

Government use of National Security Letters, Gag Orders and Transactional Information



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5 U.S.C., Section 505, of the USA Patriot Act authorizes the government to use National Security Letters (NSLs) to access information deemed “relevant” to investigations involving international terrorism or clandestine intelligence activities. Specifically, the government can access phone and email records, financial information, and records of internet sites visited by U.S. citizens.¹ Two provisions of Section 505 are intended to limit government power and protect citizens’ rights by: (1) allowing judicial challenges to the gag orders accompanying NSLs; and (2) limiting the information that the government can request using a NSL to access transactional information from a communication while barring access to a communication’s content. However, these provisions have proven insufficient to protect citizens against excessive government scrutiny, and Congress should strengthen them.

I. Gag Orders

As originally enacted, 5 U.S.C, section 2709(c) of the Patriot Act allowed the government to issue gag orders to accompany NSLs, prohibiting NSL recipients from speaking to anyone about the NSL. However, that provision was found unconstitutional on First Amendment grounds in the Supreme Court case *Doe vs. Ashcroft*. Judge Marrero ruled that section 2709(c) constituted a prior restraint on speech. Because section 2709(c) provided that all recipients of NSLs were permanently prohibited from disclosing the letters’ existence or content, regardless of circumstances, Marrero concluded that the gag order provision went beyond a need for substantial secrecy. Instead, the gag order provision constituted an unconstitutional use of absolute secrecy, which universally applied to all NLS recipients: “The government cites no authority supporting the open-ended proposition that it may universally apply these general principles to impose perpetual secrecy upon an entire category of future cases whose details are

unknown and whose particular twists and turns may not justify, for all time and all places, demanding unremitting concealment and imposing a disproportionate burden on free speech.”² Marrero indicated that gag orders should only be issued in exceptional circumstances and determined on a case-by-case basis with the authorization of a neutral adjudicator.

In response to *Doe vs. Ashcroft*, Congress amended the Patriot Act in 2006. The amendment allows recipients of a NSL to consult with a lawyer and seek judicial review of the NSL’s validity. Additionally, it requires the FBI to certify that a need for secrecy exists and, if the recipient challenges the gag order, to recertify a continuing need annually.³ However, the amendment is insufficient to protect individuals’ rights for four reasons. First, the FBI is still able to issue a permanent gag order that prohibits the NSL recipient from communicating with anyone other than an attorney. This does not address Judge Marrero’s concern that a gag order should only be issued *after* a neutral adjudicator has determined that it is necessary. Second, not all NSL recipients will spend time and money challenging a gag order in court, meaning that no neutral adjudicator will ever review the propriety of many gag orders. Third, even if a NSL recipient does challenge a gag order in court, the gag order can only be overturned if a judge determines bad faith issuance involving fraudulent intention toward the NSL recipient, a difficult standard to meet. Fourth, while this high standard alone assures sustainment of most gag orders, it is rendered completely meaningless because Congress has authorized the FBI to ignore a judicial decision invalidating a gag order if the FBI certifies that national security is at risk and a need for secrecy still exists.⁴ This ultimately eliminates the NSL recipient’s First Amendment right to seek meaningful redress resulting in the same problems that led to Judge Marrero’s earlier decision to strike down the original gag order provision.

II. Transactional Information

The Patriot Act, 18 U.S.C., Section 3121, limits information that the government can request using NSLs to access “electronic communications transactional records.” This limitation is intended to protect individuals from unnecessary privacy intrusions by allowing the government to request only transactional information (*i.e.*, the dates and types of communications) rather than the communications’ content (*i.e.*, the actual information communicated). For example, the government can use NSLs to request Pen register or trap and trace searches from phone companies, which provide dates of phone calls, numbers called, and duration of the calls.⁵ This occurred recently when Verizon, under a gag order, supplied the National Security Agency (NSA) with record information regarding U.S. citizens and overseas customers.⁶ The search involved nationwide daily transfers of information into government databases. Limiting government access to only transactional communications guards against targeting individuals based on political affiliations or unpopular beliefs, contained in the content of a speech or communication, and protected under the First Amendment. However, transactional information, like Verizon’s phone records, can provide very personal information including political contacts or connections to religious organizations that potentially enable the government to unfairly classify and target individuals based on freedoms guaranteed in the First Amendment.⁷ The need for checks and balances to regulate NSL authorization is required to avoid large scale data collections that seek to target certain groups of people.

While limiting NSLs to transactional information should protect against content-based searches, the Patriot Act fails to define the term “electronic communications transactional records.” Consequently, the FBI has created its own definition, which now includes website addresses and email subject lines.⁸ This allows the FBI to engage in content-based searches;

website addresses provide descriptive titles of a webpage and its content, as well as access to the webpage, and email subject lines summarize the communication's purpose.

5 U.S.C., Section 505, prohibits the FBI from conducting NSL investigations solely targeting activities protected by the First Amendment.⁹ However, the FBI's searches of websites and email subject lines shows that this is happening nonetheless. Moreover, knowledge that the government is investigating electronic communications may have a chilling effect on citizens' willingness to engage in electronic speech. As the Supreme Court recognized in *Dombrowski v. Pfister*, 380 U.S. 479 (1965), the government violates the constitution even when it indirectly chills the right to free expression.

Conclusion

Congress needs to strengthen the provisions of the Patriot Act to balance individuals' privacy against the government's need to collect information. A neutral determination by a court should be required to authorize the issuance of gag orders accompanying NSLs. Prescribed limits for the duration of gag orders and for how long information collected through NSLs can be maintained following an investigation are necessary. Moreover, meaningful judicial redress through enactment of a clear standard for courts to apply regarding whether a gag order is appropriate and one that the FBI is unable to override would provide necessary controls on agency power. Additionally, Congress should clarify that NSLs cannot be used to collect content-based information, providing a clear definition of transactional information to prevent FBI misuse. Increasing abuses of NSL provisions that violate First Amendment rights demand quick action by Congress for reform.

Notes:

1. Christopher Raab, "Fighting Terrorism in an Electronic Age: Does the Patriot Act Unduly Compromise our Civil Liberties," *Duke Law and Technology Review* 4, no. 1 (2006): 8, <http://scholarship.law.duke.edu/dltr/vol4/iss1/28>.
a.) *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*.
2. Andrew Nieland, "National Security Letters and the Amended Patriot Act," *Cornell Law Review* 92, no. 6 (2007): 1220, <http://cornelllawreview.org/articles/national-security-letters-and-the-amended-patriot-act/>.
a.) U.S. CONST. amend. I.
3. Nieland, "National Security Letters," 1220.
4. *Ibid.*, 1205.
5. "Surveillance Under the USA Patriot Act," *ACLU*, (Dec. 2010): 5, <http://www.aclu.org/national-security/surveillance-under-usa-patriot-act>
a.) *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, 279.
6. Leslie Friday and Art Jahnke, "Law Prof Weighs US Phone, Internet Surveillance: Moves were Legal, Cautionary Sign of the Times," *BU Today* (Jun. 2013): 1, <http://www.bu.edu/today/2013/law-prof-weighs-us-phone-internet-surveillance/>.
7. Debelak Jamela, "Guest: Why the NSA's Gathering of Metadata Matters," *The Seattle Times* (Jun. 2013): 1, http://seattletimes.com/html/opinion/2021192466_jameladebelakopedxml.html.
8. "Surveillance under the USA Patriot Act," 5.
9. Raab, "Fighting Terrorism in an Electronic Age," 8.
a.) U.S. CONST. amend. I.

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

b.) U.S. CONST. amend. I.

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a.) *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001*, Public Law 107-56, *U.S. Statutes at Large* 115 (2001).

<http://www.gpo.gov/fdsys/pkg/PLAW-107publ56/pdf/PLAW-107publ56.pdf>. b.)

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