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Provision of Patriot Act Is Ruled Unconstitutional

A method used to obtain electronic data allows for 'coercive searches,' says a judge, who grants time for an appeal.

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A federal judge Wednesday curtailed the government's power in terrorism investigations under the USA Patriot Act, saying a widely used tool to obtain Internet and other electronic records from communications firms violated the Constitution by permitting "coercive searches" without any judicial review.

The 120-page ruling, by U.S. District Judge Victor Marrero in New York, came in a lawsuit filed by the American Civil Liberties Union on behalf of an Internet service provider that had received a form of administrative subpoena known as a national security letter. The FBI has issued hundreds of these letters since the Sept. 11 terrorist attacks.

The letters have drawn fire because they are issued without any court oversight or finding of probable cause and prohibit the recipients of the letters from ever disclosing that they have been received. Authorized by law since the mid-1980s, the letters have become more widely used since the Patriot Act gave the government greater discretion in issuing them in terrorism investigations.

The Patriot Act permits widespread access to electronic communications such as basic subscriber information and call records from phone companies and e-mail and other Web-related information from Internet service providers.

It does not, however, allow the government access to the actual contents of the communications.

"Today's decision is a stunning victory against the John Ashcroft Justice Department in striking down one of the major surveillance portions of the USA Patriot Act," said Anthony D. Romero, executive director of the ACLU.

The decision marks an unusual defeat for the department and other proponents of the Patriot Act, the terrorism-fighting law enacted within weeks of the 2001 hijackings and attacks that killed almost 3,000 people.

The law has been criticized as compromising civil liberties and spawned considerable litigation. Until Wednesday's decision, though, only one constitutional challenge had been successful: In January, a federal judge in Los Angeles, citing the free speech provision of the 1st Amendment, ruled against the part of the act making it illegal to "give expert advice or assistance" to foreign terrorist organizations.

In a report issued in July, the Justice Department contended that the act had been effective in saving lives. It noted that some provisions were instrumental in the disruption of alleged terrorist cells in upstate New York and Oregon.

ACLU officials said the reasoning of Wednesday's ruling, including criticism of the government for undue secrecy, could be used to attack other provisions of the act.

In a separate suit, the group is challenging a provision that gives the government wide access to business records. Like the section of the act on national security letters, that provision also strictly prohibits those receiving the demands from disclosing them publicly.

The suit on national security letters was filed under seal because the ACLU feared it might be accused of violating the act's nondisclosure provision by acknowledging in open court that its client had received such a letter.

The client was identified only as "John Doe" in the suit.

A Justice Department spokesman said officials were reviewing the decision and declined to comment further.

The ruling was stayed for 90 days to give the government time to appeal.

The ruling does not prohibit the government from obtaining the information, only the means through which it obtained it in the past.

In its suit, the ACLU argued that the law gave the FBI unchecked power to obtain private information and gave the recipient no opportunity to challenge the requests.

In effect, the law gave the FBI alone the power to issue and enforce its own letters, the ACLU argued.

The group also argued that the permanent ban on disclosing the existence of the requests, even to an attorney, was an

unconstitutional prior restraint on speech that violated the 1st Amendment.

The government argued that the statute implicitly afforded letter recipients the opportunity to challenge the demand for information in court, just as they could with any other subpoena.

It also said the prohibition on disclosure was essential in protecting the integrity and efficacy of terrorism and

counterintelligence investigations.

Marrero declined to read such safeguards into the law. In practice, he said, the law operated in a way that coerced recipients into complying.

"Objectively viewed, it is improbable that an FBI summons ... phrased in tones sounding virtually as biblical commandment ... would not be perceived with some apprehension by an ordinary person," the judge wrote.

Marrero said he was also concerned that the law could result in violations of subscribers' own constitutional rights through the production of information protected by the 1st Amendment, such as e-mail or phone lists of political organizations.

He said he appreciated the government's need to keep sensitive investigations under wraps, but found the "automatic, categorical and permanent scope" of the order excessive.

"Secrecy's protective shield may serve not as much to secure a safe country as simply to save face," he

wrote.

Unlike subpoenas issued through a grand jury, administrative subpoenas are issued on the authority of an agency itself and are common among regulatory entities. The Internal Revenue Service uses them to investigate tax code violations, the Securities and Exchange Commission to investigate stock fraud.

But there has always been a reluctance to give this kind of power to the FBI without the involvement of a prosecutor, grand jury or judge. In general, the government is allowed to obtain stored electronic communications without a customer's permission only through a subpoena or court order.

A 1986 law carved out an exception in terrorism or

counterintelligence cases where the target was said to be an agent of a foreign power.

The Patriot Act further softened the standard so that the FBI had only to find that the information was "relevant" to an ongoing terrorism investigation.

The ACLU said that although its suit challenged letters issued for electronic communications, the judge's reasoning would apply with equal force to separate provisions that authorized searches for financial and bank records as well as credit reports.

"At a minimum, it calls into question the constitutionality of those provisions," said Jameel Jaffer, an ACLU staff attorney.

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