



Office of the Attorney General

Washington, D.C. 20530

May 8, 2009

Mr. Morgan Frankel
Senate Legal Counsel
United States Senate
Washington, D.C. 20510

Re: Doe v. Holder, 549 F.3d 861 (2d Cir. 2008)

Dear Mr. Frankel:

Pursuant to 28 U.S.C. § 530D, I am writing to advise you that the Department of Justice has determined not to file a petition for a writ of certiorari in the above-referenced case. The case involves a challenge to the constitutionality of 18 U.S.C. § 2709(c), which prohibits the recipient of a National Security Letter (NSL) from disclosing the letter's existence, and 18 U.S.C. § 3511(b), which provides for judicial review of the nondisclosure requirement at the behest of an NSL recipient. The Department has determined not to seek Supreme Court review at this time because the United States Court of Appeals for the Second Circuit's decision in large part upholds the constitutionality of the NSL statutes and permits the federal government to implement the NSL program without any likely practical impediment. It is far from certain that Supreme Court review would yield a more favorable decision than the one that the court of appeals issued. Moreover, the court of appeals' decision is interlocutory in nature, and review of such decisions is disfavored. The government retains the ability to seek further review in the Supreme Court after the remand if problems unexpectedly arise in implementation of the court of appeals' decision.

This action arose when, in February 2004, the FBI served an NSL on an Internet service provider (identified in this litigation as "John Doe"). The provider, along with the ACLU, filed suit, challenging the statute's constitutionality on numerous grounds. The United States District Court for the Southern District of New York entered summary judgment for the plaintiffs in September 2004. The court held that Sections 2709(c) and 3511(b) violate the First Amendment and the separation of powers, and enjoined the government not only from enforcing the nondisclosure requirement but also from issuing any NSLs.

In the enclosed decision, the court of appeals overturned the injunction against issuing NSLs and substantially narrowed the scope of the injunction against enforcing the nondisclosure requirement. The appeals court identified only two narrow constitutional deficiencies in the challenged provisions. First, the court held that the government, rather than the NSL recipient, must bear the burden of initiating judicial review when – but only when – the recipient gives the government prompt notice that it objects to the nondisclosure requirement. Second, the court

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held that, although the government's determinations regarding the need for nondisclosure are entitled to deference, they may not be made conclusive on the trial court. The court remanded the case for further proceedings.

The court of appeals' decision is, for the most part, favorable to the United States. The decision restores the government's authority to issue NSLs, which the district court had enjoined. The decision also confirms the constitutionality of restricting the disclosure of NSLs where the statutory criteria are met and restores the government's ability to enforce the nondisclosure requirement. The court's opinion states that "[a] demonstration of a reasonable likelihood of potential harm, related to international terrorism or clandestine intelligence activities, will virtually always outweigh the First Amendment interest in speaking about such a limited and particularized occurrence as the receipt of an NSL and will suffice to maintain the secrecy of the fact of such receipt." 549 F.3d at 882. The decision thus facilitates the government's continued use of NSLs and its concomitant ability to prevent harmful disclosures by NSL recipients.

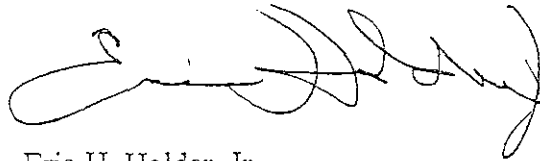
Although the court of appeals' decision does hold that the First Amendment requires some slight modifications to the operation of Sections 2709(c) and 3511(b), the mandated modifications are highly unlikely to impair the statute's objective or the government's ability to maintain the necessary secrecy of counter-terrorism and counter-intelligence investigations. The decision obligates the government to initiate judicial review proceedings only if an NSL recipient affirmatively objects to the nondisclosure requirement. Since the Second Circuit issued its decision, the Federal Bureau of Investigation (FBI) has issued more than 3,000 NSLs that provide recipients with notice of their right to make timely objections. Thus far, no recipient has notified the FBI that it objects to the nondisclosure requirement and wishes to make a disclosure about an NSL. Accordingly, the government has not had to initiate any judicial proceedings to enforce the nondisclosure requirement. Based on this experience, the FBI does not anticipate that the notice mechanism prescribed by the court will burden the government or result in unwarranted disclosures.

The FBI also does not anticipate that the efficacy of the nondisclosure mechanism will be undermined by the Second Circuit's holding that the government's determinations regarding national security and diplomatic relations may not be made "conclusive" on the courts. The court of appeals made clear that a district court must give substantial weight to the government's assessment of national security and diplomatic risks. See 549 F.3d at 882 (stating that a reviewing court must avoid "intruding on the prerogative of the Executive Branch to exercise its judgment on matters of national security" and that "[s]uch a judgment is not to be second-guessed"). The standards of judicial review articulated by the Second Circuit thus appear to pose no threat to the interests in nondisclosure advanced by the statute in the rare circumstances in which such review actually occurs.

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Finally, the Second Circuit's decision is interlocutory, and review in the Supreme Court of such decisions is presumptively disfavored. See Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); American Construction Co. v. Jacksonville, Tampa and Key West Railway Co., 148 U.S. 372, 384; Robert L. Stern, et al., Supreme Court Practice § 4.18, at 280 (9th ed. 2007). On remand, the district court will implement the Second Circuit's judgment by modifying the terms of the injunction to conform to the appellate decision and applying the appellate court's standards for judicial review to the disclosure request in this case. If, contrary to the government's expectations, the district court's actions impose harms on the FBI's use of NSLs, the government will have the opportunity to seek further review, including of the underlying constitutional issues. Accordingly, even without a certiorari petition from the court of appeals' present decision, the government retains the option of seeking further review of that court's determinations if unforeseen events indicate that is the prudent course.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric H. Holder, Jr.", written in a cursive style.

Eric H. Holder, Jr.
Attorney General

Enclosure