

In re: National Security Letter

Since the first national security letter (NSL) statute was passed in 1986, the FBI has issued hundreds of thousands of such letters seeking the private telecommunications and financial records of Americans without any prior approval from courts. In addition to this immense investigatory power, NSL statutes also permit the FBI to unilaterally gag recipients and prevent them from criticizing such actions publicly. This combination of powers -- to investigate and to silence -- has coalesced to permit the FBI to wield enormous power and to operate without meaningful checks, far from the watchful eyes of the judicial branch. Not surprisingly, this lack of checks has contributed to a dramatic expansion in the use of these tools across the the country. Indeed, for the period between 2003 and 2006 alone, almost 200,000 requests for private customer information were sought pursuant to various NSL statutes (<http://www.usdoj.gov/oig/special/s0803b/final.pdf>). Prior to 2011, the constitutionality of this underlying legal authority to investigate the records of Americans without court oversight was challenged in court -- as far as we know -- exactly one time (http://en.wikipedia.org/wiki/National_security_letter#Doe_v._Ashcroft).

In 2011, on behalf of an unnamed NSL recipient, EFF brought a major new challenge to one of the NSL statutes on behalf of a telecommunications company that received an NSL in 2011. Not only does this briefing show that the Department of Justice continues to strongly protect the FBI's NSL authority, it highlights a startlingly aggressive new tactic used by the Department of Justice: suing NSL recipients (<https://www.eff.org/node/71216>) who challenge the FBI's authority, arguing that court challenges to such authority themselves amount to breaking the law. The petition, which asked the district court to declare both the FBI's underlying authority to obtain customer records without a warrant as well as the gag order, was argued in the federal district court for the Northern District of California in November of 2011.

Update: On March 14, 2013, Judge Susan Illston of the Northern District of California granted EFF's petition, declaring that 18 U.S.C. § 2709 and parts of 18 U.S.C. § 3511 were unconstitutional. Judge Illston held that the statute's gag provision failed to incorporate necessary First Amendment procedural requirements designed to prevent the imposition of illegal prior restraints. Judge Illston also ruled that the statute was unseverable and that the entire statute, also including the underlying power to obtain customer records, was unenforceable. The judge's order was stayed for 90 days to give the government the opportunity to appeal.

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11-cv-2667



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