

D. THE FBI'S USE OF NSLs

Doe I detailed the history of NSLs and the revisions embodied in the Patriot Act which expanded their usefulness as an investigatory tool. See 334 F. Supp. 2d 480-85. The Patriot Act expanded the government's authority to use NSLs under the four existing NSL statutes¹⁰ and created a fifth category of NSLs.¹¹ However, at the time that Doe I was decided, little was publicly known about how NSLs were being used by the FBI under the new relaxed standards required for issuance after the Patriot Act.

As part of the Reauthorization Act, Congress directed the Department of Justice, Office of the Inspector General ("OIG"), to review the "effectiveness and use, including any improper or illegal use, or national security letters issued

¹⁰ In addition to § 2709, which expanded the use of NSLs under the ECPA, the USA Patriot Act amended: Section 1114(a)(5) of the Right to Financial Privacy Act, 12 U.S.C. § 3414(a)(5) (permits FBI to obtain financial records); Section 626 of the Fair Credit Reporting Act, 15 U.S.C. § 1681u (permits FBI and certain other agencies to obtain a limited amount of information about an individual's credit history); Section 802 of the National Security Act, 50 U.S.C. § 436 (allows FBI to request information related to investigation of improper disclosure of classified information).

¹¹ Section 627 of the Fair Credit Reporting Act, 15 U.S.C. § 1681v, allows the FBI to obtain full credit reports and all other consumer information in a consumer reporting agency's files.

by the Department of Justice." See Pub. L. No. 109-177, § 119. In March, 2007, the OIG issued its first public report pursuant to this statute, entitled "A Review of the Federal Bureau of Investigation's Use of National Security Letters" (the "OIG Report").¹² The OIG Report addresses the FBI's use of NSLs for calendar years 2003 through 2005.

The OIG Report confirms that the Patriot Act transformed NSLs into a much more frequently employed investigatory tool. Specifically, it states that "the FBI issued approximately 8,500 NSL requests in CY 2000, the year prior to passage of the Patriot Act. After the Patriot Act, according to FBI data, the number of NSL requests increased to approximately 39,000 in 2003, approximately 56,000 in 2004, and approximately 47,000 in 2005."¹³ (OIG Report 120.) While the number of NSL requests issued under each separate NSL provision is not publicly available, the report does indicate that "the overwhelming majority of the NSL requests sought telephone toll billing records information, subscriber information (telephone or e-mail), or electronic communication transactional records" under § 2709. (Id. 36-37.) In

¹² By letter dated March 26, 2007, Plaintiffs submitted the OIG Report for the Court's consideration.

¹³ The OIG Report notes, however, that the total number of NSL requests were under-reported by the FBI. The OIG estimated that "approximately 8,850 NSL requests, or 6 percent of NSL requests issued by the FBI during this period, were missing from the database." (OIG Report 34.)

considering these statistics, it is important to distinguish between "NSLs" and "NSL requests" -- a single NSL may contain multiple requests for information. (See id. 120.) The OIG Report specifies that "the 39,000 NSL requests in 2003 were contained in approximately 12,000 letters, and the 47,000 requests in 2005 were contained in approximately 19,000 letters." (Id.)

According to the OIG Report, there are three main reasons for the dramatic increase in the number of NSL requests issued starting in 2003. (See id. 45.) First, the Patriot Act eliminated the requirement that an NSL be issued only if "there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power." 18 U.S.C. § 2709(b) (2000). Instead, the information must currently satisfy only the lower standard of being "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(b). Second, whereas previously an NSL had to be approved by a senior FBI official at FBI headquarters, NSLs can now be authorized by Special Agents in Charge at FBI field offices. As a result, approval is no longer a lengthy process, and generally takes only two to five days. (See OIG Report 25.) Third, in 2003, the Attorney

General issued revised guidelines governing the use of NSLs in FBI national security investigations (the "NSI Guidelines"). The revised NSI Guidelines permit NSLs to be issued during preliminary investigations; under the prior NSI Guidelines, they could be issued only during full investigations.¹⁴ (See OIG Report 40.) The OIG Report concludes that "[t]aken together, these three expansions of the FBI's [NSL] authorities resulted in significantly greater use" of NSLs. (Id. 45).

FBI officials describe NSLs as "indispensable investigative tools that serve as building blocks in many counterterrorism and counterintelligence investigations." (Id. xlvi.) In particular, the most important use of § 2709 NSLs, as described by FBI officials, is "to support FISA applications for electronic surveillance, physical searches, or pen register/trap and trace orders." (Id. 48.) NSLs are also important in that they assist the FBI in collecting information sufficient to eliminate concerns about investigative subjects and close national security investigations with a greater degree of confidence. (See id.

¹⁴ Prior to 2003, the NSI Guidelines authorized two levels of investigative activity -- preliminary inquiries and full investigations. (OIG Report 16-17.) NSLs were not authorized for use in preliminary inquiries, unless prior approval was obtained from the Attorney General or FBI Director. (Id.) The NSI Guidelines authorize three levels of investigations -- threat assessments, preliminary investigations, and full investigations. (Id.) The NSI Guidelines do not permit the FBI to use NSLs during a threat assessment but do permit the use of NSLs during a preliminary investigation. (Id.)

44.) Moreover, often the target of an NSL is not necessarily the main target of an investigation, and an NSL thus serves as a key tool in allowing the FBI to follow leads. As the OIG Report notes, “[f]or example, if the response to an NSL for toll billing records on the subject’s telephone number identifies a telephone number that the subject contacted frequently during a time period relevant to the investigation, the FBI may issue another NSL requesting subscriber information for that telephone number.” (Id. 118.)

While the OIG Report provides helpful background on how NSLs are actually used by the FBI, Plaintiffs emphasize that the report also details significant misuse of NSLs by the FBI, which Plaintiffs claim supports their argument that the statute, in its current form, is too susceptible to abuse to survive First Amendment scrutiny. Specifically, the OIG Report found that in addition to significantly under-reporting the number of NSL requests issued, the FBI: (1) under-reported violations arising from the use of NSLs; (2) sought information not permitted by the statute; (3) issued NSLs without proper authorization; (4) issued over 700 “exigent letters” requesting the type of information covered by § 2709 without following the process for obtaining an NSL; and (5) repeatedly failed to properly adhere to the FBI’s own internal documentation requirements for the approval of an NSL. (See

id. 66-107.) In summary, while noting the significant challenges and major structural changes the FBI was facing during the period covered and the lack of any misuse rising to the level of criminal misconduct, the OIG Report nonetheless concluded that "the FBI used NSLs in violation of applicable NSL statutes, Attorney General Guidelines, and internal FBI policies." (Id. 124.)