



Written by [Michael Tennant](#) on July 23, 2012

Feds Sue Telecom for Fighting Warrantless Search

The Justice Department is suing a telecommunications company for challenging a request from the Federal Bureau of Investigation for customer information — despite the fact that the law authorizing the request explicitly permits such challenges.

According to [documents](#) provided by the Electronic Frontier Foundation (EFF), which is representing the telecom, the company (whose name is one of the many redacted details in the documents) received a national security letter (NSL) in 2011. An NSL is essentially a self-issued search warrant whereby the FBI bypasses the Fourth Amendment and demands information about an individual without bothering to obtain a judge's consent — and forces the recipient of the letter to keep mum about it because disclosure would allegedly harm national security. NSLs were employed somewhat sparingly prior to 2001 but became widely used — and abused, as the Justice Department's inspector general reported in 2007 — after the misnamed Patriot Act loosened the requirements for issuing them.



The telecom chose to fight not just the gag order, as a handful of other companies have done, but also the NSL and the law authorizing it. This, EFF says, is allowed under a 2006 amendment to the law, which gives a company receiving an NSL the right to oppose the gag order and force the FBI to prove in court that disclosure of the NSL would harm national security. "Since Feb. 2009," writes [Wired](#), "NSLs must include express notification to recipients that they have a right to challenge the built-in gag order that prevents them from disclosing to anyone that the government is seeking customer records."

The company is challenging the law on constitutional grounds. First, it argues that that "the nondisclosure provisions of the NSL statute constitute unconstitutional prior restraint" on free speech. Second, it maintains that the entire law "violates the anonymous speech and associational rights of Americans." Moreover, it says, "even if the statute survives constitutional scrutiny, the government must meet its heavy burden to demonstrate, rather than simply assert, that its request is relevant to an authorized investigation of the type listed, that disclosure would risk an enumerated harm and that the investigation is not solely based on activities protected by the First Amendment."

Meanwhile, the telecom is withholding the requested information until a court orders its production, a course of action both the law and the courts permit.



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Previously the government has responded to NSL challenges by filing a motion to compel compliance in which it demonstrates to the court why the NSL must be kept secret. However, those challenges were only to the gag order, not the NSL or the law authorizing it. And they were extremely rare: Of about 300,000 NSLs issued since 2001 — one-sixth of them since the 2006 amendment went into effect — only five are known to have been challenged.

Clearly the Justice Department is unaccustomed to having to defend its attempts to obtain customer data on its own say-so; and it isn't taking this fight lying down. Instead of simply filing the motion to compel as it had done in previous cases, the department filed a civil suit against the telecom on the basis that refusing to comply with the NSL and withholding the requested information until ordered by a court was "interfer[ing] with the United States' vindication of its sovereign interests in law enforcement, counterintelligence, and protecting national security" and therefore illegal.

The government argues that the telecom cannot challenge the law's constitutionality under the 2006 amendment but only under the Constitution. Then it argues that even if such a challenge were brought, the court would not be permitted to rule on the law's constitutionality because of "sovereign immunity": No one can sue the government without its consent.

But, writes the [Wall Street Journal](#):

Orin Kerr, a professor at George Washington University Law School and former computer-crime attorney at the Justice Department, said sovereign immunity usually is applied in lawsuits against the government that seek monetary damages, not in cases disputing the constitutionality of a law.

"I would say this is a puzzling argument," he said. "There has to be a way to challenge the constitutionality of the law."

Not if the government has anything to say about it. While it has in the interim "agreed to stay the civil suit and let the telecom's challenge play out in court," according to *Wired*, and has filed the typical motion to compel, it hasn't completely dropped the civil suit.

"So there's still this live complaint that they have refused to drop saying that our client was in violation of the law," EFF's Matt Zimmerman told *Wired*, "presumably in the event that they lose, or something goes bad with the [challenge case]."

According to the *Journal*, the NSL in the current case is fairly limited, seeking only "the name, address, and length of service associated with one or more accounts." But as Zimmerman told *Wired*, NSLs can request "the numbers and identities of anyone who has communicated with" a particular person or telephone number. "They're asking for association information — who do you hang out with, who do you communicate with, [in order] to get information about previously unknown people."

"That's the fatal flaw with this [law]," he said. "Once the FBI is able to do this snooping, to find out who Americans are communicating with and associating with, there's no remedy that makes them whole after the fact. So there needs to be some process in place so the court has the ability ahead of time to step in [on behalf of Americans]."

Better still, the law authorizing NSLs ought to be repealed — something that isn't likely to happen under President Barack Obama, who has actually sought [expanded NSL authority](#).

The telecom fighting the NSL, which the *Journal* believes is a small, San Francisco-based company called Credo, deserves enormous credit for standing up to the feds — something far too few NSL recipients have been willing to do, and none to this extent. A court finding that the NSL law is



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unconstitutional would go a long way toward restoring “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

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