

*DOE V. ASHCROFT**334 F. Supp. 2d 471 (S.D.N.Y. 2004)*

The District Court for the Southern District of New York held that 18 U.S.C. § 2709, as amended by the USA PATRIOT Act of 2001, which provides for the service of national security letters, is unconstitutional under the First, Fourth, and Fifth Amendments.

“John Doe” is an internet service provider (ISP) served with a national security letter (NSL) by the FBI, directing Doe to turn over certain information to the government relevant to “an authorized investigation to protect against international terrorism.” The letter further stated that Doe was prohibited from disclosing to anyone that a NSL had been issued or that records had been obtained.

NSLs are authorized by 18 U.S.C. § 2709. The statute allows the FBI to compel communications service providers to provide customer records when those records are relevant to a terrorism investigation, as certified by the Attorney General or certain other high-ranking Justice Department officials. After consultation with an attorney, Doe withheld the documents requested under the NSL and subsequently brought suit. Doe claimed that the broad subpoena power of § 2709 violated the First, Fourth, and Fifth Amendments of the Constitution, and that the nondisclosure requirement violated the First Amendment.

Ruling for the plaintiffs on a summary judgment motion, the court held that, as applied to the ISP, § 2709 violates the Fourth Amendment’s prohibition on unreasonable search and seizures because § 2709 effectively lacks provision for ex post review by a neutral tribunal. In addition, the court noted that the application of § 2709 to an ISP may violate that ISP’s subscribers’ rights to anonymous speech under the First Amendment. Finally, the court concluded that the nondisclosure requirement acts as a prior restraint on speech and a content-based speech restriction in violation of the First Amendment.



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