

ACTIVITY 17.1

NATIONAL SECURITY LETTER (NSL) WORKING GROUP

Before working on this assignment, you should understand the provisions of the Fourth Amendment to the U.S. Constitution. Here is the text of the Fourth Amendment:

The right of the people to be secure 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.

Directions: One area of concern about the Patriot Act has to do with National Security Letters (NSLs). Read the information below. It contains excerpts from the Electronic Policy Information Center's (EPIC) website regarding NSLs, and some additional information from a report of the Office of the Inspector General (OIG), Department of Justice. As you read the information, **your overall goal is to evaluate the seriousness of the threat to civil liberties posed by NSLs.**

The following questions may help to provide focus for your reading.

1. What is an NSL? What information can be obtained?
2. How great an invasion of privacy is FBI access to this information? Does it seem to violate the Fourth Amendment?
3. Are the safeguards against abuse adequate?
 - Do the procedures necessary to obtain NSLs adequately protect civil liberties?
 - How serious are the problems found in the OIG report?
4. Will the FBI do better in following the law and procedures in the future?
 - What incentives are there for the FBI to violate the law?
 - What incentives are there for the FBI to follow the law?
5. How should we interpret the numbers of NSLs? For example: "It doesn't matter. The potential for abuse is enough." or "The growing number is still very small, so it isn't much of a problem."

After considering the information, be prepared to answer these questions and report to the class on how much of an infringement on civil liberties NSLs pose.

Excerpts Quoted from EPIC (Note: EPIC has grave concerns over the Patriot Act)

National Security Letters (NSLs) are an extraordinary search procedure which gives the FBI the power to compel the disclosure of customer records held by banks, telephone companies, Internet Service Providers, and others.

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NATIONAL SECURITY LETTER (NSL) WORKING GROUP**What Types of Information Can Be Obtained by NSLs?**

- **Telephone and E-mail Records:** “Toll records,” a historical record of calls made and received from land lines, cell phones, and other sources, of a specified phone number, as well as billing records associated with that number. E-mail records, including e-mail addresses and screen names associated with the requested account and the e-mail addresses and screen names who have contacted that account.
- **Financial Records:** Financial information, including open and closed checking and savings accounts, from banks, private bankers, credit unions, thrift institutions, brokers and dealers, investment bankers and companies, credit card companies, insurance companies, travel agencies, casinos, and others.
- **Credit Information:** Full credit reports, names and addresses of all financial institutions at which the consumer has maintained an account.

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Office of the Inspector General (OIG) Report, March 2007

The report detailed significant violations of laws and regulations by the FBI in its use of its national security letter authority.

The FBI is required to report to Congress on the number of NSLs issued; the OIG found that the FBI underreported this number. The OIG review looked at 77 case files containing 293 NSLs from four separate FBI field offices issued in the 2003-2005 period. This review found that there were 17 percent more NSLs in the sample of case files than in FBI reporting databases. Delays in data entry also caused about 4,600 NSLs to not be reported to Congress. The OIG concluded that the FBI database significantly understates the number of NSL requests issued, and that Congress has been misinformed about the scale of the usage of the NSL authority.

The report further stated that violations are supposed to be self-reported by the FBI to the Intelligence Oversight Board. During the three-year period in question, the FBI self-reported 26 violations out of the 140,000 NSLs issued. The OIG, however, found 22 potential violations out of the sample of 293 NSLs it reviewed. The OIG has stated that there is no indication that the 293 NSLs it reviewed are not representative of all of the NSLs issued, thus indicating that the FBI is failing to self-report a very significant number of violations.

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NSL Statistics

The Inspector General’s report detailed the FBI’s use of NSLs from 2003 to 2005.

- Total number of NSL requests from 2000 (prior to passage of the Patriot Act): about 8,500.
- Total number of NSL requests from 2003-2005 (after passage of the Patriot Act): 143,074.

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The USA PATRIOT Act’s Impact on NSL Authority

The FBI’s NSL authority was significantly expanded by the Patriot Act in the following ways:

- The Act lowered the threshold for situations in which NSLs may be issued. Previously, the FBI could use NSLs to request information only if it had “specific [statable] facts giving reason to believe that the customer or entity whose records are sought is a foreign power or an agent of a foreign power.” The Patriot Act eliminated this requirement; now, NSLs may be issued to request information that is merely “relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities,” provided that such an investigation of a U.S. person is not based on activities protected by the First Amendment.
- The Act expanded approval authority beyond senior FBI Headquarters officials. Special Agents in charge of the FBI’s 56 field offices may now authorize NSLs.

(<http://www.epic.org/privacy/nsl/>)

Information Quoted from the OIG Report

To obtain approval for national security letters, FBI case agents must prepare: (1) an electronic communication (EC) seeking approval to issue the letter (approval EC), and (2) the national security letter itself. The approval EC explains the justification for opening or maintaining the investigation and why the information requested by the NSL is relevant to that investigation.

For field division-initiated NSLs, the Supervisory Special Agent of the case agent’s squad, the Chief Division Counsel (CDC), and the Assistant Special Agent in Charge are responsible for reviewing the approval EC and NSL prior to approval by the Special Agent in Charge. Division Counsel are required to review the NSLs to ensure their legal sufficiency—specifically, the relevance of the information requested to an authorized security investigation.

The final step in the approval process occurs when the Special Agent in Charge or authorized FBI Headquarters official (the certifying official) certifies that the requested records are relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities and, with respect to investigation of “U.S. persons,” that the investigation is not conducted solely on the basis of activities protected by the First Amendment. After making the required certification, the official initials the approval and signs the national security letter. (p. xiv)

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NATIONAL SECURITY LETTER (NSL) WORKING GROUP

Finally, in evaluating the FBI's use of national security letters it is important to note the significant challenges the FBI faced during the period covered by our review and the major organizational changes it was undergoing. It is also important to recognize that in most cases the FBI was seeking to obtain information that it could have obtained properly if it had followed applicable statutes, guidelines, and internal policies. We also did not find any indication that the FBI's misuse of NSL authorities constituted criminal misconduct.

However, as described above, we found that the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies. In addition, we found that the FBI circumvented the [Electronic Communications Privacy Act] NSL statute when it issued over 700 "exigent letters" to obtain telephone billing records and subscriber information from three telephone companies without first issuing NSLs. Moreover, in a few instances, the FBI sought or obtained information to which it was not entitled under NSL authorities.

The OIG issued 10 recommendations to "improve the accuracy of the reporting of the FBI's use of national security letters and ensure the FBI's compliance with requirements governing their use." In a letter dated March 1, 2007, Attorney General Alberto Gonzales directed the Inspector General to report to him in four months on the FBI's "implementation of your recommendations."

(<http://www.usdoj.gov/oig/special/s0703b/final.pdf>)

For the Class Report:

- What is an NSL?
- How great an invasion of privacy is FBI access to this information? Does it seem to violate the Fourth Amendment?
- Are the safeguards against abuse adequate? Explain.
- Will the FBI do better in following the law and procedures in the future? What are the incentives for doing so?
- How should we interpret the numbers of NSLs?
- Present your overall evaluation of the seriousness of the threat to civil liberties posed by NSLs. Provide evidence for your conclusion.

ACTIVITY 17.2

SECTION 215 WORKING GROUP

Before working on this assignment, you should understand the provisions of the First and Fourth amendments to the U.S. Constitution. Here is the text of the First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Here is the text of the Fourth Amendment:

The right of the people to be secure 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.

Directions: One specific area of concern about the Patriot Act has to do with Section 215. To learn about Section 215, read the information below. Your overall goal is to evaluate the seriousness of the threat to civil liberties posed by Section 215.

The excerpts you will read are from a report of the Office of the Inspector General (OIG), Department of Justice; they also contain information about changes made in the Patriot Act when Congress reauthorized it in 2006.

The following questions may help to provide focus for your reading:

1. What is Section 215? What information can be obtained?
2. How great an invasion of privacy is FBI access to this information? Does it seem to violate the Fourth Amendment?
3. Some people are concerned that Section 215 allows the FBI to obtain library records, thereby threatening civil liberties under the First Amendment. Is this a reasonable concern? Explain.
4. Are the safeguards against abuse adequate?
 - Is the lowered “threshold” for obtaining information under Section 215 serious?
 - Are the procedures necessary to obtain information under Section 215 adequate?
 - Are the changes made by the reauthorization adequate?
 - How serious are the problems found in the OIG report?

After considering the information, be prepared to report to the class on how much of an infringement on civil liberties Section 215 poses.

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SECTION 215 WORKING GROUP

What is Section 215?

Quoted Excerpts from Office of the Inspector General (OIG) Report, March 9, 2007

Pursuant to Section 215 of the Patriot Act, the FBI may obtain “any tangible things,” including books, records, and other items from any business, organization, or entity provided the item or items are for an authorized investigation to protect against international terrorism or clandestine intelligence activities. Section 215 did not create any new investigative authority but instead expanded existing authority found in the Foreign Intelligence Surveillance Act (FISA) of 1978. (p. ii)

FISA requires the FBI to obtain an order from the Foreign Intelligence Surveillance Court (FISA Court)...(p. ii)

Section 215 significantly expanded the scope of the FBI’s investigative authority... and lowered the standard of proof...(p. iii)

... the new language does not explicitly limit the type of entity or business that can be compelled by an order. Section 215 ... also expanded the categories of documents... (p. iii)

Section 215 lowered the evidentiary threshold to obtain such an order. As a result the number of people whose information could be obtained was expanded because the FBI is no longer required to show that the items being sought pertain to a person whom the FBI is investigating. Instead, the items sought need only be requested “for an authorized investigation conducted in accordance with [applicable law and guidelines] to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. (p. iv)

Other Information from the OIG Report

The first Section 215 request was made in May 2004. From then until September 2005, there were 162 requests, all approved by the FISA court. The court made minor modifications to 4 of these. (p. 77)

The report found two instances of improper use of Section 215 orders. Both errors involved telephone numbers no longer used by the target of the investigation. Both were reported to the President’s Intelligence Oversight Board and the FISA Court. (p.78)

(OIG Report source: <http://www.usdoj.gov/oig/special/s0703a/final.pdf>)

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SECTION 215 WORKING GROUP

Changes Made by the Patriot Act Reauthorization (Excerpts from the Bill of Rights Defense Committee)

- Recipients of Section 215 orders have the right to challenge them in court. However, [the reauthorized Act] places the bar for succeeding in a challenge too high. In order to succeed in a challenge, the third-party holder of records sought must prove that the government acted in bad faith, without the advantage of knowing whether the government is using secret evidence.
- [The Act] gives recipients of court-approved subpoenas for information in terrorist investigations the right to challenge a requirement that they refrain from telling anyone.
- Two new procedural hurdles have been imposed on FBI agents who want to apply for a Section 215 order to search bookstore or library records: they must first obtain the permission of one of three top officials—the director or deputy director of the FBI or the Executive Assistant Director of National Security; they must also present a statement of facts justifying the relevance of their request to a judge in the secret court established by the Foreign Intelligence Surveillance Act (FISA).
- Third parties who receive a Section 215 order will have the right to consult an attorney and the right to challenge the order in the FISA court.
- Automatic, permanent gag orders imposed on everyone who receives a National Security Letter or a Section 215 order may be appealed one year after the order is received.
- The public has gained the right to learn whether Section 215 is being abused: the Inspector General of the Justice Department will conduct a review of the use of Section 215 since 2001 and report publicly whether any abuses have occurred; in addition, the Justice Department must annually report the number of bookstore and library searches that have occurred under Section 215.
- The package clarifies that most libraries are not subject to demands in those letters for information about suspected terrorists. If the library is not an Internet Service Provider, the government will seek the Internet records directly from the ISP rather than seizing the library computer.

Source: <http://www.bordc.org/threats/legislation/reauthchanges.php#changes>

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SECTION 215 WORKING GROUP

For the Class Report:

- Explain what Section 215 is.
- How great an invasion of privacy is FBI access to this information? Does it seem to violate the Fourth Amendment? Explain.
- Some people are concerned that Section 215 allows the FBI to obtain library records, thereby threatening civil liberties under the First Amendment. Is this a reasonable concern? Explain.
- Are the safeguards against abuse adequate?
- Present your overall evaluation of the seriousness of the threat to civil liberties posed by Section 215. Provide evidence to support your conclusion.

ACTIVITY 17.3

EFFECTIVENESS WORKING GROUP

Your task is to use the information below to assess the effectiveness of National Security Letters (NSLs) and Section 215 in enhancing security. NSLs are used to compel a person, business, organization, etc., to turn over information on telephone and e-mail records, financial records, consumer credit information, etc., to the FBI. Section 215 allows the FBI to seek an order from a special court to obtain records and other information from businesses and other organizations.

Instructions

Using the information below, assess the effectiveness of the NSLs and Section 215. How valuable are these measures for enhancing national security? As you read the information, keep the following questions in mind:

1. How is the information obtained used by the FBI?
2. What evidence is there that these tools have enhanced security?
3. The FBI states that these tools are two of many used in investigating national security threats. Is it reasonable to expect “success stories” based on the use of these methods alone?
4. Will more “results” occur as the FBI increases the use of these methods?
5. Should we accept at face value the statements of agents about the effectiveness of these tools? What incentives are there for the FBI to follow guidelines in fully reporting out the various elements and uses of NSLs and Section 215 orders?

Information

Your task is complicated because there is little information about how the FBI has used the information it has obtained. Opponents of the Patriot Act try to minimize its effectiveness as a tool to enhance security. For example, a *Washington Post* story by Barton Gellman from November 5, 2005, states the following:

As the Justice Department prepared congressional testimony this year, FBI headquarters searched for examples that would show how expanded surveillance powers made a difference. Michael Mason, who runs the Washington field office and has the rank of assistant FBI director, found no ready answer. “I’d love to have a made-for-Hollywood story, but I don’t have one,” Mason said. “I am not even sure such an example exists.”

(<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/05/AR2005110501366.html>)

In *Reason Magazine*, April 6, 2005, Julian Sanchez wrote about an early FBI report (“Report from the Field”) on the use of their Patriot Act powers.

What’s striking is how weak the case for the PATRIOT Act’s vital necessity as an anti-terror measure appears even when we focus on the Department of Justice’s handpicked examples, as provided in their “Report from the Field.”

(<http://www.reason.com/news/show/34019.html>)

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EFFECTIVENESS WORKING GROUP

However, in March 2007, more recent public information came from two reports (one each on NSLs and Section 215) from the Office of the Inspector General (OIG) of the Department of Justice. The law requires these reports to present information on the effectiveness of NSLs and Section 215. The information below is drawn from these two reports.

Information Quoted from the OIG Report on NSLs

(<http://www.usdoj.gov/oig/special/s0703b/final.pdf>)

FBI Headquarters and field personnel told us that they found national security letters to be effective in both counterterrorism and counterintelligence investigations. Many FBI personnel used terms to describe NSLs such as “indispensable” or “our bread and butter.”

FBI personnel reported that the principal objectives for using NSLs are to:

- Establish evidence to support Foreign Intelligence Surveillance Act (FISA) applications to the Foreign Intelligence Surveillance Court for electronic surveillance, physical searches, or pen register/trap and trace orders;
- Assess communication or financial links between investigative subjects and others;
- Collect information sufficient to fully develop national security investigations;
- Generate leads for other field divisions, members of Joint Terrorism Task Forces, other federal agencies, or to pass to foreign governments;
- Develop analytical products for distribution within the FBI, other Department components, other federal agencies, and the intelligence community;
- Develop information that is provided to law enforcement authorities for use in criminal proceedings;
- Collect information sufficient to eliminate concerns about investigative subjects and thereby close national security investigations; and
- Corroborate information derived from other investigative techniques.

Information Quoted from the OIG Report on Section 215

(<http://www.usdoj.gov/oig/special/s0703a/final.pdf>)

We examined how the FBI has used this information in national security investigations. We found that Section 215 orders have been used primarily to exhaust investigative leads, although in some instances the FBI obtained identifying information about suspected agents of a foreign power not previously known to the FBI. However, the evidence showed no instance where the information obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot. In addition, we found that the FBI disseminated information...to another intelligence agency in only three instances.... We identified only one instance in which the FBI sought to use information...in a criminal proceeding....[However,] no [Section

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EFFECTIVENESS WORKING GROUP

215] information was used in the grand jury or subsequent proceedings. (p. 78)

....The FBI began using Section 215 authority more widely in 2006. (pp. 78-79)

Agents told us they believe that the kind of intelligence gathering from Section 215 orders was essential for national security investigations. They also stated that the importance of the information is sometimes not known until much later in an investigation when the information is linked to some other piece of intelligence...(p. xxii)

Agents called section 215 authority “critical” and a tool of last resort.... “a specialized tool that has a purpose.” ... “The only way to obtain some information.”

For the Class Report:

- How is the information obtained used by the FBI?
- What evidence is there that these tools have enhanced security?
- The FBI states that these tools are two among many used in investigating national security threats. Is it reasonable to expect “success stories” based on the use of these methods alone? Explain.
- Will more “results” occur as the FBI increases the use of these methods? Explain.
- Should we accept at face value the statements of agents about the effectiveness of these tools? What incentives are there for the FBI to follow guidelines in fully reporting out the various elements and uses of NSLs and Section 215 orders? Explain.
- Assess the effectiveness of National Security Letters (NSLs) and Section 215 in enhancing security, based on the available information. Be sure to back up your evaluation with evidence.