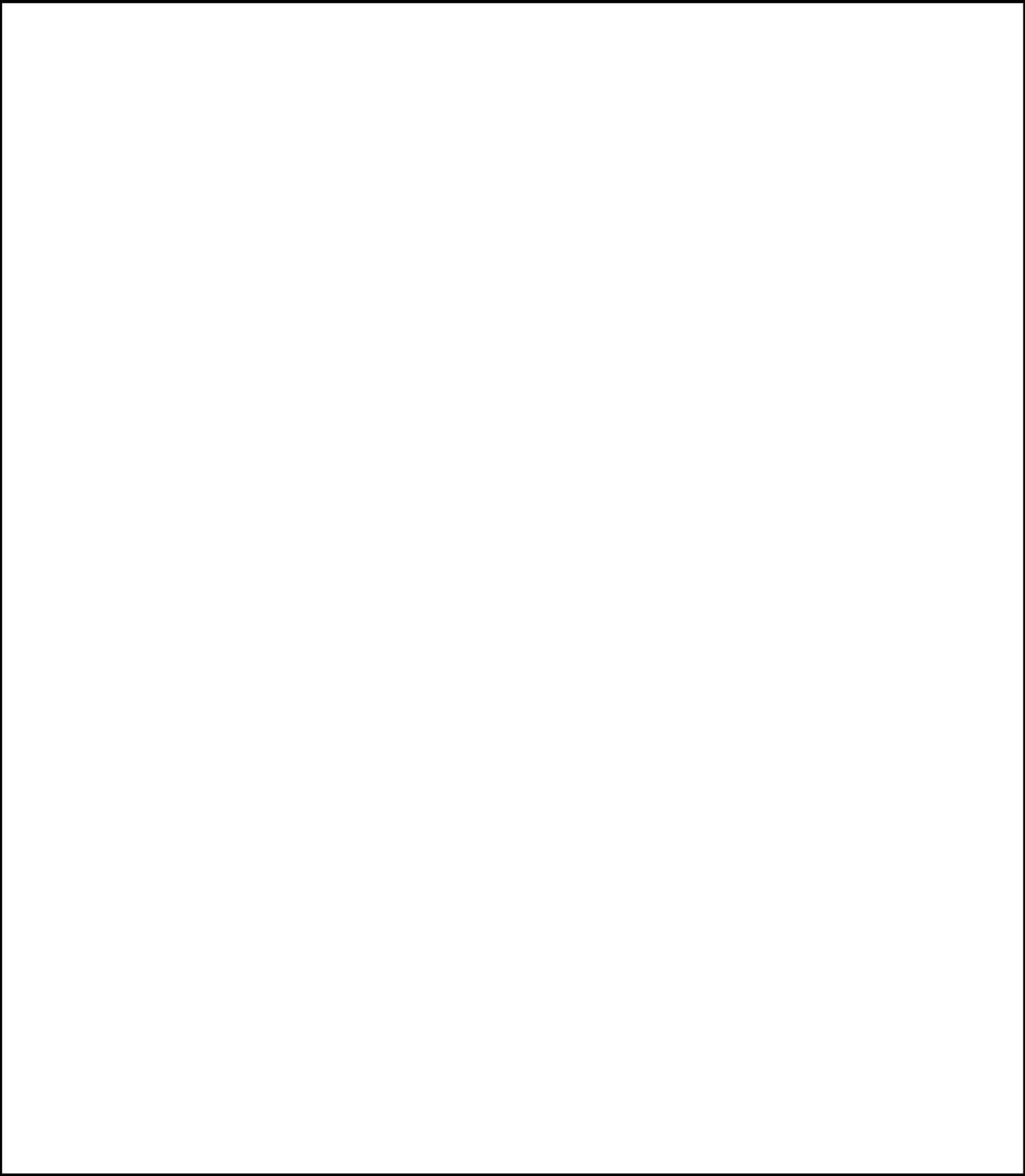


(S)

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March 2006



*Credit  
Review*

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ALL INFORMATION CONTAINED  
HEREIN IS UNCLASSIFIED EXCEPT  
WHERE SHOWN OTHERWISE

NSL VIO-14460

~~SECRET~~

DATE: 07-10-2007  
CLASSIFIED BY 65179/DMH/KSR/RW  
REASON: 1.4 (c)  
DECLASSIFY ON: 07-10-2032

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DATE: 07-10-2007  
CLASSIFIED BY 65179/DMH/KSR/RM  
REASON: 1.4 (c)  
DECLASSIFY ON: 07-10-2032

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NSL VIO-14461



## Current Litigation on National Security Letters

- I. Plaintiffs in *John Doe, et al., v. Attorney General Alberto Gonzales, et al.*, (U.S.D.C., D. Conn.) are an unidentified electronic services provider (providing various services to library patrons) and the American Civil Liberties Union (ACLU).
  - A. FBI served a NSL on the unidentified electronic service provider pursuant to the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2709.
  - B. Plaintiffs challenge the constitutionality Sec. 2709.
  - C. Plaintiffs also challenge the gag rule in Sec. 2709(c), which prohibits recipients of such NSLs from disclosing that the FBI has sought or obtained access to records or information under Sec. 2709.
  
- II. Plaintiffs subsequently moved for a preliminary injunction to permit the NSL recipient to identify itself publicly and to bar any government action against the entity so it could more fully participate in the legislative process for the USA PATRIOT Act's reauthorization.
  - A. ACLU contends the government misled the public through statements that Sec. 215 of the PATRIOT Act is not being used against libraries, while the FBI is instead using authority granted by Sec. 2709, which was amended by Sec. 505(a) of the PATRIOT Act, to seek library-related information.
  
- III. Proceedings:
  - A. On August 31, 2005, Judge Janet Hall heard plaintiffs' motion, but reserved ruling.
  - B. On September 5, 2005, at the Court's request, FBI provided certain classified material to Judge Hall *ex parte*, for *in camera* review.
  - C. On September 9, 2005, Judge Hall issued a preliminary injunction against defendants regarding the non-disclosure provision. Defendants appealed.
  - D. On September 20, 2005, the 2d Circuit issued a stay of that Order pending appeal.
  - E. The 2d Circuit denied both the plaintiffs' emergency motion to vacate the stay and subsequent motion to vacate the stay.

NSL VIO-14462.

F. On November 2, 2005, the 2d Circuit heard arguments on the above Connecticut litigation, and it heard arguments on NSL litigation arising from the Southern District of New York (a case in which the District Court found the ECPA NSL statute unconstitutional).

G. The New York case is also styled *Doe v. Gonzales*. Large portions of it remain under seal—as well as some information in the appellate briefs. However, the District Court's decision and Order are not under seal.

b5

H. Both the Connecticut case and the New York case are under submission, and the 2d Circuit has yet to take action.

IV.

b5

NSL VIO-14463

POC:

Director's Research Group  
(202)324-6155

Information provided by:

Information approved by:

Dated: March 6, 2006



## National Security Law Policy and Training Unit

Unit Chief [redacted] b2  
Room 7947 JEH b6  
[redacted] b7C

12 January 2006

### I. NSL Information:

#### A. Statutory Authority:

National Security letters are administrative requests that allow the FBI to obtain certain limited types of information without the requirement of prior court intervention:

- 1) Under the **Electronic Communications Privacy Act, 18 U.S.C. § 2709**, the FBI can obtain telephone and email communication records from telephone companies and internet service providers.
- 2) Under the **Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5)(A)**, the FBI can obtain the records of financial institutions (which is very broadly defined).
- 3) Under the **Fair Credit Reporting Act, 15 U.S.C. §§ 1681u(a) and (b)**, the FBI can obtain a list of financial institutions and consumer identifying information from a credit reporting company.
- 4) Under the **Fair Credit Reporting Act, 15 U.S.C. § 1681v**, the FBI can obtain a full credit report in a counterterrorism case. This provision was created by the 2001 USA Patriot Act.

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NSL VIO-14464

Statute	Type of NSL	Reporting Requirement
<b>Electronic Communications Privacy Act</b> 18 U.S.C. §2709(e)	<ul style="list-style-type: none"> <li>•Telephone Subscriber or Electronic Subscriber information (limited to name, address, and length of service).</li> <li>•Telephone local and long distance toll billing records.</li> <li>•Electronic Communication Transactional Records (e.g. transaction/activity logs and e-mail header information).</li> </ul>	Semiannual Reporting
<b>Right to Financial Privacy Act</b> 12 U.S.C. § 3414(a)(5)	<ul style="list-style-type: none"> <li>•Financial Records</li> </ul>	Semiannual Reporting
<b>Fair Credit Reporting Act</b> 15 U.S.C. § 1681u(a) & (b)	<ul style="list-style-type: none"> <li>•Consumer identifying Information.</li> <li>•Identity of Financial Institution.</li> </ul>	Semiannual Reporting
<b>Fair Credit Report Act</b> 15 U.S.C. § 1681v	<ul style="list-style-type: none"> <li>•Full credit reports from credit bureau.</li> </ul>	No reporting requirement under the Fair Credit Reporting Act.

**B. FBI's Use of NSLs Post-USA PATRIOT Act:**

- The standard for issuing an NSL is **relevance** to an authorized investigation to protect against international terrorism or clandestine intelligence activities provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the Constitution of the United States. (The 1681v NSL standard is slightly different to reflect that it applies only to international terrorism investigations.)

- The new "relevance" standard resulted in the increase in the number of NSLs issued by the FBI to further its investigations.

- NSLs are used as preliminary building block of an investigation - like grand jury

subpoenas and FISA section 215 business records orders.

- NSLs are limited to the described categories of records. If the information sought falls outside of these categories, the FBI must use another investigative tool (e.g., grand jury subpoena or 215 order).

**C. Process:**

- A request for an NSL has two parts. One is the NSL itself, and one is the EC approving issuance of the NSL.

- The cover EC serves four functions. It documents the predication for the NSL by stating why the information sought is relevant to an authorized investigation. It documents the approval of the NSL by field supervisors. It contains information needed to fulfill Congressional reporting requirements for each type of NSL (subject's USP status, type of NSL issued, and the number of phone numbers, email addresses, account numbers or individual records being requested in the NSL). Lastly, it transmits the NSL to NSLB for reporting requirements, to CTD, CD, or Cyber for informational purposes, and, in the case of personal service, to the requesting squad or delivering field division for delivery.

## II. Comparison of National Security Letters pre and post-USA PATRIOT Act:

### A. Standard:

Pre-USA PATRIOT Act	Post-USA PATRIOT Act
<p><b>Specific and articulable facts standard</b></p> <ul style="list-style-type: none"><li>•The pre-USA PATRIOT Act standard for the issuance of an NSL required the records be <b>relevant to an authorized foreign counterintelligence investigation</b> and that the FBI have <b>specific and articulable facts</b> that the requested records <b>related to an agent of a foreign power or a foreign power</b>.</li><li>•Put differently, the FBI had to have reached a defensible position that the person was a terrorist or spy before the FBI could gather the base information it needed to determine whether the person was a terrorist or spy.</li><li>•The standard was unreasonably high. An NSL is clearly analogous to a grand jury subpoena, which can be issued during a criminal investigation to obtain relevant information. It would be anomalous if it were easier to obtain these sorts of record in a routine criminal investigation than in an investigation to protect the national security.</li></ul>	<p><b>Relevance Standard (Section 505)</b></p> <p>The standard for issuing an NSL is <b>relevance</b> to an authorized investigation—</p> <ul style="list-style-type: none"><li>•to protect against international terrorism; or,</li><li>•clandestine intelligence activities; and</li><li>•provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the First Amendment of the Constitution of the United States.</li></ul>



**B. Approval Authority for NSLs:**

Pre-USA PATRIOT Act	Post-USA PATRIOT Act
Approval authority could be no lower than Deputy Assistant Director	<p>The authority to sign NSLs has been <u>delegated</u> to:</p> <ul style="list-style-type: none"><li>• the Deputy Director and Executive Assistant Director for CT/CI;</li><li>• Assistant Directors in charge and all DADs for CT/CI/Cyber (except that CI and Cyber ADs and DADs do not have any authority with respect to 1681v NSLs);</li><li>• General Counsel;</li><li>• Deputy General Counsel for National Security Affairs;</li><li>• Assistant Directors in Charge in NY, D.C., and LA; and,</li><li>• all SACs (An acting SAC may not sign an NSL).</li></ul>

**C. Retention/Dissemination of NSL Information:**

Pre-USA PATRIOT Act	Post-USA PATRIOT Act
<ul style="list-style-type: none"> <li>•As stated, FBI Policy pre and post USA PATRIOT Act has been to maintain the information derived from NSLs regardless of whether it turns out to be relevant (for example - FBI determines that a target is not a threat). CTD mandates that all telephone information go into Telephone Applications.</li>   <li>•Dissemination is further subject to specific statutory limitations:</li>   <li>•Privacy Act regarding U.S. Person information;</li>   <li>• toll record NSL statute, ECPA, 18 U.S.C. §2709, and financial record NSL statute, RFPA, 12 U.S.C. §3414(a)(5)(B), permit dissemination if per NSIG and information is clearly relevant to responsibilities of recipient agency;</li>   <li>•limited credit information NSL statute, FCRA, 15 U.S.C. §1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of an FCI investigation; and,</li>   <li>•no special statutory rules for dissemination under full credit report NSL statute, FCRA, 15 U.S.C. §1681v.</li> </ul>	<ul style="list-style-type: none"> <li>•Information obtained through the use of an NSL may be retained and disseminated in accordance with general standards set forth in The Attorney General's Guidelines for FBI National Security Investigation and Foreign Intelligence Collection (NSIG).</li>   <li>•FBI Policy pre and post USA PATRIOT Act has been to maintain the information derived from NSLs regardless of whether it turns out to be relevant (for example -FBI determines that a target is not a threat). CTD mandates that all telephone information go into Telephone Applications.</li>   <li>•Dissemination is further subject to specific statutory limitations:</li>   <li>•Privacy Act regarding U.S. Person information;</li>   <li>• toll record NSL statute, ECPA, 18 U.S.C. §2709, and financial record NSL statute, RFPA, 12 U.S.C. §3414(a)(5)(B), permit dissemination if per NSIG and information is clearly relevant to responsibilities of recipient agency;</li>   <li>•limited credit information NSL statute, FCRA, 15 U.S.C. §1681u, permits dissemination to other federal agencies as may be necessary for the approval or conduct of an FCI investigation; and,</li>   <li>•no special statutory rules for dissemination under full credit report NSL statute, FCRA, 15 U.S.C. §1681v.</li> </ul>