

Alaska Bill Would Ban "Material Support or Resources" to NSA

By Michael Boldin

JUNEAU, Alaska (Jan. 21, 2015) - A bill filed in Alaska late last week would ban "material support or resources" to the NSA. This would not only support efforts to turn off NSA's water in Utah, but have practical effects on federal surveillance programs if passed.

Alaska Sen. Bill Wielechowski prefiled SB13 on Jan. 16. The legislation would prohibit the state and its municipalities from using assets, including personnel, to assist a federal agency in collecting certain telephone records or electronic data without a warrant, making it the fourth state to introduce legislation similar to a bill up for consideration in Utah this year.

Wielechowski took a little different approach to protecting the Fourth Amendment in the way he crafted his bill.

In 2013, Alaska Gov. Sean Parnell signed anti-commandeering legislation into law prohibiting the state from assisting the federal government in the enforcement of laws that violate the right to keep and bear arms, in implementing indefinite detention without due process under the National Defense Authorization Act, and in enforcing or implementing the Real ID Act of 2005. Instead of drafting a standalone law to ban state assistance to federal spies, the Alaska bill amends this 2013 law to include a prohibition of state assistance to any federal agency engaging in warrantless spying.

A state or municipal agency may not use or authorize the use of an asset to implement or aid in... the collection by a federal agency of electronic data without a search warrant; in this paragraph, "electronic data" includes electronic mail and text messages; or the collection by a federal agency of telephone records without a search warrant, unless the records are collected in a manner consistent with state law.

"This is a great strategic move," OffNow executive director Mike Maharrey said. "By piggybacking onto existing anti-commandeering law, Wielechowski eliminates any debate about whether or not the state can prohibit material support to federal agencies. That's been settled in Alaska. Now it simply becomes a question of whether the state wants to cooperate

with unconstitutional NSA spying or not. Anybody who opposes this bill is essentially saying, 'Why yes, I think we should help the feds violate your rights.'

SB13 also adds an additional provision to state law limiting home rule municipality powers stipulating that "a municipality or an agent of a municipality may not assist, cooperate with, or participate with a federal agency in the collection of" electronic data or telephone records without a search warrant, and prohibits the "use, in a criminal investigation or prosecution, records or data that are provided by a federal agency or an officer or employee of a federal agency that were collected by the federal agency without a search warrant or in another manner inconsistent with state law."

"With all of its provisions amending various existing statutes, the bill seems rather complex," Maharrey said. "But it really isn't when you get down to it. Simply put, if passed, this legislation will end any cooperation by state or local agencies in warrantless spying. It does exactly what our Fourth Amendment Protection Act does. It simply takes a different legislative approach. This is a solid bill and a great strategy."

LEGALITY

As mentioned earlier, Wielechowski's bill adds to an anti-commandeering law already on the books in Alaska. The Supreme Court has repeatedly upheld the principle that the states cannot be required to expend resources or manpower to help the federal government carry out its acts or programs.

Known as the anti-commandeering doctrine, the legal principle rests primarily on four Supreme Court opinions dating back to 1842. In *Prigg v. Pennsylvania* (1842), Justice Joseph Story held that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. He said that it was a federal law, and the federal government ultimately had to enforce it.

The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The

states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or intrusted to them by the Constitution.

Other key cases include *New York v. United States* (1992), *Printz v. United States* (1997), and *Independent Business v. Sebelius* (2012).

Noted Constitutional scholar Randy Barnett of Georgetown Law said, “*State governments are free to refrain from cooperating with federal authorities if they so choose. In general, states cannot attack federal operations, but that’s not the same as refusing to help.*”

RESOURCES, SUPPORT FOR UTAH

The original definition of “material support or resources” included providing tangible support such as money, goods, and materials and also less concrete support, such as “personnel” and “training.” Section 805 of the PATRIOT Act expanded the definition to include “expert advice or assistance.”

Practically-speaking, the legislation would almost certainly stop the NSA from ever setting up a new facility in Alaska.

In 2006, the agency maxed out the Baltimore-area power grid, creating the potential, as the Baltimore Sun reported, for a “virtual shutdown of the agency.” Since then, the NSA aggressively expanded in states like Utah, Texas, Colorado and elsewhere, generally focusing on locations that can provide cheap and plentiful resources like water and power.

In a recent hearing on the Utah Fourth Amendment Protection Act, a Utah state rep, intentionally or not, made a plea to other states to help out. “If Utah goes through all this trouble to turn off the water, what’s to stop the NSA from moving to another state?” he asked.

“What will stop the NSA from moving? Bills like this one introduced by Sen. Wielechowski,” Maharrey said. “The legislation pulls the welcome mat right out from under the NSA. And if enough states step up and pass bills like this, we can literally box them in and shut them down.”

PRACTICAL EFFECT

By including a prohibition on participation in the illegal collection and use of electronic data by the state, SB13 would also prohibit what former NSA Chief Technical Director William Binney called the country's "greatest threat since the Civil War."

The bill would ban the state from obtaining or making use of electronic data or metadata obtained by the NSA without a warrant.

Reuters revealed the extent of such NSA data sharing with state and local law enforcement in an August 2013 article. According to documents obtained by the news agency, the NSA passes information to police through a formerly secret DEA unit known Special Operations Divisions and the cases "rarely involve national security issues." Almost all of the information involves regular criminal investigations, not terror-related investigations.

In other words, not only does the NSA collect and store this data. using it to build profiles, the agency encourages state and local law enforcement to violate the Fourth Amendment by making use of this information in their day-to-day investigations.

This is "the most threatening situation to our constitutional republic since the Civil War," Binney said.

The bill would also set the stage to end partnerships between the NSA and state universities.

WHAT'S NEXT

Alaska joins South Carolina, Indiana and Missouri, along with Utah, in considering this type of legislation for 2015. Legislators in seven other states have committed to doing the same. Sources close to OffNow indicate even more states will likely follow. The bill in Utah is being prepared for debate and discussion in the state House right now.

SB13 has yet to be assigned to a committee.