



Written by [Bob Adelman](#) on March 18, 2013

Another Judge Rules National Security Letters (NSLs) Unconstitutional

[A federal district court judge on March 15 ruled](#) that [National Security Letters](#) (NSLs) are unconstitutional not only under the First Amendment but also under the “separation of powers” principle. As Alex Johnson, a staff writer for NBC News, put it, those NSLs are “the supersecret mechanism[s] by which the FBI can get your private information without a warrant in the name of counterterrorism.”



The suit was brought by the [Electronic Frontier Foundation](#) (EFF), a non-profit digital rights group that supports personal privacy over the Internet, on behalf of an Internet provider that received an NSL from the FBI to provide customer information. The suit claimed the FBI’s letter was unconstitutional under the First Amendment’s guaranteed right to free speech as well as under the principle of [separation of powers](#) in that information was demanded without a court order or a probable cause search warrant issued by a judge. When the ruling was announced, the senior staff attorney for the EFF, Matt Zimmerman, exulted:

We are very pleased that the court recognized the fatal constitutional shortcomings of the NSL statute. The government’s [demands and gag orders] have truncated the public debate on these controversial surveillance tools. Our client looks forward to the day when it can publicly discuss its experience.

Part of the NSL statute requires that any company that provides communications services, such a phone companies, Internet service providers (ISPs), and banks, must not only release private information about customers upon demand, but also refrain from informing the customer about the demands. The judge said that since the gag order is unconstitutional, so is the rule allowing the demand without a court order. U.S. District Judge Susan Illson said that the secrecy provision couldn’t be separated from the main body of the law and that consequently that entire section of the law was unconstitutional.

[In her ruling](#), Illson wrote:

Petitioner contends that the NSL provisions lack the necessary procedural safeguards required under the First Amendment because the government does not bear the burden to seek judicial review of the nondisclosure order [the gag order] and the government does not bear the burden of demonstrating that the nondisclosure order is necessary to protect specific, identified interests....

Petitioner also argues that the judicial review provisions violate separation of powers principles....

The Court finds that the NSL nondisclosure and judicial review provisions suffer from significant constitutional infirmities....

As such, the Court finds [the relevant sections of the NSL law to be] unconstitutional....

The Government is therefore enjoined from issuing NSLs ... or from enforcing the nondisclosure provision in this *or any other case*. [Emphasis added.]



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When the first NSL statutes [were first developed](#) in the late 1970s they were limited to foreign powers or to persons whom the FBI had reasonable cause to believe were agents of a foreign power. They were little used because at the time compliance was voluntary and states' consumer privacy laws often allowed financial institutions to ignore any requests from the FBI for information.

In 1986, however, the NSL statutes were broadened and made mandatory, overriding states' provisions. In 1993, the law was broadened much more dramatically, expanding its targets from foreign powers or their agents to anyone the FBI suspected of breaking the law even if they weren't under direct investigation.

Following 9/11, the [USA Patriot Act](#) broadened the NSL law still further, permitting courts to override NSLs only in the event they were issued in "bad faith." And those allowed to issue NSLs were expanded from the FBI to include the Department of Homeland Security, the Pentagon, and the CIA.

In 1994 the FBI issued an NSL to a library in Windsor, Connecticut, demanding that the library provide information that a certain "John Doe" was using on a library computer and that John Doe not be informed about the NSL. When Doe (later revealed to be [Nicholas Merrill](#)) learned of the NSL, he filed suit in a case that gained national attention, [Doe v. Gonzales](#). Merrill, represented by the ACLU as John Doe, argued that the NSL law as modified by the Patriot Act was unconstitutional for the same reasons that Judge Illson ruled the law unconstitutional in the present case: It violates the First Amendment and the separation of powers principle. The judge in the earlier [Doe v. Gonzales](#) case, Victor Marrero (a Clinton appointee), concluded that the law "offends the fundamental constitutional principles of checks and balances and separation of powers."

So, once again, federal congressional overreach, giving authority to the FBI and other agencies to use National Security Letters to obtain private information from American citizens without prior judicial review, has been tempered by a federal judge.

This is not the end of the matter nor even the beginning of the end. Judge Illson has given the government 90 days to respond to her ruling before it becomes effective. But such a ruling gives encouragement to citizens increasingly concerned about the government's continuing abrogation of precious rights coveted by Americans and guaranteed to them by the Bill of Rights of the U.S. Constitution.

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