"Today's decision is a clear signal that Congress must enact changes to the overbroad and unconstitutional [national security letter] authority," said Rep. Jerrold Nadler (D-N.Y.), lead sponsor of the legislation.

He rules that investigators ordering Internet and phone companies to turn over customer records must eventually get court approval.

By Richard B. Schmitt, Los Angeles Times Staff Writer
September 7, 2007

WASHINGTON -- -- The Bush administration's war on terrorism suffered another legal setback Thursday when a federal judge struck down part of the revised USA Patriot Act.

U.S. District Judge Victor Marrero ruled that investigators eventually must get a court's approval when ordering Internet providers and phone companies to turn over records without telling customers.

The ruling suggests that despite Congress' attempts to put the Patriot Act on firmer constitutional ground, it still faces significant legal challenges. If upheld on appeal, Marrero's decision could mean major new oversight of the FBI's use of a controversial investigative technique.

The Justice Department is expected to vigorously challenge Thursday's decision.

In his ruling, Marrero said the gag order on letter recipients violated the 1st Amendment. He also ruled that the process for issuing the letters undercut the role of the courts, in violation of the principle of separation of powers under the Constitution. Marrero, who struck down the Patriot Act once before, stayed his decision to give the Justice Department time to appeal.

"The risk of investing the FBI with unchecked discretion to restrict such speech is that government agents, based on their own self-certification, may limit speech that does not pose a significant threat to national security or other compelling..."
government interest,” the judge, who sits in New York, wrote in a 103-page ruling.

Marrero said that the FBI may issue a temporary nondisclosure order without going to court, but that “within a reasonable and brief period of time” it must notify the recipient that the order is no longer in effect -- or else persuade a court of the need for continued secrecy.

Michael Woods, a former head of the FBI national-security law unit, said that if upheld, the ruling would “likely have the effect of making the NSL process so burdensome that the underlying tools are just not worth the trouble.”

He said he expected the government would appeal the decision by Marrero, who was appointed to the federal bench by President Clinton.

Said Dean Boyd, a Justice Department spokesman: "We are reviewing the decision and considering our options at this time."

National security letters -- first authorized in 1986 -- have become one of the FBI's bedrock investigative tools since Congress made them easier to issue as part of the original USA Patriot Act, enacted weeks after the attacks on New York and the Pentagon.

But they also have been a source of criticism, even within the Justice Department.

In a report released in March, the department's inspector general found that many letters had been issued in violation of Justice Department regulations. The watchdog office also found that the FBI's record-keeping system for the letters was in such disarray that reports to Congress understated by thousands the number of letters the bureau was issuing.

Civil-liberties groups praised Thursday's ruling.

The American Civil Liberties Union, which filed the challenge, had argued that legal problems with the statute led to the often-troubled process of how issuing the letters worked in practice.

"One of the arguments we made to Judge Marrero was that the kinds of constitutional deficiencies that the court found in the statute are the kinds that led to the abuses that the [inspector general] documented," said Jameel Jaffer, a lawyer who heads up the ACLU national-security law program. "The FBI can't be invested with the authority to determine by itself, without meaningful judicial oversight, which [national security letter] recipients should be allowed to speak, and which ones should be silenced."

Thursday's ruling follows changes that Congress made last year to address a 2004 ruling by Marrero that found other problems with the letters.

The original Patriot Act prohibited phone companies and Internet providers in all cases from revealing the existence of a national security letter; Marrero found that patently unconstitutional.

Congress -- in legislation reauthorizing the Patriot Act last year -- changed the law to require that the FBI decide in each case whether disclosure would result in a danger to national security. The law was also changed to give letter recipients a limited right to challenge the gag orders in court, but required courts to accept as "conclusive" testimony of FBI officials who found secrecy was needed.

Marrero on Thursday said those standards were "overly deferential" to the government, and forestalled "meaningful judicial review."

He also said that he was concerned that few phone companies and Internet providers had challenged the secrecy orders in court, and that barriers the government had erectied were such that it was not worth the time or expense to sue. He said only two suits had been filed since the law was enacted two decades ago.

The FBI issued more than 140,000 national security letters from 2003 to 2005, according to the opinion.

Marrero said the letters pose "profound concerns to our society," enabling the government to "unmask the identity of Internet users engaged in anonymous speech" or obtain itemized lists of individual e-mail accounts.

The law that Congress wrote "grants broad discretion to the FBI to completely restrict constitutionally protected speech on the basis of its content, and it places the burden
of challenging this restriction in court solely on the [national security letter] recipient -
- a party that in the overwhelming majority of cases, lacks any real incentive to do
so," he said.

"It is the government that must bear the burden of going to court to suppress the
speech and that must bear the burden of proof once in court," he added.

In July, Democratic members of Congress introduced legislation that would remove
the gag order provision that the court found unconstitutional.

"Today's decision is a clear signal that Congress must enact changes to the
overbroad and unconstitutional NSL authority," said Rep. Jerrold Nadler (D-N.Y.),
lead sponsor of the legislation.

rick.schmitt@latimes.com