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PRIVACY VS. THE PUBLIC GOOD: NATIONAL SECURITY LETTERS AND THE FOURTH AMENDMENT

BY TREVOR MOORE*

I. INTRODUCTION

With new technologies, terrorists are able to evade law enforcement and government agencies more effectively than ever before. After the September 11 attacks, Americans became keenly aware of the threat such groups pose. One principal tool used by the Federal Bureau of Investigation (FBI) and other government agencies in fighting terrorism is called a National Security Letter (NSL). An NSL is a written request issued by the FBI or other government agency for information pertinent to an ongoing national security investigation from a third party.¹ NSLs are useful to investigative agencies because they provide limited information about the target of an investigation and enable the FBI to gain warrants for further investigation. There are five current statutes addressing NSLs that give government agencies, primarily the FBI, the power to issue these letters to a wide variety of businesses.

This article shows that NSLs do not violate the freedom from unreasonable search and seizure guaranteed by the Fourth Amendment of the United States Constitution. As an investigative tool, NSLs aid law enforcement in gaining information necessary to obtain warrants authorizing searches and seizures. The paper will first

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discuss the different types of NSLs and the Fourth Amendment. Second, it will discuss why the Fourth Amendment does not protect the information requested by NSLs. After showing that NSLs do not violate an individual's Fourth Amendment rights, the paper will use the Walling test to examine how NSLs function as administrative subpoenas and will conclude by suggesting that NSLs ought to be treated legally as subpoenas.

II. TYPES OF NATIONAL SECURITY LETTERS AND THE FOURTH AMENDMENT

There are five sections of U.S. Code that authorize the issuance of NSLs: one section authorizes issuance to communications providers; another authorizes issuance to financial institutions, consumer credit agencies, and travel agencies; another section provides additional authorization for issuance to financial institutions; and two sections provide additional authorization for issuance to consumer credit agencies. These sections detail the authority granted to the FBI and the specific information it may require from companies regarding a client under investigation.

Whether the information requested by NSLs infringes on Constitutional rights depends on what is protected by the Fourth Amendment. The Fourth Amendment guarantees protection to U.S. citizens from unreasonable search and seizure in their "persons, houses, papers, and effects" by government at all levels. This protection is vital in maintaining a balance between the rights of the people and government paternalism.

Under the Fourth Amendment, the government may intrude upon this privacy only if previously authorized by a judicial warrant that is based on probable cause, describing the place to be searched

6 U.S. Const. amend. IV.
and the items to be seized. NSLs, on the other hand, are not intended to be in-depth search authorizations like warrants. Rather, they function as a preliminary investigative tool to connect the dots. Therefore, both because of the type of information requested and because of the limitations on what can be requested, the Fourth Amendment does not prohibit the use of NSLs.

III. IS INFORMATION HELD BY THIRD PARTIES PROTECTED UNDER THE FOURTH AMENDMENT?

Because NSLs deal exclusively with information which is kept in the hands of third parties, the question that must be answered is whether or not the Fourth Amendment protects information revealed to third parties. In general, access to information that is protected by statute but not by the Fourth Amendment is obtained through a subpoena. Many agencies have the power to issue administrative subpoenas. An administrative subpoena is an official order compelling an individual to provide a government administrative agency with information. In contrast, to obtain information or items protected by the Fourth Amendment, the government must have a warrant signed by a judge allowing them limited access to an individual’s papers and belongings.

Warrants and subpoenas are similar in the fact that they allow the government to gain access to private information. A major difference between the two is that a warrant is obtained through judicial authority and grants access to information protected by the Fourth Amendment, whereas subpoenas do not need judicial authority, and they request information not protected by the Fourth Amendment. For example, the FBI uses NSLs to request copies of transactional and personal records from communications providers, financial institutions, consumer credit agencies, and travel agencies. These letters require businesses to supply the FBI with transaction

7 Id.
information pertaining to persons involved in a current investigation. Showing that information held by third parties is not protected by the Fourth Amendment will logically show that NSLs do not violate Fourth Amendment protection, making NSLs comparable to administrative subpoenas in function. Three cases in particular show that, in general, information revealed to third parties is not protected by the Fourth Amendment.

In United States v. Miller, the government accused Mitch Miller of operating a distillery without the proper license and of engaging in tax fraud.9 The government’s case was based in part on bank records obtained by a grand jury subpoena. An appellate court ruled that the records should have been suppressed.10 The Supreme Court reversed the decision, saying,

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.11

In Miller, the Supreme Court did not find information revealed to third parties worthy of Fourth Amendment protection.

Another case that further illustrates the point is SEC v. Jerry T. O’Brien Inc.12 In this case, an appellate court had found that subpoenas issued by the SEC to Mr. O’Brien’s bank violated the Fourth Amendment. The Supreme Court reversed this decision and echoed the words of the opinion in Miller:13

10 Id. at 437.
11 Id. at 443.
13 Id.
Respondents cannot invoke the Fourth Amendment in support of the Court of Appeals’ decision. It is established that, when a person communicates information to a third party even on the understanding that the communication is confidential, he cannot object if the third party conveys that information or records thereof to law enforcement authorities. Relying on that principle, the Court has held that a customer of a bank cannot challenge on Fourth Amendment grounds the admission into evidence in a criminal prosecution of financial records obtained by the Government.14

Finally, in *Davidov v. United States SEC*, Davidov claimed that the subpoenas issued by the SEC for his financial records were not relevant to the SEC investigation.15 The written opinion of the Southern District Court of New York gives insight into the relationship between the Fourth Amendment and statutes regarding subpoenas requesting information held by third parties.

Congress enacted the RFPA in 1978 as a response to the Supreme Court’s decision in *United States v. Miller*, that a bank depositor had no protectible [sic] Fourth Amendment interest in bank records relating to his accounts. The RFPA is, in effect, a statutory Fourth Amendment for bank customers.16

These cases demonstrate that the Fourth Amendment does not protect information held by third parties; therefore, the government has the right to request information held by third parties without the need of a warrant. In *Davidov v. United States SEC*, the district court clarified that the type of information sought by NSLs is protected by statute and not by the Fourth Amendment. To further illustrate that NSLs do not infringe on Fourth Amendment rights, we will consider NSLs under the Harlan test, which is the common test used by

14 *Id.* at 743.
16 *Id.* at 387.
the Supreme Court to determine whether or not an act violates the Fourth Amendment.

IV. THE HARLAN TEST

To help the courts determine whether or not a person has a valid Fourth Amendment claim, Justice John M. Harlan II established a two-part test in *Katz v. United States.*\(^\text{17}\) In *Katz,* the defendant sought review of judgment passed against him by the Ninth Circuit Court of Appeals. The defendant had been convicted of transmitting information by telephone based on evidence overheard by federal investigators listening to his conversation on a pay phone. In the Ninth Circuit, the defendant argued that the evidence was collected in violation of his Fourth Amendment rights, but the claim was rejected, and the defendant was convicted.

The Supreme Court reversed the conviction, finding that there was a Fourth Amendment violation in the tapping of a pay phone. In his concurring opinion, Justice Harlan states that there is a two-fold test which must be passed for a person to have claim to Fourth Amendment protection. The first part of the test is subjective and based on an individual's expectations of what is private and what is not. Because of the subjectivity of the first part of the Harlan test, it is of limited importance for our purposes and will not be examined here. The second part of the test ultimately addresses the courts’ opinion.\(^\text{18}\) While the individual must possess an expectation of security—and thus valid claim to Fourth Amendment protection—what is ultimately at issue is whether society accepts the individual’s expectations of privacy as reasonable.

In the legal process, the courts’ opinions are put in place to reflect what society would expect to be reasonable. In *Katz v. United States,* the Supreme Court found that a conversation in a telephone


booth is protected by the Fourth Amendment.\textsuperscript{19} According to this
decision, what matters is whether a person seeks to preserve the
information as private, even in a public area: "the Fourth Amendment
protects people, not places."\textsuperscript{20} The opposite, however, also holds true.
"What a person knowingly exposes to the public, even in his own
home or office, is not a subject of Fourth Amendment protection."\textsuperscript{21}
Court decisions show that once a person devolves information to a
third party, it is no longer a subject of Fourth Amendment protection.
As a result, NSLs pass the Harlan test, thus showing that the Fourth
Amendment does not protect information obtained through the use
of NSLs.

V. The Walling Test

Because NSLs are similar to administrative subpoenas and are
not under the scope of the Fourth Amendment, we must treat the
fair use of NSLs similarly to the way we treat the fair use of other
administrative subpoenas. The Supreme Court first outlined the nec-
essary requirements for a subpoena to be legal in \textit{Oklahoma Press
Publishing Co. v. Walling}, and these requirements are still used as
the basis for establishing the legality of government-issued subpo-
neas.\textsuperscript{22} Because the requirements are similar to what is required for
a warrant, this paper will compare the Walling requirements to the
Fourth Amendment. This is done for the sake of comparison only;
the Fourth Amendment does not govern subpoenas. The require-
ments are broad by design to avoid frustrating the goal of admin-
istrative subpoenas.\textsuperscript{23} The opinion of the court was that a subpoena
must be authorized, relevant, and specific.\textsuperscript{24}

\textsuperscript{19} See \textit{Katz}, 389 U.S. at 347.
\textsuperscript{20} See \textit{id.}.
\textsuperscript{21} See \textit{id.}.
\textsuperscript{22} \textit{Okla. Press Publ'g v. Walling}, 327 U.S. 186, 208–09 (1946).
\textsuperscript{23} \textit{Bohl}, \textit{supra} note 18, at 470.
\textsuperscript{24} See \textit{Walling}, 327 U.S. at 209.
A. Authority

In regards to authority of subpoenas, the Walling decision states that “it is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command.” Congress has granted authority for NSLs to be issued by specific government officials. U.S. code in 18 U.S.C.S. 2709 specifically designates that power to the Director of the FBI, who can then delegate the authority to any agent not occupying a position lower than Deputy Assistant Director at Bureau headquarters or a Special Agent authorized by the FBI director. To monitor the correct execution of NSLs, the law stipulates that the FBI present a semi-annual report informing congress of NSLs that were issued and detailing how they were used.

B. Relevance

In the case of a warrant, the Fourth Amendment requires the law enforcement agency to give an oath or affirmation guaranteeing that what is sought is relevant to an investigation. Though literally applicable in the case of a warrant, this requirement is satisfied if a subpoena connects to an ongoing investigation. Obviously, the FBI may construe what is necessary for an investigation in a very broad sense, but this is not meant to be a strict test. All three of the requirements are matters which vary in relation to the nature, purposes, and scope of the investigation. Furthermore, because the information is given only statutory protection, constitutional rights are not violated.

C. Specificity

Related to the relevance of the subpoena is the specification of information to be surrendered. Just as warrants must specify the

25 See id.
26 U.S. CONST. amend. IV.
27 See Walling, 327 U.S. at 209.
28 See Id.
place to be searched and the things to be seized, subpoenas must also specify the information sought. The information requested must be adequate for the purpose of the investigation, but not excessive. This ensures that what is requested by an NSL is not “unduly burdensome” on the receiving party. This area can also be broad because the investigative agency often does not know precisely what it is looking for. Because of the subjectivity of this requirement, there is no defined limit on the scope of an NSL—so long as it does not require more than the recipient can reasonably produce.

VI. NSLs ARE ADMINISTRATIVE SUBPOENAS IN FUNCTION

As was stated previously, the government may obtain access to private information by one of two ways: a warrant or a subpoena. In order to request information not protected by the Fourth Amendment, an authorized government agency issues a subpoena directly, requiring the information in question to be produced. Having shown that the information requested by NSLs is not protected by the Fourth Amendment, it follows that NSLs are in function administrative subpoenas and should be treated as such. As administrative subpoenas, NSLs do not violate any of the three requirements outlined in the Walling test. By this analysis, the information-requesting function of NSLs is in agreement with current legal procedure.

VII. CONCLUSION

With present national security threats, the need for increased intelligence by law enforcement is greater than it has ever been. To prevent future attacks, government agencies must have quick access to information that so that criminals may be apprehended before they strike. NSLs aid law enforcement agencies by providing them with information that can lead to sufficient evidence for a search warrant. Legal precedent has shown that information held by third parties is not protected under the Fourth Amendment. Furthermore,

29 See id.
30 Bohl, supra note 18, at 474.
subjecting NSLs to Justice Harlan’s test shows again that the kind of information requested by NSLs is not included within the scope of the Fourth Amendment. Determining that NSLs do not violate Fourth Amendment rights leads us to treat NSLs no differently than other administrative subpoenas. Treating NSLs as administrative subpoenas demonstrates that there is adequate oversight involved for the type of information being requested. The use of NSLs by government agencies is in accordance with the laws of the United States.