

## Secret FBI Spying Program Headed For High Court Showdown

By **Allison Grande**

*Law360, New York (March 20, 2013, 9:47 PM ET)* -- A California federal judge recently struck down a controversial law that prevents companies from telling their customers that the FBI is spying on them, setting the stage for a circuit split that could prompt the U.S. Supreme Court to wade into the thorny First Amendment issue, attorneys say.

In a 24-page decision handed down March 14, U.S. District Judge Susan Illston ruled that the statute authorizing the FBI to serve secret “national security letters” demanding subscriber information from wire and electronic communications providers was unconstitutional because of a nondisclosure provision that gives the government the authority to block companies from disclosing the request without obtaining court approval.

Judge Illston ordered the FBI to stop using national security letters and to refrain from enforcing the accompanying gag orders, but she stayed her judgment for 90 days “in order for the Ninth Circuit to consider the weighty questions of national security and First Amendment rights presented in this case.”

If the appeals court affirms the judgment, attorneys predict that the battle will end up in the Supreme Court. Judge Illston's decision conflicts with the Second Circuit's 2008 ruling in *John Doe Inc. v. Mukasey*, which held that the government could overcome the statute's procedural defects by telling recipients that they have the right to challenge gag orders and then defending its secrecy decision in court if the company does so.

“There could easily be a split between the Second and Ninth circuits and, if so, the case will likely go up to the Supreme Court to resolve since it involves the constitutionality of a national security program,” Mayer Brown LLP partner Alex Lakatos told Law360.

Weisbrod Matteis & Copley PLLC partner Peter Toren said the federal government might have trouble convincing the Ninth Circuit to back its widespread use of a gag order — which is included in about 97 percent of national security letters issued by the FBI, according to Judge Illston's ruling — given the court's reputation for issuing decisions that go against the government.

“The government is going to have its work cut out for it before the Ninth Circuit,” he said.

Judge Illston provided the FBI with a glimpse of the hostility that it may face before the Ninth Circuit, according to attorneys.

Similar to the Second Circuit's 2008 ruling, Judge Illston found that imposing gag orders on companies without judicial oversight, as permitted by the national security letter program created by 18 U.S.C. Section 2709, "clearly restrains speech of a particular content — significantly, speech about government conduct," in violation of the the First Amendment.

But Judge Illston refused to allow the government to make concessions to save the surveillance program like the Second Circuit did, instead ruling that "the court cannot ignore express language in the statute in order to come up with 'reasonable interpretations' that would be constitutional."

"Judge Illston's ruling reflects a different level of trust in the executive branch than the Second Circuit," ZwillGen PLLC founding partner Marc Zwillinger said. "She takes the same route as the Second Circuit, but comes to a different conclusion that demonstrates a refusal to rely on the federal government to do certain things to make this statute constitutional."

While national security demand letters have existed since the 1970s, the USA Patriot Act of 2001 greatly expanded the FBI's power to issue them by allowing their use in seeking any information relevant to an investigation of "terrorism or clandestine intelligence activity."

According to the U.S. Department of Justice, the FBI sent more than 24,000 national security letters to Internet service providers and other companies in 2010, seeking information such as the name, address, length of service and billing records of more than 14,000 individuals in the U.S. Most of the demands were accompanied by gag orders that prohibited companies from disclosing the requests.

While the unnamed telecommunications provider that brought the challenge is one of the few to mount a public protest to the secrecy order, the outcome of its case will have a broad impact on the thousands of companies that receive national security letters in an environment where customers expect transparency about how their information is being shared.

"The current law puts many law-abiding companies in a difficult position," Toren said. "They want to take steps to make sure that the FBI is doing everything in its power to investigate terrorism and other crimes, but at the same time, companies want to respect the privacy and constitutional rights of their subscribers."

Google Inc. tried to shed some of the secrecy surrounding national security letters earlier this month, when it became the first Internet company to release data on the letters. However, it was limited to reporting broad numerical ranges rather than exact numbers for how many requests it received, because of "concerns raised by the FBI, Justice Department and other agencies that releasing exact numbers might reveal information about investigations."

"Google being able to only disclose that it received between 0 and 999 requests annually since 2009 just shows how there's not clear disclosures allowed about a process that is not well understood," Zwillinger said.

No matter what the Ninth Circuit does with Judge Illston's ruling, attorneys predict that either courts or lawmakers will soon remove some of the secrecy and difficulties for companies by allowing them to more easily challenge the information disclosure demands.

"Even if the Ninth Circuit or the Supreme Court do what the Second Circuit did and read a fix into the statute, or if they find that the statute doesn't work and gives it back to Congress to fix, chances are that the ability for companies to challenge the gag order in the statute will improve," Lakatos said.

Counsel information for the unnamed telecommunications provider was not immediately available.

The case is In re: National Security Letter, case number 11-cv-02173, in the U.S. District Court for the Northern District of California.

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