



Testimony of Jameel Jaffer
Director of the National Security Project of the
American Civil Liberties Union Foundation

Before
The House Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

Oversight Hearing on
H.R. 3189, the National Security Letters Reform Act of 2007

April 15, 2008

Thank you for inviting me to testify before the Subcommittee on behalf of the American Civil Liberties Union (ACLU), its hundreds of thousands of members, and its fifty-three affiliates nationwide.

We appreciate the opportunity to provide our views about national security letters (NSLs) and about H.R. 3189, the National Security Letters Reform Act of 2007. Because of changes made by the Patriot Act, the NSL statutes allow the FBI to compile vast dossiers about innocent people – dossiers that can include financial information, credit information, and even information that is protected by the First Amendment. The FBI collects this information in complete secrecy. The ACLU feared that the expanded NSL powers would be abused, and recent audits by the Justice Department's Office of Inspector General (OIG) have shown our fears to be well-founded. We believe that H.R. 3189 would provide needed safeguards for civil liberties while preserving government's ability to collect information about individuals who actually pose threats.

My name is Jameel Jaffer and I am the Director of the ACLU's National Security Project. The Project litigates civil liberties and human rights cases relating to detention, torture, surveillance, censorship, and secrecy. Over the past six years, I and my colleagues have brought a number of lawsuits to expose and challenge unlawful government surveillance. Among these lawsuits are several that relate to NSLs. In *Library Connection v. Gonzales*, we represented four Connecticut librarians in a

successful challenge to an NSL served on their organization in 2005.¹ Since 2004, we have also represented an Internet service provider in a facial challenge to the statute that allows the FBI to serve NSLs on “electronic communication service providers.” That litigation, now captioned *Doe. v. Mukasey*, resulted in a 2004 decision that found the statute unconstitutional under the First and Fourth Amendments, and ultimately led to the legislative amendments that Congress enacted in 2006.² Since Congress acted, we have returned to court to challenge the amended statute, this time focusing solely on the statute’s gag provisions. Last year the district court found the amended gag provisions unconstitutional,³ and the government’s appeal is now pending before the United States Court of Appeals for the Second Circuit.

Over the past six years, the ACLU has also brought a number of Freedom of Information Act suits to obtain information about the government’s use of NSLs. For example, in 2002 and 2003, we litigated two requests for records about the FBI’s issuance of NSLs after the passage of the Patriot Act.⁴ Those suits resulted in the first release of information about the FBI’s use of NSLs.⁵ More recently, we litigated a request for records concerning the issuance of NSLs by the Central Intelligence Agency and Department of Defense; some of the information we obtained through that litigation was made public last week.⁶ We are about to file a new lawsuit seeking records about the FBI’s issuance of NSLs at the behest of other executive agencies, a practice that allows those agencies to circumvent statutory limitations on their own authority to issue NSLs.

The ACLU has a number of serious concerns with the NSL statutes as they exist now. In this testimony, I focus on only two. The first is that the NSL statutes allow executive agencies (usually the FBI) to obtain records about people who are not known – or even suspected – to have done anything wrong. They allow the government to collect information, sometimes very sensitive information, not just about suspected terrorists and spies but about innocent people as well. The second concern is that the NSL statutes allow government agencies (again, usually the FBI) to prohibit NSL recipients from disclosing that the government sought or obtained information from them. This authority to impose non-disclosure orders – gag orders – is not subject to meaningful judicial

¹ 386 F.Supp.2d 66 (D. Conn. 2005), *appeal dismissed as moot*, 449 F.3d 415 (2d. Cir. 2006).

² *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004), *vacated as moot sub nom. Doe v. Gonzales*, 449 F.3d 415 (2d. Cir. 2006); USA Patriot Act Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 195 (Mar. 9, 2006) (“PIRA”); USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. 109-178, 120 Stat. 278 (Mar. 9, 2006) (“ARAA”).

³ *See Doe v. Gonzales*, 500 F.Supp.2d 379 (S.D.N.Y. 2007).

⁴ *See ACLU v. Dep’t of Justice*, 321 F.Supp.2d 24 (D.D.C. 2004); *ACLU v. Dep’t of Justice*, 265 F.Supp.2d 20 (D.D.C. 2003).

⁵ Some of the records that were made public are available at www.aclu.org/patriotfoia.

⁶ Some of the records that were made public are available at <http://www.aclu.org/safefree/nationalsecurityletters/32088res20071014.html>.

review. Indeed, as discussed below, the review contemplated by the NSL statutes is no more than cosmetic.⁷

I. The NSL statutes invest the FBI with broad authority to collect constitutionally protected information pertaining to innocent people.

Several different statutes give executive agencies the power to issue NSLs. Under 12 U.S.C. § 3414(a)(5)(A), the FBI is authorized to compel “financial institutions” to disclose customer financial records.⁸ The phrase “financial institutions” is defined very broadly, and encompasses banks, credit unions, thrift institutions, investment banks, pawnbrokers, travel agencies, real estate companies, and casinos.⁹ Under 15 U.S.C. § 1681u, the FBI is authorized to compel consumer reporting agencies to disclose “the names and addresses of all financial institutions . . . at which a consumer maintains or has maintained an account,” as well as “identifying information respecting a consumer, limited to name, address, former addresses, places of employment, or former places of employment.” Under 15 U.S.C. § 1681v, executive agencies authorized to conduct intelligence or counterintelligence investigations can compel consumer reporting agencies to disclose “a consumer report of a consumer and all other information in a consumer’s file.”¹⁰

⁷ The ACLU has a number of other concerns with the NSL statutes. First, the statutes do not significantly limit the retention and dissemination of NSL-derived information. *See, e.g.*, 18 U.S.C. § 2709(d) (delegating to the Attorney General the task of determining when, and for what purposes, NSL-derived information can be disseminated). Second, the statutes provide that courts that hear challenges to gag orders must review the government’s submissions *ex parte* and *in camera* “upon request of the government”; this language could be construed to foreclose independent consideration by the court of the constitutional ramifications of denying the NSL recipient access to the evidence that is said to support a gag order. *But see Doe v. Gonzales*, 500 F.Supp.2d 423-24 (construing statute more narrowly). Third, the statutes provide that courts that hear challenges to gag orders must seal documents and close hearings “to the extent necessary to prevent an unauthorized disclosure of a request for records”; this language could be construed to divest the courts of their constitutional responsibility to decide whether documents should be sealed or hearings should be closed. *But see Doe v. Gonzales*, 500 F.Supp.2d 423-24 (finding that statute “in no way displaces the role of the court in determining, in each instance, the extent to which documents need to be sealed or proceedings closed and does not permit the scope of such a decision to be made unilaterally by the government”).

⁸ Documents obtained by the ACLU through the FOIA indicate that the Defense Department believes it has authority to request voluntary disclosure of the same information. *See* <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>, at 60-61.

⁹ 12 U.S.C. § 3414(d).

¹⁰ Still another statute, 50 U.S.C. § 436 empowers “any authorized investigative agency” to compel financial institutions and consumer reporting agencies to disclose records about agency employees.

Most NSLs are issued by the FBI under 18 U.S.C. § 2709,¹¹ which was originally enacted in 1986 as part of the Electronic Communications Privacy Act (“ECPA”).¹² Since its enactment, the ECPA NSL statute has been amended several times. In its current incarnation, it authorizes the FBI to issue NSLs compelling “electronic communication service provider[s]” to disclose “subscriber information,” “toll billing records information,” and “electronic communication transactional records.”¹³ An “electronic communication service” is “any service which provides to users thereof the ability to send or receive wire or electronic communications.”¹⁴

Because most NSLs are issued under ECPA, this testimony focuses on that statute. All of the NSL statutes, however, suffer from similar flaws.

The ECPA NSL statute implicates a broad array of information, some of it extremely sensitive. Under the statute, an Internet service provider can be compelled to disclose a subscriber’s name, address, telephone number, account name, e-mail address, and credit card and billing information. It can be compelled to disclose the identities of individuals who have visited a particular website, a list of websites visited by a particular individual, a list of e-mail addresses with which a particular individual has corresponded, or the e-mail address and identity of a person who has posted anonymous speech on a political website. As the *Library Connection* case shows, the ECPA NSL statute can also be used to compel the disclosure of library patron records.¹⁵ Clearly, all of this information is sensitive. Some of it is protected by the First Amendment.¹⁶

Because NSLs can reach information that is sensitive, Congress originally imposed stringent restrictions on their use. As enacted in 1986, the ECPA NSL statute permitted the FBI to issue an NSL only if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; and (ii) there were specific and articulable facts giving reason to believe that the subject of the NSL was a foreign power or foreign agent.¹⁷ Since 1986, however, the reach of the law has been extended dramatically. In 1993, Congress relaxed the individualized suspicion

¹¹ 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 OIG Report”), at 107 .

¹² See Pub L. No. 99-508, Title II, § 201(a), 100 Stat. 1848 (Oct. 21, 1986) (codified as amended at 18 U.S.C. § 2510, *et seq.*

¹³ 18 U.S.C. §§ 2709(a) & (b)(1).

¹⁴ *Id.* § 2510(15).

¹⁵ *Library Connection*, 386 F.Supp.2d at 70.

¹⁶ See, e.g., *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334, 341-42 (1995) (“[A]n author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.”); *Talley v. California*, 362 U.S. 60, 64 (1960) (“Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.”).

¹⁷ 18 U.S.C. § 2709 (1988).

requirement, authorizing the FBI to issue an NSL if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; and (ii) there were specific and articulable facts giving reason to believe that *either* (a) the subject of the NSL was a foreign power or foreign agent, *or* (b) the subject had communicated with a person engaged in international terrorism or with a foreign agent or power “under circumstances giving reason to believe that the communication concerned international terrorism.”¹⁸ In 2001, Congress removed the individualized suspicion requirement altogether and also extended the FBI’s authority to issue NSLs in terrorism investigations. In its current form, the NSL statute permits the FBI to issue NSLs upon a certification that the records sought are “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities.”¹⁹

The relaxation and then removal of the individualized suspicion requirement has resulted in an exponential increase in the number of NSLs issued each year. According to an audit conducted by the Justice Department’s OIG, the FBI’s internal database showed the FBI issued 8,500 NSL requests in 2000, the year before the Patriot Act eliminated the individualized suspicion requirement.²⁰ By comparison, the FBI issued 39,346 NSL requests in 2003; 56,507 in 2004; 47,221 in 2005; and 49,425 in 2006.²¹ These numbers, though high, substantially understate the number of NSL requests actually issued, because the FBI has not kept accurate records of its use of NSLs. The OIG sampled 77 FBI case files and found 22 percent more NSL requests in the case files than were recorded in the FBI’s NSL database.²²

The statistics and other public information make clear that the executive branch is now using NSLs not only to investigate people who are known or suspected to present threats but also – and indeed principally – to collect information about innocent people.²³ News reports indicate that until very recently the FBI used NSLs “to obtain data not only on individuals it saw as targets but also details on their ‘community of interest’ – the network of people that the target was in contact with.”²⁴ Some of the FBI’s

¹⁸ Pub. L. 103-142, 107 Stat. 1491 (Nov. 17, 1993).

¹⁹ 18 U.S.C. § 2709(a) & (b)(1) (2006).

²⁰ See 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 OIG Report”), at xvi.

²¹ See *id.* at xix; 2008 OIG Report at 9.

²² 2007 OIG Report at 32.

²³ The statistics also make clear that the FBI is increasingly using NSLs to seek information about U.S. persons. The percentage of NSL requests generated from investigations of U.S. persons increased from approximately 39% of NSL requests in 2003 to approximately 57% in 2006. 2008 OIG Report at 9.

²⁴ Eric Lichtblau, *F.B.I. Data Mining Reached Beyond Initial Targets*, *New York Times*, Sept. 9, 2007; see also Barton Gellman, *The FBI’s Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, *Washington Post*, Nov. 6, 2005 (reporting that

investigations appear to be nothing more than fishing expeditions. As noted above, the ACLU has represented two entities that were served with NSLs. In both cases, the FBI abandoned its demand for information after the NSL recipient filed suit; that is, in both cases the FBI withdrew the NSL rather than try to defend the NSL to a judge. The agency's willingness to abandon NSLs that are challenged in court clearly raises questions about the agency's need for the information in the first place.

The ACLU believes that the current NSL statutes do not appropriately safeguard the privacy of innocent people. H.R. 3189 would significantly improve the current statutes by replacing the requirement that the FBI certify "relevance" with a requirement that the FBI certify individualized suspicion. Specifically, the bill would provide that "[a] national security letter may not be issued unless the official having authority under law to issue such a letter certifies that there are specific and articulable facts giving reason to believe that the information or records sought by that letter pertain to a foreign power or agent of a foreign power."²⁵ The ACLU believes that this change would protect the privacy of innocent people without impairing the government's ability to compel the production of information about people known or suspected to pose threats.

II. The NSL statutes allow the FBI to impose gag orders without meaningful judicial review.

A second problem with the NSL statutes is that they empower executive agencies to impose gag orders that are not subject to meaningful judicial review.²⁶ Until 2006, the ECPA NSL statute categorically prohibited NSL recipients from disclosing to any person that the FBI had sought or obtained information from them.²⁷ Congress amended the statute, however, after a federal district court found it unconstitutional.²⁸ Unfortunately, the amendments made in 2006, while addressing some problems with the statute, made the gag provisions even more oppressive. The new statute permits the FBI to decide on a case-by-case basis whether to impose gag orders on NSL recipients but strictly confines the ability of NSL recipients to challenge such orders in court.

As amended, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a gag order on any person or entity served with an NSL.²⁹ To impose such an order, the Director or his designee must "certify" that, absent the non-disclosure obligation, "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic

the FBI apparently used NSLs to collect information about "close to a million" people who had visited Las Vegas).

²⁵ H.R. 3189, § 3(a).

²⁶ All of the NSL statutes authorize the imposition of such gag orders.

²⁷ 18 U.S.C. § 2709 (2005).

²⁸ *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004).

²⁹ 18 U.S.C. § 2709(c).

relations, or danger to the life or physical safety of any person.”³⁰ If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from “disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records under [the NSL statute].”³¹ Gag orders imposed under the NSL statute are imposed by the FBI unilaterally, without prior judicial review. While the statute requires a “certification” that the gag is necessary, the certification is not examined by anyone outside the executive branch. No judge considers, before the gag order is imposed, whether secrecy is necessary or whether the gag order is narrowly tailored.

The gag provisions permit the recipient of an NSL to petition a court “for an order modifying or setting aside a nondisclosure requirement.”³² However, in the case of a petition filed “within one year of the request for records,” the reviewing court may modify or set aside the nondisclosure requirement only if it finds that there is “no reason to believe that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person.” *Id.* § 3511(b)(2). Moreover, if a designated senior government official “certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations,” the certification must be “treated as conclusive unless the court finds that the certification was made in bad faith.” *Id.*³³

As the district court found in *Doe v. Gonzales*, the amended gag provisions are unconstitutional. The amended statute violates both the First Amendment and the principle of separation of powers because it forecloses courts from assessing individual gag orders under “strict scrutiny,” the constitutionally mandated standard of review. As the court explained:

[T]he standard of review prescribed in [18 U.S.C.] § 3511(b) is sharply at odds with the standard of review the Supreme Court has explicitly held is required to assess the conformance of a statute with the strictures of the First Amendment. Congress cannot legislate a constitutional standard of review that contradicts or supercedes what the courts have determined to be the standard applicable under the First Amendment for that purpose.

³⁰ *Id.* § 2709(c)(1).

³¹ *Id.*

³² *Id.* § 3511(b)(1).

³³ In the case of a petition filed under § 3511(b)(1) “one year or more after the request for records,” the FBI Director or his designee must either terminate the non-disclosure obligation within 90 days or recertify that disclosure may result in one of the enumerated harms. *Id.* § 3511(b)(3). If the FBI recertifies that disclosure may be harmful, however, the reviewing court is required to apply the same extraordinarily deferential standard it is required to apply to petitions filed within one year. *Id.* If the recertification is made by a designated senior official, the certification must be “treated as conclusive unless the court finds that the recertification was made in bad faith.” *Id.*

See Dickerson v. United States, 530 U.S. 428, 437, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (“Congress may not legislatively supersede our decisions interpreting and applying the Constitution.”)

[A] statute which constitutes a prior restraint on speech or a content-based restriction on speech must be strictly construed, meaning that it must be narrowly tailored to advance a compelling government interest. That is what the judiciary has said the constitutional law is on this vital principle. Congress, even as an accommodation to the executive branch on matters of national security, cannot say that that constitutional standard is something else. That is precisely what § 3511 attempts to do insofar as it decrees the standard of review and level of deference the judiciary must accord to the executive in adjudicating a challenged restriction on protected speech.³⁴

The district court rightly found that the gag provisions are unconstitutional for another reason: because they condition NSL recipients’ right to speak on the approval of executive officers but fail to provide procedural safeguards to ensure that the censorial power is not abused. Referencing the Supreme Court’s decision in *Freedman v. Maryland*, 380 U.S. 51 (1965), the court found that the statute is unconstitutional because it places the burden of initiating judicial review on the would-be speaker – that is, the NSL recipient – rather than the government. The court explained:

[A]n NSL recipient – an ECSP – will generally lack the incentive to challenge the nondisclosure order in court – as noted by the Supreme Court in *Freedman*. *See* 380 U.S. at 59. Such a challenge would be time consuming and financially burdensome, and . . . the NSL recipient’s business does not depend on overturning the particular form of restriction on its speech. That NSL recipients generally have little or no incentive to challenge nondisclosure orders is suggested by empirical evidence. Although the FBI issued 143,074 NSL requests from 2003 to 2005 alone . . . only two challenges have been made in federal court since the original enactment of the statute in 1986.³⁵

The district court found, in sum, that the statute invests the FBI with sweeping censorial authority but fails to provide procedural safeguards that the Constitution requires.

Congress presumably enacted the gag provisions to allow the executive branch to protect information whose disclosure would jeopardize national security. Because the NSL statutes fail to provide constitutionally required procedural safeguards, however, and because gag orders are not subject to meaningful judicial review, the executive can use the gag provisions not only to protect sensitive information but to silence critics of the government’s surveillance activities. The ACLU’s client in *Doe v. Mukasey* has said

³⁴ *Doe v. Gonzales*, 500 F.Supp.2d at 411-12.

³⁵ *Id.* at 405.

in an affidavit (and in an Op-Ed that was published in the *Washington Post*), that he suspects that the NSL served on him was illegal and that the FBI was seeking information to which the agency was not entitled. The gag order prevents Doe, however, from explaining why he holds this opinion and even from disclosing his own identity. Notably, the FBI continues to enforce the gag order even though the FBI abandoned its demand for records over a year ago, and even though the underlying investigation began at least four years ago and may well have ended.³⁶

The FBI's sweeping power to silence NSL recipients also deprives the public – and Congress – of the information it needs in order to evaluate the wisdom and effectiveness of government policy. The ACLU's client in *Doe v. Mukasey* has explained that the gag order prevented him from disclosing information that might have influenced the debate about whether the Patriot Act should be reauthorized. He has explained:

I found it particularly difficult to be silent about my concerns [about the NSL statute] while Congress was debating the reauthorization of the Patriot Act in 2005 and early 2006. If I hadn't been under a gag order, I would have contacted members of Congress to discuss my experiences and to advocate changes in the law. The [2007 OIG] report confirms that Congress lacked a complete picture of the problem during a critical time: Even though the NSL statute requires the director of the FBI to fully inform members of the House and Senate about all requests issued under the statute, the FBI significantly underrepresented the number of NSL requests in 2003, 2004 and 2005, according to the report.³⁷

The ACLU's clients in *Library Connection v. Gonzales* were also prevented from sharing critical information with the public and Congress. In striking down the gag order imposed on Library Connection, the court observed that the gag order stifled debate about an issue of pressing public concern:

The statute has the practical effect of silencing those who have the most intimate knowledge of the statute's effect and a strong interest in advocating against the federal government's broad investigative powers pursuant to [the NSL statute]: those who are actually subjected to the governmental authority by imposition of the non-disclosure provision. The government may intend the non-disclosure provision to serve some purpose other than the suppression of speech. Nevertheless, it has the practical effect of silencing those individuals with a constitutionally protected interest in speech and whose voices are particularly important to an ongoing, national debate about the intrusion of governmental authority into individual lives.³⁸

³⁶ John Doe, *My National Security Letter Gag Order*, Washington Post, March 23, 2007.

³⁷ John Doe, *My National Security Letter Gag Order*, Washington Post, March 23, 2007.

³⁸ *Library Connection v. Gonzales*, 386 F.Supp.2d 66, 75 (D.Conn. 2005).

The ACLU believes that H.R. 3189 would remedy the serious constitutional problems with the current gag provisions. While the bill would impose a 30-day gag order on anyone served with an NSL, the non-disclosure obligation would expire at the end of the 30-day period unless the FBI affirmatively sought an extension from “the district court of the United States in any district within which the authorized investigation that is the basis for a request pursuant to this section is being conducted.”³⁹ The application for an extension would have to “state specific and articulable facts giving the applicant reason to believe that disclosure that the [FBI] has sought or obtained access to information or records under this section will result in (A) endangering the life or physical safety of any person; (B) flight from prosecution; (C) destruction or tampering with evidence; (D) intimidation of potential witnesses; or (E) otherwise seriously endangering the national security of the United States by alerting a target, a target’s associates, or the foreign power of which the target is an agent, of the Government’s interest in the target.”⁴⁰ The court would be permitted to grant the extension “if the court determines that the order is narrowly tailored to meet a compelling interest and that there is reason to believe that disclosure that the [FBI] has sought or obtained access to information or records under this section will have one of the [statutorily specified] results.”⁴¹ The bill would permit the FBI to “renew[]” the non-disclosure obligation for “additional periods of not more than 180 days upon another application meeting the [same] requirements.”⁴²

The ACLU believes that H.R. 3189 would provide greater protection for the First Amendment rights of NSL recipients – and allow greater public oversight of the government’s use of NSLs – while allowing for limited secrecy in those investigations that actually require such secrecy.

III. Publicly available information about the government’s use of NSLs makes clear that there is a pressing need for the amendments proposed by H.R. 3189.

The 2006 amendments to the NSL statutes required the Department of Justice OIG to audit the FBI’s use of NSLs. The first of these audits, covering 2003 through 2005, was released in March 2007. The audit found that the FBI had substantially underreported to Congress the number of NSLs it had issued; that in some cases the FBI issued NSLs even where no underlying investigation had been approved; that some NSL recipients had provided the FBI with information to which the agency was not entitled, including voicemails, emails, and images; and that the FBI issued more than 700 so-called “exigent letters,” which were authorized neither by the NSL statute nor by any other law, and some of which were not related to any authorized investigation.

³⁹ H.R. 3189, § 3(d)(3) & (4).

⁴⁰ *Id.* § 3(d)(5).

⁴¹ *Id.* § 3(d)(6).

⁴² *Id.* § (d)(7). The bill would allow for disclosures, even during the term of the gag order, to “those persons to whom disclosure is necessary in order to comply with an order under this section” and “an attorney in order to obtain legal advice regarding such order.” H.R. 3189, § 3.

In March 2008, the OIG issued an audit covering 2006 and evaluating the reforms implemented by the DOJ and the FBI after the release of the 2007 OIG Report. The audit found, among other things, that the FBI could not locate supporting documentation for 15% of NSLs; that the FBI diminished the seriousness of violations of internal controls and regulations by characterizing them as “administrative errors”; that even by the FBI’s count there had been more than 600 potential violations that should have been reported to the Intelligence Oversight Board (IOB); that an incredible 71.5% of NSLs issued from FBI headquarters (as opposed to NSLs issued from field offices) involved violations that should have been reported to the IOB; that the FBI could not locate return information for more than 500 NSL requests; that in several cases the FBI collected private information regarding innocent people who were not connected to any authorized investigation, entered the information into case files, and/or uploaded it into FBI databases; and that the FBI improperly issued “blanket NSLs” to “cover information already acquired through exigent letters and other informal responses.”⁴³ The blanket letters sought information on 3,860 telephone numbers.⁴⁴

One of the most troubling of the OIG’s findings was that the FBI had used an NSL to circumvent the statutory prohibition against investigations based solely on First Amendment activity. While the relevant portion of the OIG’s report is heavily redacted, it appears that sometime in 2006 the FBI twice applied to the FISA Court for an order under 50 U.S.C. § 1861 to compel the disclosure of “tangible things.”⁴⁵ The FBI submitted these applications even though lawyers in the Office of Intelligence Policy and Review had expressed concern that the underlying investigations raised issues under the First Amendment.⁴⁶ The court ultimately denied the applications, both times finding that the FBI had not provided a sufficient factual basis for the order and that the request “implicated the target’s First Amendment rights.”⁴⁷ Rather than abandon its effort to obtain the tangible things, however, the FBI appears to have sought the same materials with NSLs – instruments which are of course not subject to the FISA Court’s review.⁴⁸ Asked why the FBI had issued the NSLs after the FISA court’s rejection of the “tangible things” applications, the FBI’s General Counsel stated that “she disagreed with the court’s ruling and nothing in the court’s ruling altered her belief that the investigation was appropriate.”⁴⁹

⁴³ 2008 OIG Report at 123.

⁴⁴ 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.osdoj.gov/oig/special/s0803a/final.pdf> (hereinafter “2008 Section 215 Report”), p.123.

⁴⁵ *Id.* at 68.

⁴⁶ *Id.* at 67.

⁴⁷ *Id.* at 68.

⁴⁸ *Id.* at 72.

⁴⁹ *Id.* at 72; *see also id.* at 71 n.63.

The 2008 OIG Report also documents abuses of the gag provisions. According to the OIG, the FBI imposed gag orders on 97% of NSL recipients despite internal guidance stating that such orders “should not be made in a perfunctory manner” and should “no longer [be] automatically included in the NSL.”⁵⁰ The OIG also found that some NSLs that imposed gag orders did not contain sufficient explanation to justify imposition of the gag orders, and that the FBI improperly imposed gag orders in eight of eleven “blanket” NSLs that senior FBI officials issued to cover illegal requests made through “exigent” letters.⁵¹

The OIG’s reports document abuses by the FBI, but the ACLU has obtained records through the Freedom of Information Act that also suggest abuse of NSLs by other agencies. The records show that the Defense Department (“DoD”) has issued hundreds of NSLs since September 2001 to obtain financial and credit information, and – more troubling still – that DoD has asked the FBI to issue NSLs in DoD investigations, a practice that may have allowed DoD to access records that it would not have been able to obtain under its own NSL authority. Only the FBI has the statutory authority to issue mandatory NSLs for electronic communication transaction records and certain consumer information from consumer reporting agencies. DoD’s practice of relying on the FBI to issue NSLs allows DoD to circumvent statutory limits on its own investigatory powers.⁵²

It is possible that some of the abuses documented in the OIG reports and in the FOIA documents could be addressed through stronger internal controls and regulations. Notably, the OIG found that the FBI had not fully implemented all of the recommendations made in the 2007 OIG Report.⁵³ While stronger internal controls and regulations could make a difference at the margin, however, the main problem is not the absence of those controls but the sweep of the NSL statutes themselves. There is no way to address the problems with the NSL powers without amending the NSL statutes themselves.

* * *

The ACLU strongly supports the Subcommittee’s efforts to amend the NSL statutes. As explained above, the statutes invest the FBI with sweeping power to collect information about innocent people and to silence those who are compelled to disclose the information. The ACLU believes that H.R. 3189 would provide needed safeguards for individual rights while at the same time accommodating the executive’s legitimate interest in collecting information about foreign power and foreign agents.

Thank you for giving us the opportunity to provide our views.

⁵⁰ 2008 OIG Report at 124.

⁵¹ *Id.* at 127.

⁵² Some of the records that were made public are available at <http://www.aclu.org/safefree/nationalsecurityletters/32140res20071011.html>.

⁵³ 2008 OIG Report at 15.

