

National Security Letters Declared Unconstitutional by US 9th Circuit Court

March 26, 2013 - Over the years, we've talked about the problems associated with National Security Letters on a number of occasions. In case you are not familiar with NSL's, they are letters (usually presented by the FBI) that order the recipient (usually a business) to turn over highly personal information about customers. They are issued without court supervision and it is illegal for the recipient to talk to anyone other than their attorney about them. The penalty for violating that gag order is real jail time and some stiff fines. Best of all, it is up to the issuing agency to police their own activities.

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s.type = 'text/javascript';  
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})();
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NSLs are a direct result of the Patriot Act; which was passed shortly after 9/11. The letters were a knee-jerk reaction that was unnecessary given the fact that law enforcement agencies could have gotten the same type of information by using the already existing Foreign Intelligence Surveillance Act (FISA). FISA specifically setup a system of federal courts, supervised by federal judges, to deal with classified matters. The Patriot Act allowed federal law enforcement agencies to bypass FISA and the court system entirely; a clear violation of the Fourth Amendment. And the gag order imposed by on NSLs has always appeared to violate the First Amendment. But that didn't stop the FBI.

The way that the Patriot Act was written, recipients of NSLs were originally prohibited from speaking with anyone including an attorney. But that provision of the law was challenged several years ago and has already been deemed unconstitutional. Even so, the other provisions of the gag order have remained in place.

Earlier this month, Federal District Judge Susan Ilston found a number of provisions associated with NSLs didn't meet the standards required by the Constitution. She wrote that the gag order provisions create "too large a danger that speech is being unnecessarily restricted." She was also bothered that the law placed strict limits on any judge's ability to lift a gag order associated with an NSL. She found those restrictions unconstitutional because they prevent any meaningful form of judicial review.

Because of these issues, Ilston declared that the letters themselves are unconstitutional and said that if Congress wants law enforcement agencies to continue to use NSLs, that it is up to Congress and not the courts to bring them in line with the Constitution.

Over the years there have been a number of reports on the use of NSLs. The Justice Department's own Inspector General found that the FBI was inappropriately using the letters to spy on Americans that had no ties to foreign intelligence or terrorism. Yet, in 2011 alone, the FBI issued more than 16,000 NSLs without any supervision or standards

of accountability. Since the letters are often used to track bank transactions and acquire account information, they specifically impact the financial privacy of targeted individuals without any due process requirements.

Although Ilston's finding is immediate, she stayed her order for 90 days to give the Justice Department the ability to appeal. If they do, the case would be heard by the US 9th Circuit Court of Appeals. If not, Ilston's order would only impact the portion of the country covered by the US 9th Circuit which includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. The court also covers two US territories; Guam and the Northern Mariana Islands.

byJim Malmberg

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