

Attorneys:

- **Timothy G. Ronan**
tronan@pullcom.com
203.674.7933
- **James T. Shearin**
jtshearin@pullcom.com
203.330.2240

FBI Prohibited From Issuing National Security Letters

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In a detailed opinion issued just this month, the U.S. District Court for the Northern District of California struck down an oft-used FBI counterterrorism tool. Under the statute at issue, the FBI has issued tens of thousands of so-called National Security Letters (“NSLs”) to ECSPs – electronic communications service providers. Those NSLs have required their recipients to disclose to the FBI certain information about their customers and, in almost 97% of cases, have also prohibited disclosure of their contents and even their very existence.

Writing for the Northern District of California in [In re National Security Letter](#), 2013 WL 1095417, Judge Susan Illston prohibited the FBI from issuing NSLs, finding that the statutes authorizing the NSL’s gag order provisions, – 28 U.S.C. §2709(c) and 28 U.S.C. §3511(b) – failed to meet Constitutional muster. Then Judge Illston identified several crucial shortcomings. First, the statutes did not provide the procedural safeguards required by the First Amendment: that the restriction on speech be short-lived, subject to prompt judicial review, and the government’s burden to sustain. Second, it was overbroad; the statutes authorized the gag order in many more cases than where justified by the government’s admittedly strong interest in national security. Third, the statutes violated separation of powers principles by purporting to take from the federal courts the ability to determine whether a gag order was appropriate in each particular case.

Most notable about the Northern District’s decision, however, is its departure from established Second Circuit authority on the same issues. In a 2008 case, the Second Circuit – the appellate court that reviews federal trial court decisions from Connecticut, New York, and Vermont – bent over backwards construing the same statutory language so as to avoid deciding the Constitutional permissibility of many of its provisions. Unlike the Second Circuit, which largely accepted the

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government's position that it would act under the statute so as to satisfy First Amendment principles, the Northern District stressed that a plain reading of the statutes required no such First Amendment compliance.

Judge Illston stayed the ban she entered against the FBI's issuance of NSLs for 90 days. In the coming months, the Ninth Circuit is expected to review the Northern District's decision, opening the door to a split of authority between the Federal Circuit Courts of Appeal and potential Supreme Court review. At the very least, the Northern District's opinion calls into question the Second Circuit's earlier holding.

National security is a most compelling issue; however, freedom of speech is perhaps the most fundamental Constitutional right. Given the paucity of authority on the issue, – which, in large measure, civil libertarians might say is the consequence of the statute's barriers to judicial review, – the door is still very much open for ECSPs to challenge NSL gag orders.

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