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Trust Us…We're the FBI

Benjamin Shimp

Ben is a junior majoring in criminal justice. This paper was written as part of a criminal justice course he took in Fall 2007 under the instruction of Prof. Richard Wright. At this point in his academic career, he is still deciding on a career path but enjoys the study of American civil liberties.

On September 11, 2001, the United States of America was attacked by terrorist operatives causing one of the worst acts of terrorism known to date. In an effort to prevent these types of occurrences from happening in our country, the Uniting and Strengthening of America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act was passed by Congress in October of 2001. Since then many wiretap and surveillance programs have been put into place, and many older provisions such as the National Security Letter have gained strength. However, along with increased safety efforts many liberties and freedoms afforded to Americans have been restricted and compromised as a result.

According to the Federal Bureau of Investigation (FBI), a National Security Letter (NSL) is a letter requesting "…information from a third party that is issued by the FBI or by other government agencies with authority to conduct national security investigations" (Federal Bureau of Investigation [FBI], n.d.). The authority of the NSL is provided by five provisions of the United States Code. First, the Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5), allows NSLs to obtain financial institution customer records (FBI, n.d.). Second, the Fair Credit Reporting Act, 15 U.S.C. § 1681u(a) and (b), permits disclosure on a list of financial institution identities and consumer identifying information from a credit reporting company (FBI, n.d.). Third, amendments to the Fair Credit Reporting Act, 15 U.S.C. § 1681v, (under the USA PATRIOT Act) allow disclosure of a full credit report on individuals believed to be involved in an international terrorism case (FBI, n.d.). Fourth, the Electronics Communications Privacy Act, 18 U.S.C. § 2709, provides billing and transactional communication service providers records from telephone companies and internet service providers (FBI, n.d.). And finally, the National Security Act, 50 U.S.C. § 436, obtains financial, consumer, and travel records on certain government employees who have access to classified information (FBI, n.d.). In simple terms, NSLs allow the FBI and other government agencies to gather personal financial and transactional information on residents in the United States.

Historically, NSLs were only used on foreign residents residing in America. Since 9/11 and the subsequent USA PATRIOT Act, President Bush's administration transformed NSLs essentially permitting disclosure of records on *any* United States resident (foreign or domestic) (Gellman, 2005; Johnston & Lipton, 2007).

While this may seem harsh, it has become one of the primary methods of gathering intelligence information to generate possible links to terrorism and terrorist plots. A method such as this proactive approach was scrutinized because of criticisms that the FBI received from being unable to prevent the terrorist attacks in 2001 (Gellman, 2005; Washington Post, 2006). Thus, the Bush administration and the FBI believed the NSL was necessary to obstruct terrorism.

According to the FBI (n.d.), there are only two restrictions or limitations placed on NSLs. First, they are only available for authorized national security investigations (i.e., international terrorism or foreign intelligence/counter-intelligence investigations), not general criminal investigations or domestic terrorism investigations (FBI, n.d.). And second, an NSL can only be used to seek transactional information permitted under the five NSL provisions (FBI, n.d.).

A NSL cannot be used to acquire content within the transaction, only the information that the transaction exists. For example, a NSL cannot be used to authorize eavesdropping on telephone communications or reading the contents of an e-mail. But it allows government agencies to trace the paths of communication between the telephone calls and the e-mails. Essentially, the government can obtain records on how a person makes and spends money, what he/she buys, where he/she travels, what he/she reads on the Internet, who telephones or e-mails him/her at home or at work, etc. The letters have typically been used to trace the financial transactions of military personnel, but have also largely been used to investigate civilian contractors as well (Lichtblau & Mazzetti, 2007).

While the NSL seems like a viable method in catching terrorists and disrupting planned operations, it is not a practical use of resources, and it violates the First and Fourth Amendments of the U.S. Constitution which guarantees citizens rights and freedoms in the United States. Therefore, a citizen, whether foreign or domestic, who is within the United States should not be required to turn over any documentation if he/she is a recipient of a NSL.

Under the Fourth Amendment of the Constitution, "The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized" (The National Archives, n.d.). The NSL is much like a warrant or subpoena seeking particular information (such as bank statements, telephone records, etc.), but it fails to support the provisions of probable cause. When the NSL was created in 1986 as part of the Electronics Communication Privacy Act, 18 U.S.C. § 2709, it was utilized as an investigative tool to monitor for terrorism and terrorist activity. However, because of the attack on the World Trade Center in 2001, it is being used more loosely as a fishing tool to acquire as much information as possible on thousands of innocent people simply because they use a specific Internet Service Provider or a certain telephone company (Savage, 2007).

According to the Department of Justice Office of Inspector General (OIG), an underestimated 143,000 NSLs were issued between 2003 and 2005, and annually there has been a fivefold increase in letters since 2001 (Fine, 2007; Smith, 2007). Staggering numbers such as these show 'hunches' rather than probable cause, because it is not probable that there is an excess of 143,000 United States citizens who wish to commit an act of terrorism.

Before the USA PATRIOT Act, an NSL could only be used if it had "specific and articulable facts [(e.g. probable cause)] giving reason to believe that the customer or entity whose records are sought [was] a foreign power or agent of a foreign power" (Fine, 2007). However, after the USA PATRIOT Act this requirement was amended allowing NSLs to obtain information on any person so long as it is *relevant* to a national security investigation (Fine, 2007; Lichtblau & Mazzetti, 2007). The amended requirement is so broad that the FBI can construe practically anything as being a national security investigation, which makes the NSL limitless. Also, after the USA PATRIOT Act, issuance of NSLs was broadened. Previously, NSLs were issued by a limited number of senior FBI Headquarters officials, but new provisions allowed Special Agents in Charge of the FBI's 56 field offices to sign and approve NSLs for use, greatly expanding approval authority (Fine, 2007).

Furthermore, according to its own provisions, the NSL is not "supported by oath or affirmation," rather it is issued by FBI personnel without judicial oversight (The National Archives, n.d.). This could cause significant abuses of power because of inadequate checks and balances. In a report issued on March 28, 2007, Inspector General Glenn Fine testified that during the period from 2003 to 2005 (3 years), out of 143,000 NSLs only 26 violations were found by the FBI.

The violations included "the issuance of NSLs without proper authorization, improper requests under the statutes cited in the NSLs, and unauthorized collection of telephone or Internet e-mail transactional records" (Fine, 2007). Unfortunately, in the OIG's review of only 293 NSLs, 22 violations had not been reported or identified by the FBI (Fine, 2007). This is very unsettling because OIG found 22 violations out of 293 NSLs whereas the

FBI reports 26 violations out of an excess of 143,000 NSLs. But while these violations found by the OIG were believed to have been a result from FBI agents' confusion and unfamiliarity with NSL constraints and not abuse, many, if not all of the violations would not have occurred if judicial oversight existed in approving an NSL.

Additionally, this report found problems under the Fourth Amendment with "exigent letters," or letters that request information immediately because of emergency circumstances. These letters were not part of the NSL authority and were not NSLs. However, they were used to obtain subscriber information from three telephone companies whose impression was that the FBI had NSLs being constructed for them (which was true). The NSL, however, would not arrive until months later because the FBI needed to "cover" itself from being able to explain how intelligence information was obtained legally (Fine, 2007). Often, it was found that these exigent letters were authorized and signed by FBI personnel who were not authorized to sign NSLs, making them non-legal binding documents. And according to OIG, their review found that many times the "exigent letters" were used in non-emergency situations to begin with (Fine, 2007).

Under the First Amendment in our Constitution, people are guaranteed that "Congress shall make no law…abridging the freedom of speech or of the press" (The National Archives, n.d.). Within the provisions of a NSL there is a clause that places a gag order on the letter, prohibiting its re,cipient from ever speaking about it (18 U.S.C. 2709(c) [2006]). Original provisions to the NSL prohibited its recipients from challenging the letter in court. However, after the USA PATRIOT Improvement and Reauthorization Act of 2005, 18 U.S.C. § 3511 (2006), amendments to judicial review were inserted into the USA PATRIOT Act allowing the United States district courts to "…petition for an order modifying or setting aside the request" (18 U.S.C § 3511 [2006]). This decision came after the 2004 case of John Doe versus John Ashcroft (Marrero, 2007).

In this particular case, John Doe, an internet service provider, received an NSL to disclose records from customers using their services. After refusing, Doe challenged the letter claiming its unconstitutionality under the gag order provision. In September 2004, Judge Victor Marrero struck down NSL provisions of the USA PATRIOT Act saying that permanent gag orders violated free speech rights protected under the First Amendment. The government appealed the ruling, but Congress amended the NSL provision (through the USA PATRIOT Improvement and Reauthorization Act) before the court could issue a decision (American Civil Liberties Union [ACLU], 2007). Essentially, had Congress not passed the bill, the NSL would probably have been declared unconstitutional, thus prohibiting its use.

However, the new provisions, which allow limited judicial review (only challenging) are still unconstitutional. The NSL still violates the First Amendment by "giving the FBI authority to suppress speech without *prior* judicial review" (ACLU, 2007). While the amended statute allows recipients to challenge gag orders in district court, the NSL provision requires that the courts defer to the FBI's view that secrecy is necessary (ACLU, 2007). But, this defeats the purpose of judicial review and checks and balances if discretion is solely limited to the FBI.

While one can understand the expeditious process and speediness of the NSL as a tool, it should not be utilized if it violates the First and Fourth Amendments. There should be a balance between civil liberties and investigative methods, however, the NSL does not provide an adequate balance and draws supreme power to the Executive branch. Rather, instead of using an NSL perhaps it would be more prudent to use something similar to the original Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 (2006), however, maintain the intelligence information that an NSL obtains (i.e., transactional records rather that complete surveillance as the FISA does). This way prior judicial consent would be required in order to lawfully collect data on suspects. Under FISA-like provisions, the courts must find probable cause and minimization requirements to justify surveillance. Moreover, problems with the First Amendment will cease to exist because the FISA requires no gag order for its recipients. Overall, some speediness may be lost, but even more is being lost when companies refuse to hand over information because they believe the request to be unconstitutional.

Thus far, the documents that have been collected through the NSL have not found or established any links to terrorism or terrorist related planning (Lichtblau & Mazzetti, 2007; Gellman, 2006). And on September 6, 2007, the gag order on the NSL was declared unconstitutional under the First Amendment because "it functions as a licensing scheme that does not afford adequate procedural safeguards, and because it is not a sufficiently narrowly tailored restriction on protected speech" (Marrero, 2007). Because the courts determined that the subsection involving the gag order could not be separated from the rest of the statute, the entire NSL provision was declared unconstitutional barring an appeal within 90 days (Marrero, 2007). This does not restrict the FBI from using the NSL within the extra 90 days, however, unless an appeal is filed the decision will uphold the statute as unconstitutional.

While there is no doubt that an appeal will be filed or amendments will be made to the existing NSL statute, one can only hope that new provisions will give American citizens proper civil liberties afforded by the U.S. Constitution. As the battle continues to stop the War on Terrorism, we must not lose sight of maintaining liberty and order by keeping our methods of intelligence gathering fair and constitutional.

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