

# dataprotectionlaw&policy

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# Federal Court: ban on NSL notification is unconstitutional

National Security Letters work as administrative subpoenas that allow the FBI to obtain customer records without obtaining a court order. Michael Vatis, a partner in the New York office of Steptoe & Johnson LLP, explains the Federal Court's decision that 'gag' orders, which prohibit electronic communications providers from telling customers that they have received an NSL, violate the First Amendment.

On 6 September, a federal court in New York ruled that 'gag' orders prohibiting electronic communications service providers from disclosing that they received National Security Letters (NSLs) for customer information, violate the First Amendment. Moreover, because it found that the gag order section cannot be severed from the rest of the NSL provision, the court invalidated the entire provision. The court also found that the limitations on judicial review of nondisclosure orders violate the First Amendment and the separation of powers. The court stayed its ruling pending appeal (or for 90 days in the unlikely event that no appeal is filed), meaning that the FBI can continue to serve NSLs on telecoms and email providers. While the court's lengthy defense of judicial prerogatives and its soaring flights of rhetoric may stir the souls of civil libertarians, a narrower and more carefully calibrated opinion might have stood a better chance of withstanding appeal.

This case, *Doe v Gonzales*, has been ongoing since April 2004, when an unnamed Internet Service Provider (ISP) filed its original complaint after receiving an NSL. NSLs are essentially administrative subpoenas that the FBI can use, without having to go to a court or a grand jury, to obtain a wide variety of customer records - but not communications content - from electronic communications providers, financial institutions and credit agencies. After the district court awarded<sup>1</sup> plaintiffs a sweeping victory that invalidated both the NSL's demand for information and the gag order on Fourth and First Amendment grounds, respectively, the government appealed. But before the Second Circuit ruled on the matter, Congress passed legislation<sup>2</sup> reauthorizing and amending the

USA PATRIOT Act<sup>3</sup>. That legislation gave NSL recipients a limited right to challenge an NSL in court, as well as a right to challenge a gag order. As a result, plaintiffs decided to drop their Fourth Amendment claim, and the Second Circuit vacated<sup>4</sup> the district court's decision and remanded for reconsideration in light of the newly enacted legislation.

The amended gag order provision, 18 USC § 2709(c), prohibits a recipient of an NSL from disclosing that it received a letter if the FBI certifies that such disclosure 'may result in' any one of several enumerated harms, including: a 'danger to ... national security', 'interference with ... a[n] investigation [or] diplomatic relations', or 'danger to the life or physical safety of any person'. Meanwhile, the newly enacted 18 USC § 3511(b) allows an NSL recipient to request judicial review of a gag order, but states that the court may lift the order only if it determines 'that there is no reason to believe' disclosure 'may result in' one of the enumerated harms. Section 3511(b) also states that the court must treat the government's certification that 'disclosure may endanger the national security of the United States or interfere with diplomatic relations' as 'conclusive', unless the court finds that such certification was 'made in bad faith'.

On remand, the district court found that the amended section 2709(c) still violates the First Amendment, since it permits the government to restrain speech without 'afford[ing] adequate procedural safeguards' and was not narrowly tailored to the government's interests. The court determined that section 2709(c) fails to place the 'burden of going to court to suppress the speech and the burden of proof once in court ... on the censoring government', as

required under *Freedman v Maryland*<sup>5</sup>, 380 U.S. 51 (1965). The court reasoned that, like *Freedman*, section 2709(c) ‘constitutes a form of licensing,’ since it allows the FBI ‘broad discretion’ to grant some disclosure requests while denying others. The court also found that section 2709(c) is not narrowly tailored to a compelling government interest, since the statute potentially places ‘a permanent bar on disclosure’ and does not require the government to lift the gag order when the threat to national security has passed or when the existence of the NSL is disclosed through other means. Perhaps most strikingly, the court also found that section 2709(c) is not severable from sections 2709(a) and (b), which govern demands for information. The court reasoned - as it had in its initial opinion - that ‘Congress intended the statute to function as a secret means of gathering information from communications service providers’ and therefore could not have intended the provisions governing demands for information to operate without the nondisclosure provision. ‘Accordingly,’ the court concluded, ‘§§ 2709(a) and (b) must be invalidated as non-severable from § 2709(c)’.

The court also held that section 3511(b), which allows for limited judicial review of gag orders, is unconstitutional under both the First Amendment and the doctrine of separation of powers. The court concluded that section 3511(b) violates the First Amendment because it ‘impermissibly ties the judiciary’s hands by requiring a

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reviewing court to effectively end its analysis as long [as] the court finds a reason - any reason - to believe disclosure ‘may’ lead to one of the Enumerated Harms’. Moreover, the court noted that section 3511(b) does not permit the kind of ‘particularized,’ ‘case-by-case’ analysis required to balance the potential harm to the government against First Amendment interests, and concluded that ‘credit[ing] the government’s invocation of national security as conclusive absent evidence of bad faith eviscerates any meaningful judicial review’. The court also found that section 3511(b) violates the separation of powers by mandating ‘when and how deference [to the executive’s assertions of danger to national security] should be accorded,’ thereby barring the judiciary from applying established First Amendment standards to a challenged restriction on protected speech. In one of its purpler passages, the court warned that such incursions on the role of courts ‘could serve as a precedential step toward the development of a much larger and more fearsome vehicle for legislative or executive intrusion into the business of the courts,’ and that ‘what might commence as an innocent legislative step over a blurry line in the dark could later’ morph into ‘the legislative equivalent of breaking and entering, with an ominous free pass to the hijacking of constitutional values’.

Such rhetorical flourishes might sound like choir music to the converted, but they sometimes can grate on appellate judges like

fingers on a blackboard. We already saw one instance of this recently, when the Sixth Circuit in July vacated<sup>6</sup> a sweeping (but sloppily reasoned) district court order<sup>7</sup> striking down the NSA’s former warrantless wiretapping program. Moreover, the district court in *Doe* probably didn’t help itself when it reached out to strike down the entire NSL provision, rather than just the gag order sections. The government has already said it is considering an appeal.

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1. <http://www.step toe.com/assets/attachments/421.pdf>.
2. USA PATRIOT Improvement and Reauthorization Act of 2005, public law 109-177-Mar. 9, 2006.
3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, public law 107-56-Oct. 26, 2001.
4. *John Doe I, John Doe II, American Civil Liberties Union, American Civil Liberties Union Foundation, v Alberto Gonzales* (in official capacity as Attorney General), *Robert S. Mueller III* (in official capacity as Director of the Federal Bureau OF Investigation), *Marion E. Bowman* (in official capacity as Senior Counsel of the Federal Bureau of Investigation), *John Roe*, Docket Nos. 05-0570-cv(L), 05-4896-cv(CON), November 2, 2005.
5. U.S. Supreme Court, *Freedman v Maryland*, 380 U.S. 51 (1965).
6. <http://www.ca6.uscourts.gov/opinions.pdf/07a0253p-06.pdf>
7. <http://www.step toe.com/publications/418d.pdf>.

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