure would be more effective. This evidence should reflect the ODAG's evaluation and basis for either a) the change in the oversight structure of NSRs, or b) the justification for maintaining the current oversight structure with regard to NSRs. If a change in the oversight

structure of NSRs is determined to be warranted, the ODAG must also provide evidence demonstrating that all necessary stakeholders received the training. Finally, the ODAG must also provide the OIG with a copy of its updated NSR standard operating procedures, including an effective date.