CHAPTER TWELVE

National Security Letters and Section 215 of the USA PATRIOT Act

I. The Problem

National Security Letters are simple form documents signed by officials of the FBI and other agencies, with no prior judicial approval, compelling disclosure of sensitive information held by banks, credit companies, telephone carriers and Internet Service Providers, among others. Recipients of NSLs are usually gagged from disclosing the fact or nature of a request.

The PATRIOT Act eliminated any effective standard for issuing NSLs. It wiped away the requirement that the information being sought "pertain to" a foreign power or the agent of a foreign power. This requirement used to protect information about Americans because few are agents of a foreign government, a foreign terrorist organization, or another foreign power. Instead, today it is sufficient for the FBI merely to assert that the records are "relevant to" an investigation to protect against international terrorism or foreign espionage. The PATRIOT Act also eliminated the statutory requirement that agents have any factual basis for seeking records. In 2003, Congress dramatically expanded the types of "financial institutions" on which an NSL can be served to include travel agencies, real estate agents, jewelers, the Postal Service, insurance companies, casinos, car dealers, and other businesses not normally considered "financial institutions."

In addition, advances in technology have made more "digital footprints" more readily available to the government through its NSL authority. For example, the government reportedly used its NSL authority to seek casino and hotel records about hundreds of thousands of travelers who stayed in Las Vegas on a recent New Years Eve – a data dump difficult to do and difficult to sort through without recent advances in technology.

DOJ Inspector General reports in 2007 and 2008 revealed widespread abuses and misuses by the FBI of its NSL authorities. The IG found that the FBI:

- Issued NSLs when it **had not even opened the investigation** that is a predicate for issuing an NSL;
- Used **"exigent letters" not authorized by law** to quickly obtain information without ever issuing the NSL that it promised to issue to cover the request;
- Used NSLs to obtain personal information about people **two or three steps removed from the subject** of the investigation;
- Has used a **single NSL to obtain records about thousands** of individuals; and
- **Retains almost indefinitely the information** it obtains with an NSL, even after it determines that the subject of the NSL is not suspected of any crime and is not of any continuing intelligence interest, and it makes the information **widely available to thousands** of people in law enforcement and intelligence agencies.

These abuses primarily affect Americans. The IG reports showed that a clear majority of the records obtained with the tens of thousands of NSLs issued annually now pertain to Americans instead of to non-citizens – a reversal brought about by the PATRIOT Act.

Section 215 of the USA PATRIOT Act (the "library records" provision) also expanded the FBI's power to obtain material from businesses for counterterrorism and anti-espionage purposes. It eliminated the prior requirement that the information sought pertain to an agent of a foreign power and it expanded the kind of material that could be sought and the entities that could be required to provide it. Now, the government can, with a minimal showing to a judge, obtain an order under Section 215 requiring any person or entity to turn over any document or object and can effectively bar the recipient from disclosing that it has done so. For the most part,

all the government has to do is prove that the information or object sought is relevant to an investigation to protect against international terrorism or espionage. While a judicial order is required under Section 215, the minimal showing that must be made combined with the broad scope of records that can be obtained makes this power ripe for abuse.

II. Proposed Solutions

A. Guiding Principles

Information obtained with National Security Letters and Section 215 orders can be valuable to counterterrorism and counter espionage investigations. However, more sensitive information warrants stronger due process protections. Thus, for more sensitive information, the government should have to get a court order and should have to prove a closer tie between the person to whom the material pertains and a foreign terrorist organization or foreign government. The President can take immediate steps to implement some reforms; others require legislation.

B. Proposed Measures

1. The next President should direct agency heads to sharply curtail use of NSLs to seek sensitive information about Americans. He should direct the incoming Attorney General to require the FBI to come up with a plan to minimize the collection and retention of personal information about Americans that is obtained with NSLs and Section 215 orders. That plan should require adoption of minimization procedures that comply with Section 101(h) of the Foreign Intelligence Surveillance Act.
2. The next President should also support legislation like the National Security Letters Reform Act (S. 2088 in the 110th Congress) and work with Congress to pass it. The legislation should:
    a. Promote uniform practices by allowing only the FBI to issue NSLs;
    b. Permit the FBI to obtain only less sensitive information with an NSL, such as information that identifies a person or reveals a person's home or email address;
    c. Permit the FBI to use an NSL to obtain that less sensitive information when it has "specific and articulable facts" that the information sought: (i) pertains to the activities of a suspected agent of a foreign power, and that obtaining the information sought is the least intrusive means that could be used to identify persons involved in such activities; or (ii) pertains to an agent of a foreign power or a person in contact with an agent of a foreign power;
    d. Require the government to use other authorities – such as subpoenas in criminal investigations and a judicial order under Section 215 in intelligence investigations – to obtain more sensitive information such as email logs, local and long distance toll billing records, and transactional records from financial institutions;
    e. Tighten the standard for issuing an order under Section 215 to require a showing to a judge of specific and articulable facts that the material sought pertains to a suspected agent of a foreign power or a person in contact with or otherwise directly linked to such an agent;
    f. Limit to 30 days the period during which the recipient of an NSL or Section 215 order can be gagged, unless the government can prove to a judge that there is reason to believe that a specified harm would come to pass unless the gag is extended;

g. Require adoption of minimization procedures based on FISA Section 101(h);
h. Provide for civil damages, including liquidated damages, to any person aggrieved by a clearly illegal misuse of NSL authorities, and such a provision can be found in H.R. 3189, the House counterpart to S. 2088 in the 110th Congress.

Section 215 of the USA PATRIOT Act and two related provisions will sunset on December 31, 2009 unless Congress acts to reauthorize them. Any reauthorizing legislation should contain these reforms.

III. Allies*

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The ALA Policy Manual: The Rights of Library Users and the USA Patriot Act (52.4.5) *available at*
http://www.ala.org/ala/aboutala/governance/policymanual/policymanual.31_3.pdf

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* These groups and individuals support the general principles expressed and the general policy thrust and judgments in the policy proposals described above. The allies listed do not necessarily endorse the specific language in every proposed solution, but they do agree that the proposals reflect the general principles that should govern policy in this area. Please contact the individuals and organizations listed in this section for more information

IV. Counter-Arguments and Rebuttal:

A. *NSLs are the equivalent in an intelligence investigation to subpoenas in criminal investigations because both are issued without prior judicial review.*
This argument fails to recognize that intelligence investigations are more dangerous to liberty than are criminal investigations and therefore require more civil liberties protections. Intelligence investigations are broader and are not limited by the criminal code. They can investigate legal activity including First Amendment activity, so long as it is not the sole focus of the investigation. They are more secretive and less subject to the after-the-fact scrutiny that a prosecutor faces when criminal charges are brought. Unlike a defendant in a criminal case, the target of an intelligence investigation usually never learns that he or she was investigated. And, businesses that receive NSLs are effectively barred from complaining and are perpetually blocked from notifying their customers that their records have been turned over to the government. Since intelligence investigations are broader, more secretive and subject to less probing after-the-fact scrutiny, protections must be built in at the front end, when sensitive information is being sought.

B. *Increasing the standards for governmental access to information obtained with NSLs or Section 215 orders will inhibit agents' ability to obtain information necessary to an intelligence investigation early in the investigation.*
This argument fails to appreciate the sensitivity of the records that can be obtained with NSLs and Section 215 orders. A log of a person's email activity is sensitive information.

It should be made available to the government only when a judge finds that there is strong evidence of wrongdoing or of association with a foreign power, such as a foreign terrorist organization or foreign government.

C. *The FBI has put in place internal guidance to address the abuses of NSLs identified in the Inspector General reports.*
While bureaucratic reforms can address some of the abuses of NSLs identified in the IG reports, there is no substitute for reestablishing traditional checks and balances, under which a judge must approve governmental access to sensitive information. And, some of the problems identified simply cannot be remedied by bureaucratic reforms. For example, in one report, DOJ's IG indicated that he thought that lead attorneys in FBI field offices were reluctant to provide an independent review of NSLs for fear of antagonizing the head of the field office, who supervises the lead attorney. That review is central to the reforms outlined in the FBI guidance. But this institutional shortcoming can only be remedied by independent judicial review.

V. Recommended Documents for Further Information:

a. Testimony containing reform proposals:
   i. Testimony of Jameel Jaffer, Director of the National Security Project of the American Civil Liberties Union Foundation, *Oversight Hearing on H.R. 3189, the National Security Letters Reform Act of 2007*: *Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary* (April 15, 2008)
   ii. Testimony of Gregory T. Nojeim, Director of the Project on Freedom, Security, & Technology of the Center for Democracy & Technology, *Hearing on National Security Letters: The Need for Greater Accountability and Oversight, Hearing Before the S. Comm. on the Judiciary* (April 23, 2008)

b. The National Security Letter (NSL) statutes in effect include:
   i. 12 U.S.C. § 3414(a)(5) – Section 1114(a)(5) of the Right to Financial Privacy Act
   ii. 15 U.S.C. § 1681u – Section 626 of the Fair Credit Reporting Act
   iii. 15 U.S.C. § 1681v – Section 627 of the Fair Credit Reporting Act
   iv. 18 U.S.C. § 2709 – Section of the Electronic Communications Privacy Act
   v. 50 U.S.C. § 436 – Section 802 of the National Security Act
   vi. 18 U.S.C. § 1510 – Criminalizing violations
   vii. P.L. 109-177, Sec. 118
   viii. P.L. 109-119, Sec. 119
   ix. 18 U.S.C. § 3511

c. Section 215 of the PATRIOT Act:
   i. As it appeared originally in 1998: Pub. L 105-272, Title II, Section 215, 112 Stat. 2411 (Oct. 20, 1998); 50 U.S.C. Section 1862(a) (1998)
   ii. As it appears today: 50 U.S.C. Sections 1861-1862, as modified by the PATRIOT Act Pub. L. 107-56, title II, Sec. 215, 115 Stat. 287 (Oct. 26, 2001), and by the PATRIOT Reauthorization Act.

d. Congressional Research Service Reports on National Security Letters:
   i. http://www.fas.org/sgp/crs/intel/RS22406.pdf
   ii. http://assets.opencrs.com/rpts/RL33320_20080328.pdf

e. Relevant Executive Branch materials:
   i. FBI Guidance on National Security Letters (June 1, 2007)

ii. E.O. 13462 – President's Intelligence Advisory Board and Intelligence Oversight Board (Feb. 29, 2008) *available at* http://www.whitehouse.gov/news/releases/2008/02/print/20080229-5.html

iii. E.O. 12333 – U.S. Intelligence Activities (enacted Dec. 4, 1981 – As amended by E.O. 13284 (2003), E.O. 13355 (2004), and E.O. 13470 (2008))

f. Department of Justice Inspector General Reports, 2007-08, on NSLs and Section 215:

i. *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage in 2006*, Report of the Department of Justice Inspector General (March 2008)

ii. *A Review of the FBI's Use of National Security Letters: Assessment of Corrective Actions and Examination of NSL Usage*, Report of the Department of Justice Inspector General (March 2007) (covers usage of NSLs from 2003 until 2005)

iii. *A Review of the FBI's Use of Section 215 orders for Business Records in 2006*, Report of the Department of Justice Inspector General (March 2008)

iv. *A Review of the FBI's Use of Section 215 orders for Business Records*, Report of the Department of Justice Inspector General (March 2007)