U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7259
DNL:SRMcIntosh Washington, D.C. 20530

Tel: (202) 514-4052
Fax: (202) 514-8151

March 29, 2006

Ms. Roseann B. MacKechnie
Clerk, United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

Re: John Doe v. Alberto Gonzales, No. 05-0570-cv
John Doe v. Alberto Gonzales, No. 05-4896-cv (consolidated)

Dear Ms. MacK

and permits the Court to vacate the judgment and dismiss the appeal in No. 05-4896.

1. The Reauthorization Act's NSL Provisions

The plaintiffs' claims in these cases focus on three aspects of § 2709: the availability of pre-enforcement judicial review of NSLs, the permissibility of disclosing an NSL to the recipient's counsel, and the scope, duration, and application of the nondisclosure requirement. The Reauthorization Act's NSL provisions address each of these elements.

A. Pre-enforcement Judicial Review. – Section 115 of the Act expressly authorizes pre-enforcement judicial review of NSLs. Specifically, any recipient of an NSL "may * * * petition [a district court] for an order modifying or setting aside the request" for information. 18 U.S.C. § 3511(a) (added by Act § 115). The district court is authorized to "modify[] or set[] aside the request" if the court determines that compliance "would be unreasonable, oppressive, or otherwise unlawful." Id. If a recipient fails to comply with an NSL, the Attorney General may apply to a district court for an order compelling compliance. Id. § 3511(c).

B. Disclosure to Counsel. – Section 116 of the Act expressly authorizes the recipient to disclose the NSL to the recipient's counsel. Specifically, the law now provides that the general prohibition on disclosure does not apply to disclosure to "an attorney to obtain legal advice or legal assistance with respect to the request * * * ." 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)).

C. Imposition of the Nondisclosure Requirement. – Previously, the general prohibition against disclosure of NSLs in § 2709(c) took effect automatically upon the issuance of an NSL and applied to all NSLs. Section 116 of the Act makes the imposition of the nondisclosure requirement contingent on a pre-issuance determination of need by the government. Specifically, the nondisclosure requirement applies only if the Director of the FBI or other specified FBI officials certify that "otherwise there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person * * * ." 18 U.S.C. § 2709(c)(1) (as amended by Act § 116(a)). When such a certification is made, the NSL itself must notify the recipient of the nondisclosure requirement. Id. § 2709(c)(2).

D. Judicial Review of the Nondisclosure Requirement. – At any time following receipt of an NSL, the recipient may petition a district court for an order "modifying or setting aside a nondisclosure requirement imposed in connection with such a request." 18 U.S.C. § 3511(b)(1) (added by Act § 115). If the petition is filed one year or more after the issuance of the NSL, the government must either recertify the need for nondisclosure within 90 days or terminate the nondisclosure requirement. Id. § 3511(b)(3). The district court may grant relief from the nondisclosure requirement if it finds "no reason to believe" that disclosure may cause any of the harms underlying the certification. Id. § 3511(b)(2), (b)(3). If, in response to the petition, the Director of the FBI or other specified senior government officials certify that disclosure might harm national security or diplomatic relations, that determination is conclusive unless the court finds that it was made in bad faith. Id. In contrast, the bad-faith standard is inapplicable, regardless of who makes the certification, for certifications that disclosure might interfere with an investigation or endanger life or physical safety. Id.

2. Effect of the Reauthorization Act's NSL Provisions on The Present Appeals

A. Applicability of the New NSL Provisions to the Pending NSLs

The extent to which new laws are applicable to pre-existing controversies is governed by Landgraf v. USI Film Products, 511 U.S. 244 (1994). Under Landgraf, "prospectivity [is] the appropriate default rule," and new legislation is not to be applied retroactively "absent clear congressional intent favoring such a result." 511 U.S. at 272. The application of a statute is considered to be retroactive if "it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." Id. at 280. However, retroactivity concerns are not present "[w]hen the intervening statute authorizes or affects the propriety of prospective [i.e., injunctive] relief." Id. at 273. Similarly, the application of new procedural rules to pending cases ordinarily does not raise retroactivity concerns. Id. at 275; Salahuddin v. Mead, 174 F.3d 271, 275 n.2 (2d Cir. 1999)

the right to disclose the NSL to counsel, which was always implicit in the text of § 2709(c), is now expressly set forth in § 2709(c)(1).

The district court thought that § 2709 effectively coerced recipients into forgoing pre-enforcement challenges because "neither the statute, nor an NSL, nor the FBI agents dealing with the recipient" notified the recipient that the NSL could be disclosed to the recipient's counsel, and because the right to seek pre-enforcement review "is not apparent from the plain language of the statute, the NSL itself, or accompanying government communications * * * ." SPA-66-67; see also SPA-74 ("An NSL recipient would be unable to learn from the text of § 2709 that the [NSL] letter was not actually coercive") (emphasis omitted). The enactment of provisions that expressly authorize disclosure to counsel and pre-enforcement challenges eliminates these concerns, just as the express authorization of pre-enforcement review of criminal subpoenas in Rule 17 eliminates any concern that recipients of a subpoena will be coerced into forgoing judicial review by the categorical language of such subpoenas. Any recipient of an NSL now has express statutory notice that he can disclose the NSL to counsel in order to seek "legal advice or legal assistance with respect to the request" (§ 2709(c)(1)) and that he and his counsel can obtain judicial review of the NSL before it is enforced (§ 3511(a)). Even before these statutory changes, the district cour

against the plaintiffs with respect to the NSL recipient's identity. SPA-31. The new statutory provisions regarding judicial review of nondisclosure requirement render it unnecessary for this Court to address the validity of that injunction and the constitutional holding on which it rests.

As explained above, with the enactment of 18 U.S.C. § 3511(b), the district court now has statutory authority that it did not previously possess to "modify or set aside" the nondisclosure requirement if it finds that there is no reason to believe that disclosure may result in the enumerated harms. At the same time, the FBI now has statutory authority that it did not previously possess to make case-by-case determinations regarding the need for nondisclosure. To the extent that the plaintiffs are seeking to modify the nondisclosure requirement with respect to disclosure of the NSL recipient's identity, the FBI has determined that it will not oppose that request. As a result, the district court is free to enter an immediate order under § 3511(b) modifying the nondisclosure requirement to allow the plaintiffs to disclose the recipient's identity.

As soon as the district court acts to allow disclosure of the NSL recipient's identity under § 3511(b), this appeal will become moot. At that point, the appropriate disposition by this Court will be to dismiss the appeal and vacate the preliminary injunction. Vacatur of preliminary injunction is appropriate under United States v. Munsingwear, Inc., 340 U.S. 36 (1950), and this Court's broad authority to "direct the entry of such appropriate judgment * * * as may be just under the circumstances." 28 U.S.C. § 2106. The district court's opinion is predicated on a feature of the statute – the automatic, categorical, and permanent imposition of the nondisclosure obligation – that Congress itself has now eliminated. There is no reason to leave an unreviewed ruling of unconstitutionality on the books, nor will there be anyde44.7600 0.0000 TD(liminary)Tj40.3200 0.0000 Tc326