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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**IN RE GRAND JURY SUBPOENA SERVED ON
THE AMERICAN CIVIL LIBERTIES UNION**

MEMORANDUM OF LAW
IN SUPPORT OF THE ACLU'S MOTION TO QUASH

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PRELIMINARY STATEMENT

Pursuant to Fed. R. Crim. P. 17(c)(2), the American Civil Liberties Union (“ACLU”) moves to quash a subpoena served on it on November 20, 2006, which by agreement was made returnable December 11, 2006. The subpoena (annexed as Exhibit 1 to the accompanying Declaration of Joshua L. Dratel (“Dratel Decl.”) seeks no testimony and no information that the government does not already have, only “any and all copies of a document marked ‘Secret,’ dated 12/20/05, with the heading ‘Information Paper’ that was received by the ACLU on or about October 23, 2006.” Since the subpoena has no investigatory purpose but only a confiscatory and information-suppressing one, and the subpoena power does not extend to confiscating “any and all” copies of any such documents, it should be quashed under longstanding law.

Prior to the service of any subpoena, in two conversations with counsel on November 20, 2006, Assistant United States Attorney Jennifer Rodgers demanded that the ACLU provide the government with any and all copies of a document that the ACLU had received a month earlier and detailed assurances that no copies whatever would be retained. She initially mentioned no subpoena, and the government’s exclusive purpose appeared to be collecting any and all copies of a “secret” document that it knew had been provided to the ACLU (and apparently by whom and when). When the ACLU declined to comply voluntarily, the government promptly served the ACLU with a grand jury subpoena. By its express terms, the subpoena instructs the ACLU to turn over “any and all copies” of the identified document to the government. Like the prior calls from AUSA Rodgers, the unambiguous purpose of the subpoena is to eliminate any copies of the document from the ACLU’s possession or control.

Such a subpoena is unprecedented: so far as research reveals, not a single reported decision even mentions, much less enforces, any such subpoena. If enforced, it would provide

the government with an easy expedient to avoid the rule of *New York Times Co. v. United States*, 403 U.S. 713 (1971) (the “*Pentagon Papers*” case), which prevents the government from obtaining injunctions barring publication of classified documents, unless publication would cause “direct, immediate, and irreparable damage to our Nation or its people.” *Id.* at 730 (Stewart & White, JJ., concurring). The grand jury’s concededly broad powers do not extend beyond investigative purposes to support subpoenas vacuuming up all copies of documents allegedly concerning the national defense (even if marked or classified “secret”) that come into the possession of those engaged in reporting, public education, and public advocacy. No official secrets act has yet been enacted into law, and the grand jury’s subpoena power cannot be employed to create one.

Furthermore, even if the subpoena were construed to seek what the government has not sought and does not need – a single copy of the identified document rather than “any and all copies” in the ACLU’s possession – the subpoena should still be quashed because it has neither an evidentiary nor investigatory function. Under *Branzburg v. Hayes*, 408 U.S. 665 (1972), and the qualified First Amendment privilege applied in this Circuit, the grand jury cannot be used, as it is being used here, for the purpose of suppressing information. Indeed, this case presents the very scenario described as unconstitutional by both Justice White’s opinion for the Court in *Branzburg* and Justice Powell’s concurrence: Where the subpoena is not “in good faith” because its purpose is not investigation but rather the suppression or harassment of activity protected by the First Amendment, the government cannot meet any of the tests for the qualified First Amendment privilege discussed and applied in *New York Times Co. v. Gonzales*, 459 F.3d 160, 173-74 (2d Cir. 2006) (the “*Gonzales*” case). Accordingly, the *Branzburg* majority’s admonition

“that grand juries must operate within the limits of the First Amendment as well as the Fifth” requires quashing this subpoena in its entirety. 408 U.S. at 708.

STATEMENT OF FACTS

1. The ACLU’s activities in support of civil liberties have increasingly focused, in the period after 9/11 and the engagement of U.S. troops in Afghanistan and Iraq, on the government’s “war on terror” and its long-term detention of persons without process or judicial protection. Those activities have included, among many other things: (a) litigation under the Freedom of Information Act (“FOIA”) seeking information about the government’s policies and practices regarding torture and the government’s compliance with the Geneva Conventions, a damages action against Donald Rumsfeld and three senior military commanders for the abuse of four Afghans and five Iraqis while in American custody, a lawsuit against the CIA challenging the practice of so-called extraordinary rendition, and legal representation for government whistleblowers; (b) public education, including a searchable database on the ACLU website of government documents that now consists of more than 100,000 pages obtained through FOIA documenting the government’s torture and detention policies; and (c) public advocacy on the same subjects, including press commentary, paid advertisements, town meetings, congressional briefings, and U.N. submissions. Declaration of Anthony D. Romero ¶6.

Through public education and public advocacy, the ACLU has pressed the Administration to comply with the Geneva Conventions, renounce torture and other forms of cruel, unusual and degrading treatment, and hold accountable senior officials who authorized or condoned such activities. The ACLU has also called on Congress to demand compliance with the Geneva Conventions, exercise meaningful oversight of the Administration’s torture and detention practices, and restore the writ of habeas corpus for detainees that was

unconstitutionally abridged in the recently enacted Military Commissions Act. Romero Decl. ¶¶7-8.

Like all useful public education and advocacy, these activities depend on the facts. Without a clear understanding of what the government is doing, it is difficult to assess what should be done differently or to advocate for change. Fact-gathering and fact-reporting are therefore an essential part of the ACLU's mission, *Id.* ¶9.

2. On October 23, 2006, the ACLU received "over the transom" (*i.e.*, without having solicited it) a three-and-one-half page document, marked "Secret," which provides a set of general policy guidelines on a matter of longstanding concern to the ACLU. Its date of promulgation also raises important questions. The ACLU did not release or otherwise disseminate the document upon receipt, and it has not done so since. However, the ACLU reserves the right to do so in the future, and retained the document for further consideration. Although the word "Secret" is printed as part of the text on each page, the document does not indicate by whom, or pursuant to what authority, the marking was made.

3. Nearly a month later, on Friday, November 17, Terence Dougherty, ACLU's in-house counsel, received a voicemail message from AUSA Rodgers. The voicemail message mentioned no subpoena, or investigation, or need for evidence, and asked for Mr. Dougherty to return her call. Dougherty Decl. ¶2. Ms. Rodgers later left another voicemail message explaining that the ACLU was in possession of a classified document sent to the ACLU on October 23, 2006, which had to be returned to the government. *Id.*

When Mr. Dougherty returned the call on Monday morning November 20, AUSA Rodgers again explained that a document had been delivered to the ACLU on October 23, gave him the impression that the government already had the document and knew to whom it had been

sent by email, and insisted that the ACLU deliver to the government any and all copies it had of the document, together with information as to whether the document had been disseminated by the ACLU and assurances, to be negotiated and discussed, that all copies were in fact returned (leaving none extant at the ACLU). *Id.* ¶3. AUSA Rodgers said that it was illegal to possess or disclose the document, and when asked for authority identified 18 U.S.C. §§ 793 and 798.¹ *Id.* Noting that she did not know the parameters of the ACLU's computer systems, she said that the assurances being sought would have to account for the ACLU's computer system configuration and provide the government certainty that all copies had been delivered to the government or destroyed and that no copies were left at the ACLU. She asked for a response that day. *Id.*

Later that day, Joshua L. Dratel, an attorney whom the ACLU engaged to represent it, called AUSA Rodgers and advised her that the ACLU would not be complying with the government's request. Dratel Decl. ¶6. The subpoena quoted above at page 1 (Dratel Decl., Ex. 1) was faxed to Mr. Dratel on behalf of the ACLU still later that day. *Id.* Mr. Dratel asked

¹ As is explained below at Point I(B), neither statute has any application here. Section 793(e) subjects to punishment, in pertinent part:

Whoever having unauthorized possession of, access to, or control over any document . . . or note relating to the national defense . . . willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it

Section 798 applies to the communication (but not retention) only of classified information

- (1) concerning the nature, preparation, or use of any code, cipher, or cryptographic system of the United States or any foreign government; or
- (2) concerning the design, construction, use, maintenance, or repair of any device, apparatus, or appliance used or prepared or planned for use by the United States or any foreign government for cryptographic or communication intelligence purposes; or
- (3) concerning the communication intelligence activities of the United States or any foreign government; or
- (4) obtained by the processes of communication intelligence from the communications of any foreign government, knowing the same to have been obtained by such processes

AUSA Rodgers if the ACLU was a target of any investigation, and she assured him that it was not. *Id.* ¶4.

4. At the time of AUSA Rodgers' call, the ACLU had a single paper copy of the document and an electronic copy on its computer systems. In view of the government's position, the ACLU secured the paper copy and isolated the electronic copy so that it could not be generally accessed on the ACLU's computer systems. No other copies had been made, and none have been made since (save for copies automatically made by the system's back-up function). Dougherty Decl. ¶¶4-5.

The subpoena also called for "any and all copies of any other documents marked 'Secret' that were received in October or November 2006 from the same source as provided the 12/20/05 document referenced above." Dratel Decl., Ex. 1. No other such documents are believed to exist. Dougherty Decl. ¶7.

5. As the Court will see when the government provides it a copy of the document sought by the subpoena, which we urge the government to submit or the Court to request that the government do so, the document is nothing more than a policy, promulgated in December 2005, that has nothing to do with national defense. Release of the document might perhaps be mildly embarrassing to the government, but the document contains no information concerning matters such as troop movements, communications methods, intelligence sources, or the like. Neither its retention nor publication by the ACLU could in any way potentially threaten the nation. To the contrary, the document appears to be a classic example of overclassification. It neither fits within the categories of documents subject to classification under the governing Executive Order

