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Southern District of New York
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

THE NEW YORK TIMES COMPANY
and CHARLIE SAVAGE,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
JUSTICE,

Defendant.

14 Civ. 3776 (AT)

SECOND DECLARATION OF TARA M. La MORTE

Tara M. La Morte, pursuant to the provisions of 28 U.S.C. § 1746, declares, under penalty of perjury, as follows:

1. I am an Assistant United States Attorney in the office of Preet Bharara, United States Attorney for the Southern District of New York, attorney for the defendant in this case. I am an attorney assigned to the defense of this matter.
2. I submit this declaration in support of defendant United States Department of Justice's cross-motion for summary judgment.

3. Attached as Exhibit A hereto is a true and correct copy of the Government's supplemental production of documents Bates-stamped DOJ-OIG-00134 to -00135. These documents were previously produced to Plaintiffs with redactions, which have now been lifted. The previous versions of these documents were attached as part of an exhibit to the Declaration of David E. McCraw and numbered E-144 to E-145. For ease of reference, the attached, unredacted versions are numbered E-144(A) to E-145(A).

4. Attached as Exhibit B hereto is a true and correct copy of the Government's supplemental production of documents Bates-stamped DOJ-OIG-00896 to -00905. These documents were previously produced to Plaintiffs with additional redactions. The previous versions of these documents were attached as part of an exhibit to the Declaration of David E. McCraw and numbered E-131 to E-140. For ease of reference, the attached, less redacted versions are numbered E-131(A) to E-140(A).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
February 19, 2016

/s/ Tara M. La Morte
TARA M. La MORTE
Assistant United States Attorney

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subjects of the underlying investigations. In the remaining 4 matters, the NSL targets could not be determined. (U)

Source of Error. Twelve of the 22 possible IOB violations identified by the OIG were due to FBI errors, and 10 were due to errors on the part of third-party recipients of the NSLs. (U)

Uploading of information obtained beyond time period specified in NSL request. We identified one instance in which the FBI uploaded into Telephone Applications from an NSL that exceeded the time period requested in the NSL. The NSL was issued during a full counterterrorism investigation of a U.S. person requesting toll billing records on the investigative subject's telephone number for the period September 1, 2002, to July 16, 2003. However, the FBI received and uploaded into its specialized application for telephone data telephone toll billing records information for two months in excess of the requested time period. (U)

B. National Security Letter Issued in a Charlotte, N.C. Terrorism Investigation (U)

In this section, we describe another possible IOB violation arising from the use of national security letter authorities that was not identified by the FBI. We learned of this possible violation through press accounts. For this reason we did not include it in the description of the results of our review of investigative files in the four field offices we visited. However, we believe this violation is noteworthy, and we therefore describe it in this section. (U)

According to press accounts, the FBI's Charlotte Division was looking for information about a former student at North Carolina State University in connection with in the London subway and bus bombings in July 2005, who was later cleared of suspicion.¹²⁰ According to field office personnel, the field office obtained a federal grand jury subpoena to obtain educational records about the investigative subject and was in the process of serving it on the institution when the Raleigh RA was directed by personnel in the FBI Headquarters Counterterrorism Division to serve a national security letter for the records instead of proceeding with the grand jury subpoena. A Charlotte Division supervisor and one of the case agents who was involved in the matter told the OIG that they did not recall being advised of a reason for using a national security letter instead of a grand jury subpoena. (S)

At the direction of the Counterterrorism Division the case agent generated approval documentation for issuance of the national security letter, citing as authority the ECPA NSL statute. The national security letter requested (S)

¹²⁰ Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, The Washington Post, Nov. 6, 2005, at A1. (U)

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Applications for admission, applications or statements concerning financial aid and/or financial situation, housing information, emergency contacts, association with any campus organizations, campus health records, and the names, without being redacted, of other students included in the records associated with the following information: (U)

Because the Special Agent in Charge of the field division was on a temporary assignment, the approval EC and national security letter were sent at the direction of the Counterterrorism Division to another field division for approval and signature. The Special Agent in Charge of the other field division signed the national security letter, which was served on the university. The Chief Division Counsel in both the Charlotte Division and the field office that issued the NSL told the OIG that they were not asked to and did not review the national security letter. (S)

According to press accounts, university officials said that the FBI "tried to use a national security letter to demand much more information than the law allows." The field office notified the Counterterrorism Division of the university's position. The Counterterrorism Division directed another field office to obtain a federal grand jury subpoena. This subpoena was provided to the field office in the jurisdiction in which the university is located, and that field office served the subpoena on the university seeking the records that had been referenced in the national security letter. The university produced the records in response to a grand jury subpoena. (S)

As discussed in Chapter Two, the ECPA NSL statute authorizes the FBI to obtain telephone toll billing records and subscriber information and electronic communication transactional records. It does not authorize the FBI to obtain educational records.¹²¹ According to FBI records, the matter was not reported to FBI-OGC as a possible IOB violation. It also was not reported as a possible misconduct matter to the FBI's Office of Professional Responsibility. (U)

¹²¹ The production of educational records is governed by the Family Education Rights and Privacy Act of 1974 (FERPA), commonly referred to as "the Buckley Amendment." See 20 U.S.C. § 1232g. Generally, the Buckley Amendment prohibits the funding of an educational agency or institution that has a policy or practice of disclosing a student's records without parental or student consent if the student is over the age of 18. The law contains 16 exceptions to this general rule, one of which is known as the "law enforcement exception." In responding to a federal grand jury subpoena, the institution is not required to seek consent but must notify the parents and student in advance of compliance. See 20 U.S.C. § 1232g(b)(2)(B). However, for good cause shown, a court may order the institution not to disclose the existence of the subpoena or the institution's response. 20 U.S.C. § 1232g(b)(1)(J)(i). (U)

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II. Other Noteworthy Items (U)

A. Request for a [redacted] (S)

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(S) [redacted] considered the Section 215 request for [redacted] (S) [redacted] discussed earlier in this report at pages 33 to 34 to be a noteworthy item. In this case, the FISA Court had twice declined to approve a Section 215 application based on First Amendment concerns. However, the FBI subsequently issued NSLs for information about the [redacted] even though (S) the statute authorizing the NSLs contained the same First Amendment restriction as Section 215 and the ECs authorizing the NSLs relied on the same facts contained in the Section 215 applications. We therefore describe this case in more detail in this section. (S) (U)

1. The FBI Investigation (U)

[redacted] (S)

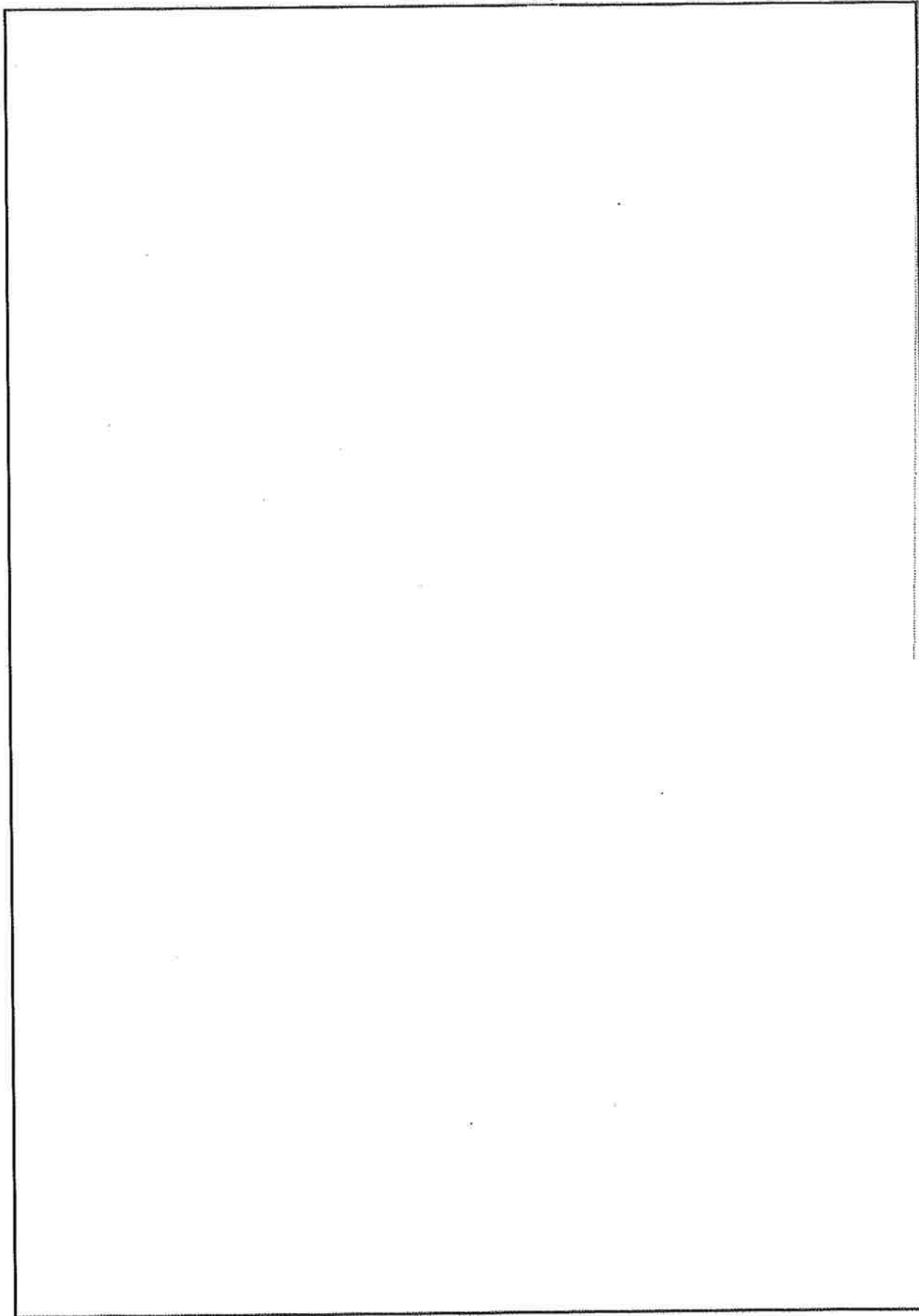
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(S) When the FBI's Section 215 application was sent to OIPR for review, the assigned OIPR attorney initially raised First Amendment concerns with regard to the Section 215 application.⁵⁸ The NSLE attorney e-mailed the OIPR attorney on two occasions stating that she thought that the underlying FBI investigation of the [redacted] was legitimate. ~~(S)~~ (U)

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According to the OIPR attorney, OIPR attorneys had different views regarding how the First Amendment affected this Section 215 application and that these discussions delayed the submission of the application.⁵⁹ (U)

⁵⁸ Section 215 states that the FBI can apply for an order for the production of business records "for an investigation . . . to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment of the Constitution." 50 U.S.C. § 1861(a)(1). (U)

⁵⁹ We asked the former Acting Counsel for Intelligence Policy how the First Amendment concerns were resolved, and she told us that the initial application was submitted after a meeting between the former Counsel of Intelligence Policy and the FBI General Counsel. However, neither the former Counsel for Intelligence Policy nor the FBI General Counsel said they recalled such a meeting. (U)

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2. The FISA Court's Objections to the Section 215 Application on First Amendment Grounds (U)

The Section 215 request was presented to the FISA Court as a read copy application in February and March 2006. On both occasions the Court declined to approve the application and order. ~~(S)~~ (U)

The first Section 215 application presented to the FISA Court included

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The FISA Court declined to approve the first application. OIPR and NSLB e-mails state that the FISA Court decided that "the facts were too 'thin' and that this request implicated the target's First Amendment rights." (U)

[Redacted]

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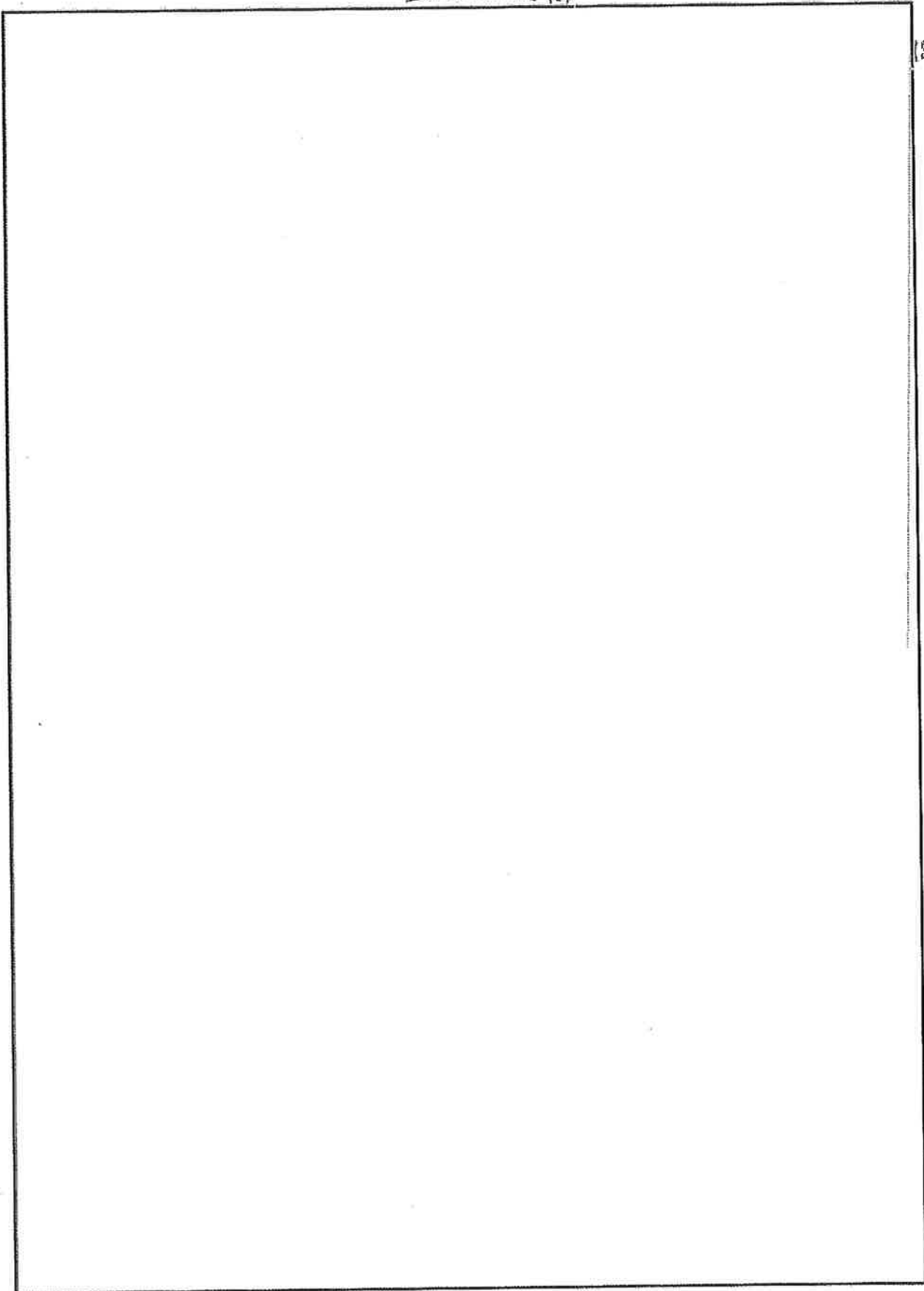
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The FBI General Counsel and the OIPR attorney signed the second Section 215 application and two OIPR attorneys presented it to the FISA Court as a read copy application. ~~(S)~~ (U)

The changes to the Section 215 application did not persuade the FISA Court. According to an e-mail to NSLB from one of the OIPR attorneys who attempted to convince the Court that the application was not predicated solely on protected First Amendment activities, the Court's concern stemmed from the fact that the target was an [Redacted]

[Redacted] Further, the OIPR attorney said that the revision of the Section 215 application to focus on the [Redacted] failed to appease the Court's concerns because "we can't say that is terrorist-connected. I thought the [Redacted] got us over the top. He didn't buy it." ~~(S)~~ (U)

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The OIPR attorney's e-mail also stated that the Court "invited us back if we learn more about the [Redacted] activities." However, the case agent told NSLB (and the OIG) that there were no additional facts to add to the application because the order was intended to obtain background information. The OIPR attorney also told the OIG that the application presented the facts in their most favorable light and there was nothing else that she could add to make the application stronger. ~~(S)~~ (U)

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3. FBI and OIPR's Response (U)

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the [redacted] such as [redacted] because of the Court's stated First Amendment concerns. The General Counsel responded that she did not "view the judge's denial of the 215 [application] to be a holding that the investigation is not lawfully opened," and that neither the FISA Court nor OIPR had ordered that the case be closed.⁶³ [redacted]

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The FBI General Counsel told the OIG that she disagreed with the FISA Court. She stated that whether the [redacted] were protected by the First Amendment was irrelevant because the [redacted] suggested the activity was not innocuous. She also stated that because of the [redacted] she did not believe that the Section 215 request was based solely on protected First Amendment activity. ~~(S)~~ (U)

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Four days later the NSL3 attorney e-mailed the case agent and asked him to [redacted] to obtain information to support the Section 215 application. However, because the agent obtained the [redacted]

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In [redacted] the FBI [redacted]

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[redacted] as "pro-Taliban in nature."⁶⁴ We asked the case agent who wrote the [redacted] why he described the materials as "pro-Taliban in nature." The agent stated that the materials included a poster of members of an Afghani group who died fighting the Soviets in the Soviet-Afghan War in the 1980s. The case agent said that the group was supported by the United States during that war but had since evolved and become the Taliban. Therefore, because the group was a predecessor to the Taliban, he thought it appropriate to characterize the poster as "pro-Taliban in nature." ~~(S)~~ (U)

⁶³ The FBI General Counsel told the OIG that the FISA Court does not have the authority to close an FBI investigation. (U)

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We asked both the FBI General Counsel and the former Counsel for Intelligence Policy whether, in light of the Court's decision, they had reviewed the underlying investigation of [redacted] to ensure that it was not being conducted in violation of the First Amendment caveat. The FBI General Counsel told us that she did not review the underlying investigation of [redacted] because, for the reasons stated above, she believed there was enough information to predicate the investigation. She said she disagreed with the court and nothing in the court's ruling altered her belief that the investigation was appropriate. (S) (U)

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In contrast, the former Counsel for Intelligence Policy stated that OIPR should have examined the underlying investigation after the Court's decision regarding the Section 215 request. However, he said that with the increase in national security investigations and FISA requests, OIPR had not been able to fully serve such an oversight role.⁶⁵ (U)

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.⁶⁶ 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 those assertions. (U)

We also asked the FBI General Counsel whether it was appropriate to issue NSLs in this investigation based on the same factual predicate as the Section 215 application given that the statutory provisions authorizing NSLs and Section 215 requests contain the same First Amendment caveat.⁶⁷ The FBI General Counsel told the OIG that she believed that it was appropriate to issue NSLs because she disagreed with the FISA Court and because the FBI was responsible for investigating the [redacted] with other subjects of national security investigations. She stated that the FBI would

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⁶⁵ According to the former Counsel for Intelligence Policy, he raised his concerns about OIPR's inability to fulfill its oversight role in late 2004 or early 2005. The former Acting Counsel for Intelligence Policy told us that, as of November 2007 OIPR developed a strategy for reviewing national security investigations and had begun conducting national security reviews. According to an OIPR attorney, OIPR has conducted all 15 of their planned national security reviews at approximately 14 field offices and FBI Headquarters. (U)

⁶⁶ The former Acting Counsel also stated that FBI agents are under significant pressure to respond to national security threats and that some agents are angry that FBI agents have been accused of failing to identify these threats. (U)

⁶⁷ The FBI requested three NSLs [redacted] pursuant to the *Right to Financial Privacy Act* (RFPA), 12 U.S.C. § 3414. RFPA requires that the individual issuing the NSL certify that the investigation is "not conducted solely on the basis of activities protected by the First Amendment to the Constitution of the United States." (S) (U)

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have to close numerous investigations if it was not permitted to investigate individuals based on their contact with other subjects of FBI investigations. ~~(S)~~ (U)

The former Counsel for Intelligence Policy stated that investigations based on association with subjects of other national security investigations are weak, but "are not necessarily illegitimate." He stated that when OIPR receives cases that appear to be based solely on association, OIPR first attempts to identify specific conduct by the subject and asks "what makes you - the FBI - think that this guy did anything wrong." [redacted] (S)

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4. **OIG Analysis** (U)

We considered this matter to be noteworthy because the FISA Court twice refused to authorize Section 215 orders based on concerns that the investigation was premised on protected First Amendment activity, and the FBI subsequently issued NSLs to obtain information [redacted] based on the same factual predicate without first reviewing the underlying investigation to ensure it did not violate the First Amendment caveat. ~~(S)~~ (U)

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Section 215 allows the FBI to seek a business records order for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution." See 50 U.S.C. § 1861(a)(1) and (a)(2)(B). Similarly, the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3414, allows the FBI to issue NSLs to obtain financial records for a national security investigation of a U.S. person provided that the investigation is "not conducted solely upon the basis of activities protected by the first amendment of the Constitution." (U)

(S) In this matter, both FBI and OIPR personnel had raised First Amendment concerns regarding the predicate for the investigation of [redacted] before and after the first Section 215 read application was submitted to the FISA Court. Once the Court expressed similar concerns and rejected the successive applications, we believe it was incumbent upon the FBI and OIPR re-evaluate the investigation before seeking additional information about [redacted] using NSLs. Instead, the FBI issued NSLs based on the same factual predicate contained in the Section 215 applications and without additional information about the [redacted] activities, despite the Court's rejection on two occasions of requests for a Section 215 order. ~~(S)~~ (U)

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We were also concerned by the [redacted] [redacted] (S)

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[Redacted]

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(S) B. [Redacted] of Some Section 215 Requests ~~(S)~~ (U)

(S) We also considered the [Redacted] of several Section 215 orders issued during 2006 to be a newsworthy item. [Redacted]

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The resulting record collections include significant amounts of information [Redacted] not the subject of an FBI investigation, and therefore can implicate civil liberty and privacy concerns.

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