The FBI's Secret Scrutiny

'Don't Go Overboard'

In Room 7975 of the J. Edgar Hoover Building, around two corners from the director's suite, the chief of the FBI's national security law unit sat down at his keyboard about a month after the Patriot Act became law. Michael J. Woods had helped devise the FBI wish list for surveillance powers. Now he offered a caution.

"NSLs are powerful investigative tools, in that they can compel the production of substantial amounts of relevant information," he wrote in a Nov. 28, 2001, "electronic communication" to the FBI's 56 field offices. "However, they must be used judiciously." Standing guidelines, he wrote, "require that the FBI accomplish its investigations through the 'least intrusive' means. . . . The greater availability of NSLs does not mean that they should be used in every case."

Woods, who left government service in 2002, added a practical consideration. Legislators granted the new authority and could as easily
take it back. When making that decision, he wrote, "Congress certainly will examine the manner in which the FBI exercised it."

Looking back last month, Woods was struck by how starkly he misjudged the climate. The FBI disregarded his warning, and no one noticed.

"This is not something that should be automatically done because it's easy," he said. "We need to be sure . . . we don't go overboard."

One thing Woods did not anticipate was then-Attorney General John D. Ashcroft's revision of Justice Department guidelines. On May 30, 2002, and Oct. 31, 2003, Ashcroft rewrote the playbooks for investigations of terrorist crimes and national security threats. He gave overriding priority to preventing attacks by any means available.

Ashcroft remained bound by Executive Order 12333, which requires the use of the "least intrusive means" in domestic intelligence investigations. But his new interpretation came close to upending the mandate. Three times in the new...
guidelines, Ashcroft wrote that the FBI "should consider . . . less intrusive means" but "should not hesitate to use any lawful techniques . . . even if intrusive" when investigators believe them to be more timely. "This point," he added, "is to be particularly observed in investigations relating to terrorist activities."

'Why Do You Want to Know?'

As the Justice Department prepared congressional testimony this year, FBI headquarters searched for examples that would show how expanded surveillance powers made a difference. Michael Mason, who runs the Washington field office and has the rank of assistant FBI director, found no ready answer.

"I'd love to have a made-for-Hollywood story, but I don't have one," Mason said. "I am not even sure such an example exists."

What national security letters give his agents, Mason said, is speed.

"I have 675 terrorism cases," he said. "Every one of these is a potential threat. And anything I can do to get to the bottom of any one of them more quickly gets me closer to neutralizing a potential threat."

Because recipients are permanently barred from disclosing the letters, outsiders can make no assessment of their relevance to Mason's task.