Who Watches the Watchmen: National Security Letters and the Need for Oversight
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Introduction: National security letters (NSL), secret subpoenas that demand private information and prevent recipients from disclosing the existence of the request, have been used by the FBI for over two decades. The primary target of an NSL is transactional data which, in the Supreme Court Case U.S. v. Miller, was deemed outside the protection of the Fourth Amendment’s right to privacy. After the September 11th attacks, section 505 of the Patriot Act greatly expanded their use. In one year the amount of NSLs went from less than 100 to over 30,000. Challenges have been made against the validity of such a surveillance tool. The unconstitutional nature of NSL was established in Doe v. Ashcroft and Doe v. Gonzales. In both cases a communication service provider was issued an NSL and told to relinquish private user data to the FBI. The courts found for both cases that the NSL's nondisclosure statute violated the service provider's First Amendment right to free speech. But, the user’s right to privacy was never ruled on. In the age of social networking, where everything is done online, an individual’s right to privacy is paramount. The safeguards established on invasive intelligence gathering tools such as NSLs are being left in the dust of technological growth. New reforms and new judicial oversight need to be created to help bridge that gap.

Abstract: This research project is split into three areas surrounding NSLs: their different types and early history, the Patriot Act’s expansion of their powers and the government’s abuse of that power, and finally a discussion on proposed oversight and reform. Information was gathered via research into congressional records, law reviews and court cases, in addition to analysis of journal articles and other publications concerning NSLs. From these sources, this project concludes that the government’s oversight of NSLs is insufficient to prevent future abuse.

NSL Timeline:
1978: The Right to Financial Privacy Act (RFPA) is created to protect Fourth Amendment rights to privacy for transactional information, includes an exception for counterintelligence investigations.
1986: The Electronic Communications Privacy Act (ECPA) is created to update protections on wired and electronic communications. As with RFPA, an exception is included for counterintelligence investigations and codified under 18 U.S.C. § 2703
2005: § 2709(a), which authorized use of NSLs on any wire or electronic communication service provider, is ruled to be in violation of the First Amendment in Doe v. Gonzales.
2007: The amended nondisclosure provision § 2709(c) is ruled to be in violation of the First Amendment. 2010: Government drops gag order on Doe v. Ashcroft’s John Doe and Nick Merrill is finally recognized as the first challenger to § 2709’s NSL authority.

NSL Court Cases: Doe v. Gonzales:
- Plaintiffs represented by the American Civil Liberties Union (ACLU) file suit arguing that § 2709(a), which allows NSLs to be served to any wire or electronic communication service provider, violates their First and Fourth Amendment rights.
- Move for an injunction rather than a summary judgment, because they want to join the debates over amending the Patriot Act.
- Judge rules in favor of the injunction but also orders a stay of judgment pending appeal.
- New York Times runs an article that names John Doe as the Library Connection of Connecticut, a nonprofit consortium that serves 27 libraries in the Hartford area.
- With their identities known, the plaintiffs file an emergency plea to get the gag-order removed, but are turned down.
- 6 weeks after the passage of the amended Patriot Act the Attorney General removes the gag order and the appeals case is dropped.

Doe v. Ashcroft:
- An anonymous Internet Service Provider (ISP) received an NSL, under the ECPA’s § 2709 provision, but did not comply with it.
- Filed suit with the UCLA arguing the § 2709 NSL statute broke the First and Fourth Amendments.
- The Court ruled in favor of the plaintiff. The judge found that the document production provision violated the First and Fourth Amendments and the nondisclosure provision was unconstitutional under the First Amendment.
- During the appeal of that decision, Congress amended the Patriot Act vacating the decision.
- Doe dropped the First and Fourth Amendment claims on the document production provision, but left the First Amendment claim against the nondisclosure provision.
- The Court upheld the unconstitutionality of the nondisclosure provision under the First Amendment.
- After over five years since first filing suit against the NSL, the Government drops the gag-order on John Doe and Nick Merrill is finally recognized as the first challenger of § 2709’s NSLs.

NSL Reform: While both Doe v. Ashcroft and Doe v. Gonzales were successful in proving the unconstitutionality of the § 2709 NSL statute under the First Amendment, the rights of the individual patron were not decided. The ruling that the nondisclosure provision violated the First Amendment was considering the NSL recipient, the communication provider’s right to free speech. As for the violation of the patron’s constitutional rights, currently they do not exist. The road block that is standing in the way of individual privacy protection is the Fourth Amendment’s Third Party Doctrine. As discussed in the Supreme Court Case U.S. v Miller, the doctrine states that once information is voluntarily released to a third party the owner relinquishes any Fourth Amendment rights to that information. So, any information given to a bank, website, library, etc. is no longer considered protected under the Fourth Amendment’s right to privacy and therefore is accessible via an NSL.

There are two solutions to this problem. The first and easiest would be to have Congress pass additional safeguards on § 2709's NSLs. Congress could extend protection to the information that society considers private. By, for example, establishing greater judicial oversight, Congress could eliminate the potential of abuse from the FBI's self-certification of NSLs and provide protection for privacy concerns. The second solution would be to update the third party doctrine to account for the increase in internet communication. Modifying the doctrine to cover privacy of information given to third parties like financial institutions and ISPs would protect that kind of information from the scope of NSLs. When the average person’s medical history, financial status, sexual fetishes and private documents are just a click away, it is up to our government to ensure our rights stay protected.

Conclusion: NSLs serve as an important information gathering tool for the FBI's investigations into counterintelligence and counterterrorism. After the horrors of the September 11th attacks, it is easy to let our fears overshadow our constitutional rights. This is exactly what happened with the Patriot Act and its reformed NSL provision. But, Doe v. Ashcroft and Doe v. Gonzales highlighted the fact that these NSLs are in violation of the recipient’s First Amendment rights. It is now time to show that NSLs are also a violation of the information owner’s Fourth Amendment right to privacy by passing additional judicial review or amending the out of date third-party doctrine. As our dependency on the internet grows, our laws and constitution must serve as a line in the sand to prevent invasive tools like NSLs from infringing on our right to privacy.

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