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TUESDAY, MAR 4, 2003 01:22 AM CET

# Senate report: FBI still unprepared

A bipartisan report says the agency is still too cautious in dealing with terror suspects -- and has promoted the agents who bungled the Moussaoui case.

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Whether we're talking about a nightclub sound manager warning (<http://www.nytimes.com/2003/02/26/national/nationalspecial2/26WARW.html>) that pyrotechnic displays might cause a concert to turn into a disaster, a NASA safety engineer expressing concern ([http://www.sptimes.com/2003/02/22/Worldandnation/More\\_e\\_mails\\_show\\_con.shtml](http://www.sptimes.com/2003/02/22/Worldandnation/More_e_mails_show_con.shtml)) that the Space Shuttle Columbia might break apart two days before it blew up, or two former senators trying (</politics/feature/2001/09/12/bush/index.html>) to get the president to pay attention to their January 2001 report on a pending terrorist attack, you might think by now we would pay a little more heed to alarms sounded by expert sources.

But a recent warning alarm about the continued ineptitude of the Federal Bureau of Investigation, sounded by a bipartisan group of senators last week, went almost entirely unheard. The questions raised were grave, focusing not only on what the FBI did wrong before 9/11, but also on the fact that those same mistakes, systemic problems and

incompetent FBI executives continue to plague the bureau, leaving the country vulnerable to another terrorist attack.

“There is a real question as to whether the FBI is capable of carrying out counterintelligence to protect the citizens of the United States,” Sen. Arlen Specter, R-Penn., said, acknowledging “anger and frustration” in his tone. “Sept. 11 might well have been prevented” had the FBI done its job properly, he said. “What are they doing now to prevent another 9/11?”

Specter was one of three senators on the Judiciary Committee who, on Tuesday, Feb. 25, at the Senate Radio/TV Gallery, said that the FBI still didn’t have its house in order, almost a year and a half after Sept. 11. Sen. Charles Grassley of Iowa and Specter — the No. 2 and No. 3 ranking Republicans on the Judiciary Committee — and Sen. Patrick Leahy of Vermont, the ranking Democrat, issued an interim report.

Its chief criticism: that FBI officials as high-ranking as the director were ignorant of the surveillance law, and were still applying a too-stringent standard for those FBI agents seeking warrants to watch individuals under suspicion.

They also proposed legislation to ensure greater congressional oversight of the FBI’s surveillance powers.

Disconcertingly, FBI sources contacted by Salon backed the report. “It’s an important report,” the FBI’s Minneapolis bureau chief, whistleblower Coleen Rowley, told Salon. “Unfortunately, it’s not getting as much attention as it deserves.” The FBI still needs “to address its inherent endemic problems,” says Time Magazine’s 2002 Person of the Year. (<http://www.time.com/time/personoftheyear/2002/poyrowley.html>) And as the Senate report indicates, much of that improvement has yet to take place.

“They’re right on point,” seconds former FBI special agent John Vincent, who retired last December after 27 years in the bureau and who reviewed the interim report for Salon. “Everything they said was correct.”

A very early draft of the report was leaked to the New York Times last August, at a time when only Specter was involved. A less comprehensive version, the report didn’t directly criticize FBI director Robert Mueller III, name specific FBI brass allegedly at fault, or specifically address how the FBI was misunderstanding the applicable surveillance law. This report does. Though all members of the Judiciary Committee were invited to participate in the drafting the report, only Grassley and Leahy did so. The committee chairman, Sen. Orrin Hatch, R-Utah, issued a letter protesting the report’s findings.

Referring to an FBI field report from Phoenix about suspicious individuals taking flight training courses, and the stymied Minneapolis investigation of Zacarias Moussaoui, Specter said that “it was evident that had this trail been followed, along with other

evidence, that the tragedy of Sept. 11 might well have been avoided. After all, Specter said, the warrant that Rowley sought to search Moussaoui's computer — which was not granted until after the terrorist attacks — would have revealed "a veritable blueprint" for the events of that horrible Tuesday morning.

The three senators charged key members of the law enforcement organization with negligence, incompetence and ignorance. "I hate to say this," Leahy said, "but we found that the FBI is ill-equipped" to conduct surveillance on those in the United States possibly plotting terrorist acts on behalf of foreign powers. The senators' complaints focused around implementation of warrants under the Foreign Intelligence Surveillance Act. Passed in 1978 to prevent Communist espionage, and expanded in the USA PATRIOT Act to prevent further terrorist attacks, FISA allows the government to conduct surveillance on foreign nationals and U.S. citizens acting as foreign agents.

The senators said FBI brass in Washington, D.C., imposed too harsh an evidence standard before applying for FISA warrants.

In the past, the senators said, a FISA application usually needed to show a reasonable basis to believe that an individual is engaged in criminal conduct. But the FBI for years has been acting as if the standard is a higher one, requiring "probable cause," meaning that it is more likely than not that the person will engage in some malfeasance. Sen. Richard Shelby, R-Ala., chairman of the Senate's Select Committee on Intelligence, clearly agrees with the three senators on this matter. A few months ago, Shelby said that Justice Department attorneys used "a hyperrestrictive and legally unnecessary approach to FISA applications."

The Justice Department immediately dismissed the report as being "old news," inaccurate, unfair, unofficial and the views of a minority on the committee.

"The Justice Department has fully addressed the FISA problems that occurred almost entirely prior to this administration," Justice Department spokeswoman Barbara Comstock said, referring to 75 error-filled FISA warrants filed in 2000 and 2001 — a matter that was only a small part of the report's focus. (For this story, the FBI referred questions to the Department of Justice, which referred a reporter to Comstock's written statement.)

In rejecting the senators' report, Comstock also quoted Judge Royce Lamberth, the former presiding judge of the FISA court, in support of her claim that all was well at the Justice Department. Lamberth said, "We consistently find the [FISA] applications 'well-scrubbed' by the attorney general and his staff before they are presented to us," and that "the process is working. It is working in part because the attorney general is conscientiously doing his job, as is his staff."

But many in law enforcement view Lamberth as being too cautious in his views of what

surveillance is permitted under FISA — precisely the mind-set that has made FBI brass in Washington, D.C., so uncooperative and unwilling to help agents in the field, intelligence sources say. Citing Lamberth as supportive of the FBI's current view of FISA would be like citing Mark McGwire in support of Major League Baseball's policy on performance-enhancing dietary supplements.

Because of all these problems, the three senators proposed the Domestic Surveillance Oversight Act of 2003, requiring that every act of surveillance be reported to the House and Senate Judiciary committees. All three senators expressed concern that the Justice Department and FBI had not been responsive or cooperative with their oversight inquiries. "The FBI and the Justice Department seem to make it an adversarial process," Grassley said.

Since the bill would mandate public accounting of the broad details — though not specifics — of the number of individuals subjected to surveillance under FISA and the number of times FISA information is used for law enforcement purposes, civil libertarians applauded it.

"There's a lot of concern in this country that, especially with the USA PATRIOT Act, FISA has become a massive tool for secret surveillance," Timothy H. Edgar, legislative counsel of the American Civil Liberties Union, told Salon. "One way to assuage those concerns — or show that they're true — is to have more reporting." While the secret nature of foreign surveillance may be understandable, Edgar says that "certainly some basic information about how many people are under surveillance or what rules are used to issue a FISA warrant wouldn't be national security issues."

The ACLU's support of the bill is curious, however, in that Specter, Grassley and Leahy spent so much time talking about the FBI enforcing too high a standard for granting warrants. Is that something the ACLU would support? "It depends," Edgar says. "If it's bureaucratic intransigence, we're not for that." Edgar also sees such problems as ultimately eroding civil liberties since "if the government is not using the powers it has effectively against persons suspected of terrorism, that encourages the Congress to grant it more authority."

*Jake Tapper is the senior White House correspondent for ABC News.*

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