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To: Interested Persons

From: Caroline Fredrickson, Director,  
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Mike German, Policy Counsel  
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Re: Analysis of Department of Justice Inspector General Reports on the FBI's Use of National Security Letters and Section 215 Orders for Business Records in 2006

Date: April 7, 2008

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The American Civil Liberties Union has long warned that the overbroad and secret investigative authorities granted to the Federal Bureau of Investigation (FBI) in the USA PATRIOT Act (Patriot Act) would lead to abuse and threaten Americans' privacy and civil liberties.<sup>1</sup> The ACLU reiterated these concerns when Congress debated whether to renew these authorities, while the Department of Justice (DOJ) and the FBI repeatedly claimed there were no "substantiated" allegations that the FBI had abused its Patriot Act powers.<sup>2</sup> Of course the lack of substantiation was not due to a lack of abuse, but rather to the cloak of secrecy that surrounded the FBI's use of these powers, which was duly enforced through unconstitutional gag orders.

Fortunately, when Congress reauthorized the Patriot Act it included a provision requiring the Department of Justice Inspector General (IG) to audit the FBI's use of National Security Letters (NSLs) and Section 215 orders for business records, so Congress and the American public could learn how these powers were being used.<sup>3</sup> The first two of these audits, covering 2003 through 2005, were released in March 2007 and they confirmed widespread misuse, abuse and mismanagement of these authorities by the FBI.<sup>4</sup> The NSL audit revealed that the FBI substantially under-reported its

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<sup>1</sup> See, American Civil Liberties Union, Letter to the House Urging Rejection on the Final Version of the USA PATRIOT Act (10/23/2001), <http://www.aclu.org/natsec/emergpowers/14402leg20011023.html>; Letter to the Senate Urging Rejection on the Final Version of the USA PATRIOT Act (10/23/2001), <http://www.aclu.org/natsec/emergpowers/14401leg20011023.html>.

<sup>2</sup> *USA PATRIOT Act of 2001: Hearing Before the S. Select Comm. on Intelligence*, 109<sup>th</sup> Cong. 97, 100 (2005) (testimony of Alberto R. Gonzales, Attorney General of the United States and Robert S. Mueller, III, Director, Federal Bureau of Investigation), available at [http://www.fas.org/irp/congress/2005\\_hr/shrg109-341.pdf](http://www.fas.org/irp/congress/2005_hr/shrg109-341.pdf).

<sup>3</sup> USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 119(a), 120 Stat. 192 (2006).

<sup>4</sup> Dep't. Of Justice, Office Of Inspector General, A Review Of The Federal Bureau Of Investigation's Use Of National Security Letters (March 2007), <http://www.usdoj.gov/oig/special/s0703b/final.pdf> [hereinafter 2007 NSL Report]; Dep't. Of Justice, Office Of Inspector General, A Review Of The Federal Bureau Of Investigation's Use Of Section 215 Orders

use of NSLs to Congress, ignored the requirements of the NSL authorizing statutes, and used NSLs to collect private information against individuals two or three times removed from subjects of FBI investigations. The Section 215 audit showed the number of requests for Section 215 orders were sparse by comparison, due primarily to lengthy bureaucratic delays at both FBI headquarters and the Department of Justice Office of Intelligence Policy Review (OIPR) in bringing applications to the Foreign Intelligence Surveillance Court (FISC) for approval. The disparity suggested that FBI agents were avoiding the more arduous Section 215 process by using NSLs in a manner not authorized by law, thereby circumventing congressionally-imposed limitations on FBI authority.

On March 13, 2008 the IG released a second pair of audit reports which cover 2006 and evaluate the reforms implemented by the DOJ and the FBI after the first audit was released in 2007.<sup>5</sup> Not surprisingly, the new reports identify many of the same problems discovered in the earlier audits.

The new NSL report shows that the FBI issued 49,425 NSLs in 2006 (a 4.7 percent increase over 2005), and confirms that the FBI is increasingly using NSLs to gather information on U.S. persons (57 percent in 2006, up from 53 percent in 2005).<sup>6</sup> FBI Director Robert Mueller suggested that the FBI's 2006 abuses are not relevant to a discussion of current FBI practice because they pre-date the reforms implemented by the FBI in 2007 – after the first pair of reports.<sup>7</sup> But in this year's report, the IG has included an evaluation of those reforms and found them lacking. The IG found the FBI did not fully implement all of the recommendations the IG made in his previous report, and the IG expressed uncertainty about whether the planned reforms, even if implemented, would be sufficient:

...there are additional steps that the FBI is still considering and needs to take, and we believe that ensuring full compliance will require the continual attention, vigilance, and reinforcement by the FBI and the department. We also believe it is too soon to definitively state whether the new systems and controls developed by the FBI and the Department will eliminate fully the problems with the use of NSLs that we and the FBI have identified.<sup>8</sup>

The ACLU shares the IG's lack of confidence that new FBI and DOJ internal policies and procedures will remedy the problems with these overbroad and unchecked authorities, and we call on Congress to limit the FBI's power to pry into private lives without suspicion of wrongdoing. As the IG's new report makes clear, the NSL statutes, Attorney General Guidelines, and internal FBI policies in place at the time of the first IG audit established a "highly regulated system for controlling the approval process and for identifying violations" – and even in that environment a multitude of violations occurred.<sup>9</sup> The new IG reports reveal that the FBI remains seriously mismanaged, and is

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for Business Records (March 2007), <http://www.usdoj.gov/oig/special/s0703a/final.pdf> [hereinafter 2007 Section 215 Report].

<sup>5</sup> Dep't. Of Justice, Office Of Inspector General, A Review Of The FBI's Use Of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006 (March 2008), <http://www.usdoj.gov/oig/special/s0803b/final.pdf> [hereinafter 2008 NSL Report]; Dep't. Of Justice, Office Of Inspector General, A Review Of The FBI's Use Of Section 215 Orders for Business Records in 2006 (March 2008), <http://www.usdoj.gov/oig/special/s0803a/final.pdf> [hereinafter 2008 Section 215 Report].

<sup>6</sup> 2008 NSL Report, at 9-10.

<sup>7</sup> Dan Eggen, *FBI Chief Confirms Misuse of Subpoenas*, WASH. POST, Mar. 6, 2008, at A02, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/03/05/AR2008030500463.html>.

<sup>8</sup> 2008 NSL Report, at 15.

<sup>9</sup> 2008 NSL Report, at 69.

simply incapable of policing itself. Moreover, the FBI misconduct highlighted in the new audits demonstrates a dangerous unwillingness to accept the limitations of the law at the highest levels of the FBI.

Additional FBI and DOJ guidelines will not prevent future abuse of these Patriot Act authorities because the overbroad scope of these unchecked authorities all but invites such abuse. Congress must limit the FBI's use of these authorities promptly. Otherwise, the next IG audit may reveal the collection of the private records of thousands of more innocent persons by the government for no legitimate national security purpose.

A careful reading of the new audit reports explains the many reasons for the IG's skepticism that new internal controls will prevent future abuse of these authorities.

### **1. The audit results demonstrate that the FBI remains incapable of policing itself**

The first IG NSL audit found violations of law or policy in 7.5 percent of the NSLs examined that should have been reported to the Intelligence Oversight Board (IOB). The FBI claimed in congressional testimony that the IG's results were overstated because they were skewed by the small size of the audit sample:

The sample was a judgmental sample and the size was chosen because the audit was extremely labor intensive. We do not suggest that the sample was not a fair sample (although it was not random), but only that it is questionable from a statistical standpoint to attempt to extrapolate from a very small sample to an entire population.<sup>10</sup>

To correct this perceived statistical problem, the FBI initiated its own inspection designed to review a full ten percent of the NSLs issued between 2003 and 2006. But, according to the IG's new NSL report, the FBI audit was beset with problems from the start. First, FBI inspectors could not fully review 1,175 NSLs in the audit sample chosen because they could not locate either the relevant supporting documents or the returns the FBI received from the NSL recipients.<sup>11</sup> The IG concluded that the number of unreviewable NSLs, equal to a full 15 percent of the audit sample, made it more than likely that the FBI audit significantly understated the number of possible violations.<sup>12</sup>

Moreover, at the conclusion of the field review, FBI supervisors found that the inspectors conducting the audit entered "incomplete or contradictory" information into the audit files.<sup>13</sup> As a result, the data they collected had to undergo an additional "scrubbing process."<sup>14</sup> The FBI supervisors also re-characterized a number of the possible IOB violations the inspectors found as "administrative errors," rather than violations. Infractions the FBI categorized as "administrative errors" included such potentially serious violations as:

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<sup>10</sup> *National Security Letters: Hearing Before the H. Permanent Select Comm. on Intelligence*, 110<sup>th</sup> Cong. (Mar. 28, 2007) (statement of John Pistole, Deputy Director, Federal Bureau of Investigation), available at <http://www.fbi.gov/congress/congress07/pistole032807.htm>.

<sup>11</sup> 2008 NSL Report, at 78 n.48.

<sup>12</sup> 2008 NSL Report, at 98-99.

<sup>13</sup> 2008 NSL Report, at 79.

<sup>14</sup> 2008 NSL Report, at 80.

- Records requested in approval memos differed from the records requested in the subsequently issued NSLs;
- Approval memos requesting issuance of NSLs lacked approvals from the appropriate officials;
- Statutory authority cited in approval memos differed from the citation in the subsequently issued NSLs.<sup>15</sup>

The FBI found 1,498 “administrative errors” in comparison to 640 potential IOB violations.<sup>16</sup> The IG said the FBI diminished the seriousness of these infractions by calling them “administrative errors” and suggested they were better characterized as “lapses in internal controls.”<sup>17</sup> The FBI also had to go back and re-audit six offices that had suspiciously low violation rates in the initial FBI audit. The FBI’s re-audit identified 83 additional violations that were missed by the first inspectors.<sup>18</sup>

Even with all these problems the FBI reported a higher overall IOB violation rate (9.43 percent) than the IG found during his 2007 audit.<sup>19</sup> But the IG determined the FBI audit still underreported the true number of NSL violations. When the IG went back and re-examined a sample of the files the FBI audited he found almost three times the number of violations in the files than the FBI reported.<sup>20</sup> The IG attributed the deficiencies in the FBI audit to the short time period the FBI devoted to planning the review and to the inspectors’ lack of experience in conducting national security investigations.<sup>21</sup>

## **2. The FBI’s continuing management deficiencies risk civil liberties and security**

Particularly troubling in the 2008 IG audit report is a discussion with FBI Director Robert Mueller regarding his perception of the causes of the abuse of Patriot Act authorities. Director Mueller cited:

- the FBI’s previous lack of focus on the procedures necessary to ensure compliance with all legal requirements;
- inadequate infrastructure at FBI headquarters to ensure compliance with all legal requirements;
- organizational “stove piping” under which FBI personnel did not fully communicate across division lines;
- rotation of FBI middle management so that they did not always “take ownership” of problems they encountered;
- significant pressure to respond to any threat; and
- inadequate staffing in the FBI’s Counterterrorism Division.<sup>22</sup>

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<sup>15</sup> 2008 NSL Report, at 81.

<sup>16</sup> 2008 NSL Report, at 81.

<sup>17</sup> 2008 NSL Report, at 100.

<sup>18</sup> 2008 NSL Report, at 81.

<sup>19</sup> 2008 NSL Report, at 8.

<sup>20</sup> 2008 NSL Report, at 95.

<sup>21</sup> 2008 NSL Report, at 98.

<sup>22</sup> 2008 NSL Report, at 15-16.

These are, of course, virtually the same problems that the FBI blamed for the operational failures that preceded the terrorist attacks on September 11, 2001.<sup>23</sup> Citing these problems again in 2008 to explain continuing failures in FBI national security programs is the strongest indication yet that the FBI remains dangerously mismanaged. That a law enforcement agency armed with the authority to deprive citizens of their liberty would ever lack focus on “the procedures necessary to ensure that all legal requirements” are satisfied is simply unacceptable. Mismanagement of national security programs risks both security and civil liberties.

On the security front, the audit report indicates the FBI could not locate return information for 532 NSL requests during their field audit.<sup>24</sup> Because the law only allows the FBI to issue NSLs in terrorism and espionage investigations, it cannot be assumed that the loss of these records is inconsequential to our security. That national security information continues to fall through the cracks at the FBI through sheer incompetence is truly a worrisome revelation. Moreover, it appears supervisors at FBI headquarters are a bigger problem than agents in the field. The IG report noted that NSLs issued from FBI headquarters had a significantly higher IOB violation rate (an incredible 71.5 percent) than the violation rate in the field (9.4 percent).<sup>25</sup> The FBI was unable to locate the records provided by the NSL recipients in response to 70 NSLs issued from FBI headquarters (28 percent of the NSLs sampled).<sup>26</sup>

As to civil liberties, the mismanagement of the FBI’s NSL authority continues to threaten the privacy rights of innocent persons by allowing the FBI to collect and retain indefinitely private records without legal justification or authorization. In discussing the five most serious violations missed in the FBI inspection, the IG details incidents where the FBI collected private information regarding several innocent people who were not relevant to any authorized investigation, entered it into FBI case files, and/or uploaded it into FBI databases. These errors occurred because FBI agents requested records for the wrong telephone numbers or wrong time periods. The IG noted two instances in the audit sample in which social security and date of birth information for individuals not relevant to FBI investigations was uploaded into FBI databases even though the FBI case agent had written on the face of the documents:

“Individual account records not relevant to this matter. New subscriber not related to subject. Don’t upload.”<sup>27</sup>

Agents did not consistently recognize or report when they received unauthorized information from NSL recipients outside the scope of the NSL requests, and did not properly sequester the information as required.<sup>28</sup> Agents self-reported the over-production of unauthorized information in only four of the 557 instances the IG identified (less than one percent). Consequently, the IG concluded that the unauthorized information likely made its way into FBI case files and databases where it would be shared throughout the intelligence community.<sup>29</sup>

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<sup>23</sup> NATIONAL COMMISSION ON TERRORIST ATTACKS, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, (2004), *available at* <http://govinfo.library.unt.edu/911/report/index.htm>

<sup>24</sup> 2008 NSL Report, at 81.

<sup>25</sup> 2008 NSL Report, at 87.

<sup>26</sup> 2008 NSL Report, at 88.

<sup>27</sup> 2008 NSL Report, at 97 n.76.

<sup>28</sup> 2008 NSL Report, at 99.

<sup>29</sup> 2008 NSL Report, at 100.

The new Section 215 audit also revealed continuing management deficiencies. First, the IG found that neither the FBI's FISA Management System nor DOJ's OIPR tracking system kept reliable records regarding the length of time Section 215 requests remained pending.<sup>30</sup> Using other means, the IG was ultimately able to determine that processing times for Section 215 requests ranged from ten days to an incredible 608 days, with an average of 169 days for the approved orders and 312 days for withdrawn requests.<sup>31</sup> The IG found these delays were often the result of unfamiliarity with the proper process, simple misrouting of the Section 215 requests, and an unnecessarily bureaucratic, self-imposed, multi-layered review process.<sup>32</sup> Most tellingly, the IG reported that this process has not improved since his last audit.<sup>33</sup>

### **3. The FBI gags NSL recipients in almost all cases despite internal guidance**

The ACLU successfully challenged the constitutionality of blanket non-disclosure and confidentiality orders contained in NSLs, known as "gag orders," on First Amendment grounds.<sup>34</sup> Upon reauthorization, the Patriot Act limited gag orders to those situations when a Special Agent in Charge certifies that disclosure of the NSL request might result in danger to the national security, interference with an FBI investigation, or danger to any person. The purpose of this alteration to the law was to ensure that NSL recipients would only be gagged when there was a "genuine need."<sup>35</sup> The FBI General Counsel issued guidance to the field that non-disclosure orders "should not be made in a perfunctory manner" and should "no longer [be] automatically included in the NSL."<sup>36</sup>

The IG found, however, that 97 percent of NSLs issued by the FBI continue to come with gag orders,<sup>37</sup> and that five percent of these NSLs contained "insufficient explanation to justify imposition of these obligations."<sup>38</sup> While a five percent violation rate may seem small compared to the widespread abuse of NSL authorities documented elsewhere, it demonstrates that gags continue to be applied in an overly broad, and therefore unconstitutional, manner. That the FBI has not responded more forthrightly to internal guidance to limit the gags suggests the FBI will not respond to new internal controls. Moreover, the IG found that gags were improperly included in eight of the 11 "blanket NSLs" that senior FBI counterterrorism officials improperly issued to cover illegal requests made through exigent letters.<sup>39</sup>

### **4. The FBI ignored First Amendment concerns of the FISA Court**

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<sup>30</sup> 2008 Section 215 Report, at 39.

<sup>31</sup> 2008 Section 215 Report, at 43.

<sup>32</sup> 2008 Section 215 Report, at 45-47.

<sup>33</sup> 2008 Section 215 Report, at 47.

<sup>34</sup> See, *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y. 2004); *Doe v. Gonzales*, 500 F.Supp. 2d 379 (S.D.N.Y. 2007); *Doe v. Gonzales*, 386 F. Supp. 2d 66 (D.Conn. 2005). The ACLU is still litigating the constitutionality of the gag order provisions in the USA PATRIOT Improvement and Reauthorization Act of 2005. See, American Civil Liberties Union "ACLU Asks Appeals Court to Affirm Striking Down Patriot Act 'National Security Letter' Provision (3/15/08), <http://www.aclu.org/safefree/nationalsecurityletters/34480prs20080314.html>.

<sup>35</sup> 2008 NSL Report, at 120.

<sup>36</sup> 2008 NSL Report, at 119-120.

<sup>37</sup> 2008 NSL Report, at 124.

<sup>38</sup> 2008 NSL Report, at 11.

<sup>39</sup> 2008 NSL Report, at 127.

The IG's 2008 Section 215 report includes a troubling description of an episode in which the FBI applied to the Foreign Intelligence Surveillance Court for a Section 215 order, only to be denied on First Amendment grounds. While this portion of the IG report is heavily redacted, it appears that sometime in 2006 the FBI twice asked the FISA Court for a Section 215 order seeking "tangible things" as part of a counterterrorism case. The court denied the request, both times, because "the facts were too 'thin' and [the] request implicated the target's First Amendment rights."<sup>40</sup> Rather than re-evaluating the underlying investigation based on the court's First Amendment concerns, the FBI circumvented the court's oversight and pursued the investigation using three NSLs that were predicated on the same information contained in the Section 215 application.<sup>41</sup>

It turns out that the FISA Court was not the first to raise First Amendment concerns over this investigation to FBI officials. Lawyers with OIPR raised the First Amendment issue when the FBI sent the Section 215 application for its review.<sup>42</sup> The OIPR is supposed to oversee FBI intelligence investigations, but OIPR officials quoted in the IG report said the OIPR has "not been able to fully serve such an oversight role" and that they were often bullied by FBI agents:

In addition, the former Acting Counsel for Intelligence Policy stated that there is a history of significant pushback from the FBI when OIPR questions agents about the assertions included in FISA applications. The OIPR attorney assigned to Section 215 requests also told us that she routinely accepts the FBI's assertions regarding the underlying investigations as fact and that the FBI would respond poorly if she questioned their assertions.<sup>43</sup>

When the FISA Court raised First Amendment concerns about the FBI investigation, the FBI General Counsel decided the FBI would continue the investigation anyway, using methods that had less oversight. When asked whether the court's concern caused her to review the underlying investigation for compliance with legal guidelines that prohibit investigations based solely on protected First Amendment activity, the General Counsel said it did not because "she disagreed with the court's ruling and nothing in the court's ruling altered her belief that the investigation was appropriate."<sup>44</sup> Astonishingly, she put her own legal judgment above the decision of the court. She added that the FISA Court "does not have the authority to close an FBI investigation."<sup>45</sup>

A former OIPR Counsel for Intelligence Policy argued that while investigations based solely on association with subjects of other national security investigations were "weak," they were "not necessarily illegitimate."<sup>46</sup> It is also important to note that this investigation, based on simple association with the subject of another FBI investigation, was apparently not an aberration. The FBI General Counsel said the FBI would have to close "numerous investigations" if they could not open cases against individuals who merely have contact with other subjects of FBI investigations.<sup>47</sup>

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<sup>40</sup> 2008 Section 215 Report, at 68.

<sup>41</sup> 2008 Section 215 Report, at 72.

<sup>42</sup> 2008 Section 215 Report, at 67.

<sup>43</sup> 2008 Section 215 Report, at 72.

<sup>44</sup> 2008 Section 215 Report, at 72.

<sup>45</sup> 2008 Section 215 Report, at 71 n.63.

<sup>46</sup> 2008 Section 215 Report, at 73.

<sup>47</sup> 2008 Section 215 Report, at 72-73.

The IG questioned the legality of the FBI's use of NSLs based on the same factual predicate contained in the Section 215 request the FISA Court rejected on First Amendment grounds, because the authorizing statutes for NSLs and Section 215 orders contain the same First Amendment caveat.<sup>48</sup> The FBI's stubborn defiance of OIPR attorneys and the FISA Court demonstrates a dangerous interpretation of the legal limits of the FBI's authority at its highest levels, and lays bare the inherent weakness of any set of internal controls. The FBI's use of NSLs to circumvent more arduous Section 215 procedures confirms the ACLU's previously articulated concerns that the lack of oversight of the FBI's use of its NSL authorities would lead to such inappropriate use.

## **5. The FBI continues to minimize its misconduct**

### **a) By continuing to claim the misconduct was unintentional**

In response to the first IG report detailing the massive misuse of NSLs, FBI Director Robert Mueller appeared at a press conference where he said, "I'll note that the Inspector General indicated that his review did not reveal intentional violations of national security letter authorities, A.G. Guidelines, or internal FBI policy."<sup>49</sup> This statement was clearly contradicted by the information detailed in the IG report, but the FBI continued making the claim in congressional testimony and media reports.<sup>50</sup>

Nowhere is the intentional misuse of NSLs more apparent than in the IG's discussion of the FBI's use of patently illegal "exigent letters," which contained obviously false statements regarding fake emergencies and non-existent legal process to support FBI demands for documents, often without any authorizing investigation.<sup>51</sup> FBI agents in the field and National Security Law Branch attorneys repeatedly complained about this abuse, yet FBI supervisors continued to use these exigent letters until the first IG audit began in 2006. The new IG audit reveals that high-ranking FBI officials, including an Assistant Director, a Deputy Assistant Director, two Acting Deputy Directors and a Special Agent in Charge, improperly issued eleven "blanket NSLs" in 2006 seeking data on 3,860 telephone numbers.<sup>52</sup> The IG reported that none of these "blanket NSLs" complied with FBI policy and eight imposed non-disclosure requirements on recipients that did not comply with the law.<sup>53</sup> Moreover, it is clear from the IG report that the NSLs were written to "cover information already acquired through exigent letters and other informal responses."<sup>54</sup> The IG expressed concern that such high-ranking officials would fail to comply with FBI policies requiring FBI lawyers to review all NSLs, but it seems clear enough that this step was intentionally avoided because the officials knew these NSL requests were illegal.<sup>55</sup> It would be difficult to call this conduct anything but intentional.

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<sup>48</sup> 2008 Section 215 Report, at 73.

<sup>49</sup> Robert Mueller, Director, Federal Bureau of Investigation, FBI Press Conference On DoJ Inspector General's Report on the Use of National Security Letters, (Mar. 9, 2007), available at <http://www.fas.org/irp/news/2007/03/fbi030907.html>.

<sup>50</sup> See *Oversight of the Federal Bureau of Investigation: Hearing Before the S. Comm. on the Judiciary*, 110<sup>th</sup> Cong. (Mar. 27, 2007) (statement of Robert Mueller, Director, Federal Bureau of Investigation, available at <http://www.fbi.gov/congress/congress07/mueller032707.htm>).

See also, Lara Jakes Jordan, *FBI Chief Says Report Will Show Additional Improper Use of Subpoenas in Terror, Spy Cases*, ASSOCIATED PRESS, March 5, 2008, <http://www.startribune.com/nation/16254701.html>.

<sup>51</sup> 2007 NSL Report, at 86-97.

<sup>52</sup> 2008 NSL Report, at 127, 129 n.116.

<sup>53</sup> 2008 NSL Report, at 127.

<sup>54</sup> 2008 NSL Report, at 127.

<sup>55</sup> 2008 NSL Report, at 130.



## **b) By highlighting third-party errors**

In testimony before the House Judiciary Committee FBI General Counsel Valerie Caproni minimized the FBI's role in the high IOB violation rate by blaming third-party errors:

Setting aside questions about whether the sample is representative, I urge you to look closely at the numbers before arriving at the conclusion that there is a systemic problem concerning the use of NSLs. Of the 293 NSLs the OIG examined, 22 (7 percent) were judged to have potential unreported IOB violations associated with them. Moreover, of that 7 percent, 10—or almost 50 percent—were third-party errors; that is, the NSL recipient provided the FBI information we did not seek. Only 12 of the NSLs examined—4 percent—had mistakes that the OIG rightfully attributes to the FBI.<sup>56</sup>

The IG rejects the FBI's "third-party error" framing. The IG correctly notes that when NSL recipients provide the wrong information or more information than the FBI requests in an NSL, the FBI often compounds this error by failing to identify the improper over-production before entering it into FBI case files or uploading it into FBI databases.<sup>57</sup> Instead, the IG refers to this type of unauthorized collection as "initial third-party errors," so as not to ignore or excuse the FBI's misconduct. The fact that less than one percent of the over-production the IG discovered in this year's audit was self-reported by agents reveals that the vast majority of "initial third-party errors" are compounded by FBI misconduct.<sup>58</sup>

## **6. Failure to establish minimization procedures**

The IG severely criticized the National Security Letter Working Group for failing to establish appropriate privacy safeguards and measures to minimize the retention of information collected with NSLs. The NSL Working Group is a joint initiative of the DOJ and the Director of National Intelligence (DNI) and was created by the 2006 Patriot Act reauthorization to study "the feasibility of applying minimization procedures in the context of national security letters to ensure the protection of the constitutional rights of U.S. persons."<sup>59</sup>

The IG repudiated a NSL Working Group proposal that would allow "the unlimited uploading and retention of electronic communication transactional data regardless of investigative value" and stated "that the NSL Working Group's proposed standards for uploading and retaining NSL-derived financial and credit information provides no meaningful constraint and requires no balancing of privacy interests against genuine investigative needs."<sup>60</sup> The IG noted that, according to FBI agents, "a primary use of NSLs is to close leads and eliminate suspects," yet NSL Working Group guidelines would classify such information as having "investigative value" so it could be uploaded into FBI databases and retained for up to 30 years.<sup>61</sup>

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<sup>56</sup> *The Inspector General's Independent Report on the F.B.I.'s Use of National Security Letters: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (Mar. 20, 2007) (Statement of Valerie Caproni, General Counsel, Federal Bureau Investigation), available at <http://www.fbi.gov/congress/congress07/caproni032007.htm>.

<sup>57</sup> 2008 NSL Report, at 82.

<sup>58</sup> 2008 NSL Report, at 100.

<sup>59</sup> Pub. L. No. 109-177, §119(f).

<sup>60</sup> 2008 NSL Report, at 70, 71.

<sup>61</sup> 2008 NSL Report, at 70.

The IG likewise criticized OIPR for failing to develop appropriate minimization procedures for Section 215 orders mandated under the Patriot Act reauthorization.<sup>62</sup> After failing to come to an agreement with the FBI over the definition of “U.S. person identifying information,” among other things, OIPR simply adopted existing Attorney General Guidelines for FBI National Security Investigations as “interim” standard minimization procedures.<sup>63</sup> The IG found these “interim” standards did not meet the statutory requirement that DOJ adopt procedures “to minimize the retention and prohibit the dissemination of U.S. person information.”<sup>64</sup>

## **7. The FBI lacks firm evidence that NSLs or Section 215 orders are “vital tools”**

The IG report once again parroted FBI agents who described NSLs as “essential and indispensable” tools in their national security investigations, but the IG documented just eight vague and unconvincing anecdotes to substantiate such claims.<sup>65</sup> With the tens of thousands of NSLs issued each year it would not be difficult to demonstrate clear and significant successes in FBI investigations if this tool were truly as vital as is claimed.

Likewise the Section 215 report indicates FBI agents regard Section 215 as an “invaluable” tool despite the burdensome process, yet the IG acknowledged that “no agent suggested that the records obtained pursuant to the order resulted in a major case development.”<sup>66</sup>

Four separate IG audit reports now lead to the inescapable conclusion that these invasive powers are regularly misused to the detriment of the civil liberties and privacy of innocent Americans. Worse still, Americans are paying the price of reduced liberty without getting the benefit of improved security, as there is no evidence that these measures have proven effective to justify their continued use.

### **CONGRESS MUST ACT** **TO PROTECT THE PRIVACY OF INNOCENT PERSONS**

A new report on the Inspector General’s investigation of the FBI’s illegal use of “exigent letters” and “blanket NSLs” is expected later this year. With the expectation that the new report will be just as damning as the previous four, that will make five IG reports in two years that show repeated, rampant, and intentional misuse of Patriot Act authorities. Moreover, these reports document serious mismanagement within FBI national security programs, leaving both our liberty and our security at risk. While these reports are an important first step toward holding the FBI accountable for its abuse of power, more must be done to end the abuse. Even if the FBI officials implicated in intentional misconduct were held accountable, and even if these management problems were solved, hundreds of thousands of NSLs would continue to collect information on innocent Americans because that is exactly what the NSL statutes allow. Congress must act now to limit these authorities in the following ways:

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<sup>62</sup> Pub. L. No. 109-177, § 106A.

<sup>63</sup> 2008 Section 215 Report, at 75-83.

<sup>64</sup> 2008 Section 215 Report, at 82.

<sup>65</sup> 2008 NSL Report, at 114.

<sup>66</sup> 2008 Section 215 Report, at 57.

- Repeal the expanded NSL authorities that allow the FBI to demand information about innocent people who are not the targets of any investigation and return to previous standards limiting the use of NSLs to gather information only about terrorism suspects and other agents of foreign powers.
- Amend the NSL statute so that gag orders are imposed only upon the authority of a court, and only where necessary to protect national security. Limit judicially-imposed gag orders in scope and duration and ensure that their targets have a meaningful right to challenge them before a fair and neutral arbiter.
- Impose judicial oversight of Patriot Act authorities. Allowing the FBI to certify that it has met the statutory requirements invites further abuse and overuse of NSLs. Contemporaneous and independent oversight of the issuance of NSLs is needed to ensure that they are no longer issued at the drop of a hat to collect information about innocent U.S. persons.

Bills are already pending in Congress that would rein in the FBI's use of NSLs: the National Security Letter Reform Act of 2007 (H.R. 3189) sponsored by Representative Jerrold Nadler and the NSL Reform Act of 2007 (S. 2088) sponsored by Senator Russ Feingold. These are good bills that take great strides towards limiting the FBI's authority to issue NSLs and they should be acted upon this year. Waiting another year will simply mean that thousands of other innocent people will have their private records collected by the FBI.

## **CONCLUSION**

The IG audits have uncovered an extraordinary level of mismanagement, incompetence, and willful misconduct.<sup>67</sup> The audits clearly demonstrate that Congress must repeal the overbroad and unchecked authorities given to the FBI in the Patriot Act. The FBI and DOJ have demonstrated that they cannot police themselves and they need independent oversight to assure a now-skeptical public that they are complying with the law. Congress must fully investigate the FBI's abuse of power to ensure that those responsible for these violations are held accountable; that the innocent people who have had their privacy invaded and their civil rights abused are identified and notified; and that records which have been improperly or inappropriately seized are purged from FBI databases. But most importantly, Congress needs to fix the Patriot Act, which has opened the door for government abuse that only undermines the FBI's legitimate law enforcement mission.

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<sup>67</sup> Another example of the FBI's apparent misuse of its NSL authority is not discussed in the IG's report. Documents released in response to an ACLU Freedom of Information Act (FOIA) request suggest that the FBI may have assisted Department of Defense (DOD) in evading legal limits on its own use of NSLs. Congress gave the DOD a very limited authority to issue non-compulsory requests for information regarding DOD employees in counter-intelligence and counter-terrorism investigations. The documents reveal that the DOD may have asked the FBI to issue NSLs compelling the production of information DOD wanted, but was not authorized to obtain, and that the FBI appears to have complied with these requests even when the FBI was not conducting an authorized investigation of its own. For the FBI to assist the DOD in obtaining records it is not legally authorized to obtain is problematic in and of itself, but for the FBI to issue NSLs without its own "authorized investigation" would appear to be a violation of the FBI's statutory authority. *See* Newly Unredacted Documents Confirm Lack of Oversight of Military's Domestic Surveillance Powers, ACLU press release (April 1, 2008), at: <http://www.aclu.org/safefree/nationalsecurityletters/34724prs20080401.html>