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United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

KOLAN DAVIS, STAFF DIRECTOR AND CHIEF COUNSEL
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June 15, 2006

Via Electronic Transmission

The Honorable Robert S. Mueller
Director
Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535

Dear Director Mueller:

At the Senate Judiciary Committee's May 2, 2006, Federal Bureau of Investigation (FBI) oversight hearing, I asked you about the recent report prepared by the Justice and Homeland Security Departments' Offices of Inspectors General (OIGs) regarding lack of coordination on a Houston terrorist financing case. As you know, a delay in processing an Immigration and Customs Enforcement (ICE) wiretap request in a terrorist financing case prevented the government from capturing communications between a criminal suspect and an individual designated as a global terrorist by the Treasury Department.

In response to my question about preparing a declassified version of the report for public release, you indicated that you were willing to work toward that goal. I appreciate that commitment and would like to know when a complete declassified version will be available for public release. As you know, I am concerned that the report is over-classified. Specifically, I believe that there are paragraphs marked secret that contain OIG analysis and conclusions rather than sensitive operational details. I have been told that some of these paragraphs were originally marked as unclassified during the review process, but were later classified secret. I would like to know who made those decisions and why. I would also like to know whether any FBI personnel mentioned in the report participated in the classification decision. It seems like a clear conflict of interest to me if government officials get to edit criticisms of their own actions out of the public versions of IG oversight reports.

I am also concerned that during the hearing you selectively read from unclassified portions of the report. The few passages you read paint a distorted picture of its findings and conclusions. While it is true that the OIGs concluded that "the FBI did not *intentionally* delay processing the ICE Houston criminal wiretap application," that's only a small part of the story. In fact, the OIGs also concluded that "the delay was caused primarily by" the failure of FBI's International Terrorism Operations Section (ITOS) to learn of the request until months after ICE shared it with the FBI's Houston field office and the Justice Department. ITOS did not learn of the request in a timely way "[d]ue to several missteps by the FBI and other entities," which are chronicled in the report. This is definitely not a story of smooth cooperation between the FBI and ICE.

As you know, the FBI has a leadership role on terrorism financing cases by virtue of a May 2003 memorandum of agreement (MOA) between the Homeland Security and Justice Department(s), not by any statute or Congressional mandate. The facts established in the OIG report do not instill confidence in the FBI's ability to lead under the process established by the MOA. At the heart of the problems in the Houston case was the failure of the FBI to re-open a case on the ICE target and work the case jointly from the Houston JTTF.

The report criticizes the head of the FBI's Terrorism Financing Operations Section (TFOS), Michael Morehart, for his failure to communicate and his lack of involvement in the case:

Pursuant to the MOA, [FBI's] TFOS is responsible for ensuring that ICE cases with a terrorism nexus are moved to FBI JTTFs or otherwise properly coordinated. Except for a brief telephone call to FBI Houston about the case, TFOS managers took no additional action with respect to the ICE Houston case in the summer of 2004[.]

* * *

We do not believe [FBI Agent Tony] Guerrero instructed FBI Houston to move the case to the JTTF. Morehart is the only witness who told the OIGs that Guerrero gave such an instruction. . . . Morehart told us that he understood that Guerrero gave the instruction based on Morehart's [May 2004] conversation with [ICE Agent Brock] Nicholson and Guerrero in which they told him the case was being worked "jointly" with the FBI. . . . However, Guerrero [and two other witnesses] all denied that Guerrero instructed FBI Houston to transfer the case to the JTTF in Guerrero's May 2004 conversation . . . and the case was in fact not transferred.

If this version of events is accurate, then Morehart failed to communicate properly with Nicholson and Guerrero, the two key officials responsible for helping him coordinate joint FBI/ICE terrorist financing investigations. His misunderstanding contributed significantly to the delayed wiretap and ultimately caused him to mislead his superiors, the OIGs, and Congress:

Morehart put this misunderstanding in writing when he prepared an [electronic communication] to his executive management on January 11, 2005, stating that FBI Houston had been instructed to move the ICE Houston case to the JTTF and such an instruction had been given to FBI Houston previously by TFOS in May 2004.

* * *

In response to the draft OIG report, Morehart stated that after reviewing the report he had an opportunity to discuss the events of May 2004 in detail with Guerrero and Nicholson and learned his recollection that Guerrero had instructed FBI Houston to move the case to the JTTF was incorrect. The OIGs believe that Morehart could have and should have

taken steps to sort out what happened . . . immediately after the problems with the handling of the case came to light in December 2004 rather than waiting until February of 2006 to do so after he was interviewed by congressional staff and the OIGs. By failing to have these in-depth conversations with Guerrero and Nicholson at the time, Morehart reported inaccurate information to his executive management in January 2005 that FBI Houston had failed to follow instructions from FBI Headquarters, and did so again later to Congress and the OIGs. We believe these inaccuracies, while not intentional misrepresentations, represent significant failures by Morehart.

This raises serious questions about the effectiveness of the FBI's leadership role in coordinating with other law enforcement agencies on terrorist financing cases.

Whether a case has or has not been transferred to a JTTF is very basic information. If the senior FBI official responsible implementing the terrorist financing MOA cannot accurately provide such basic case information to his management, then there is a problem. If he still cannot do so months later when questioned by Congress and the OIGs, then there is a serious problem.

When Morehart was interviewed by staff from the Senate Homeland Security and Finance Committees in March 2005, he indicated that in May 2004, he had instructed an agent in the FBI's Houston field office, Mike Clancy, to transfer the case to the JTTF. In order to determine whether Clancy's recollection matched Morehart's, I requested on May 9, 2005, that Clancy be interviewed by Committee staff. The FBI never made Clancy available for an interview, and it is unclear from the report whether Clancy was interviewed by the OIG, and if so, whether his recollection differs from Morehart's. In any event, it is clear from the OIG report that the explanation of events Morehart provided to Congress differs significantly both from his initial explanation to the OIG and his subsequent explanation after reviewing the draft OIG report. In short, Morehart has given multiple, contradictory accounts of his role in this matter.

Accordingly, please provide written answers to the following questions by June 30, 2006:

1. Did any of the FBI personnel mentioned in the OIG report participate in the decision to classify portions of the report? If so, please provide the names of the individuals and indicate whether any paragraphs referencing each individual were classified secret.
2. What steps do you intend to take to address what the OIG called "significant failures" by the head of the FBI's Terrorist Financing Operations Section in making false statements to Congress and the OIGs?

Please ensure that all replies are faxed to the attention of Jason Foster at (202) 228-0554. Thank you for your prompt attention to this important matter.

Sincerely,



Charles E. Grassley
Chairman

cc: Max Baucus, Ranking Member
Senate Committee on Finance

Arlen Specter, Chairman
Senate Judiciary Committee

Patrick Leahy, Ranking Member
Senate Judiciary Committee

Susan Collins, Chairman
Senate Homeland Security Committee

Joseph Lieberman, Ranking Member
Senate Homeland Security Committee