


UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

  
AMERICAN CIVIL LIBERTIES UNION,  
and AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION;

Plaintiffs,

v.

JOHN ASHCROFT, in his official capacity as  
Attorney General of the United States;  
ROBERT MUELLER, in his official  
capacity as Director of the Federal Bureau of  
Investigation; and MARION E. BOWMAN,  
in his official capacity as Senior Counsel to  
the Federal Bureau of Investigation,

Defendants.

04 Civ. 2614 (VM)

**SEALED**

**DECLARATION OF ANTHONY D. ROMERO**

I, Anthony D. Romero, of New York, New York, do declare:

1. I am the Executive Director of the American Civil Liberties Union ("ACLU") and the American Civil Liberties Union Foundation ("ACLU Foundation" or "ACLUF").
2. The ACLU is a nationwide, non-profit, non-partisan organization with over 400,000 members dedicated to the constitutional principles of liberty and equality. The primary mission of the ACLU, which is a 501(c)(4) organization, is to educate the public about the civil liberties implications of pending and proposed legislation in Congress and in state and local legislatures; to directly lobby legislators and to provide analyses of such pending or proposed legislation; and to mobilize our members and other activists to lobby their legislators.

16. We have highlighted our work on the Patriot Act, and on NSLs in particular, through our web site, direct mail, online newsletters, and paid advertisements. Our work opposing the Patriot Act has led to a significant increase in new members and donations.

17. Lawyers employed by the ACLUF represent [REDACTED] in this lawsuit, which challenges the constitutionality of the NSL power.

Because the NSL served on our client contains a gag provision, the ACLUF is gagged from disclosing to any other person that the FBI sought information from our client through an NSL. The gag is preventing us from communicating information that is relevant to the public debate about the Patriot Act. But for the gag provision, we would provide this information to the press and the public, to Congress, and to ACLU and ACLUF staff, members and donors.

18. The gag is preventing the ACLU and the ACLUF from educating the public about the government's use of new powers under the Patriot Act generally, and the NSL power in particular. The gag prevents us from informing the public of the mere fact that the FBI has used the NSL power, from disclosing the general categories of information sought in an NSL, and from disclosing numerous other non-sensitive facts about this lawsuit. But for the gag, we would disclose this information. Thus, as the public debate over the Patriot Act continues, the public does not have the benefit of all the facts.

19. Ironically, the ACLU and ACLUF are gagged from stating a fact that any other member of the public can state -- that lawyers for the ACLUF represent a client served with an NSL. It is clear from the redacted Complaint, which the government agreed to file publicly, that the ACLUF represents another plaintiff in this case. It is clear from the redacted Complaint that our client received an NSL. After all, the gag provision applies

only to those served with an NSL (and their agents). If our client had not been served with an NSL, there would be no need for any redactions in the Complaint. A number of reporters have deduced these precise facts, and reported them in news articles, merely from reading the redacted Complaint and other publicly available documents in the case. See Exh. 1. The government has nevertheless insisted that we would be in violation of the gag if we state publicly that we represent a client served with an NSL, even if we do not identify the name of our client, the subject of the NSL, or any other details about the specific NSL served.

20. The gag has also prevented me from providing non-sensitive information about the case to journalists. For example, at a recent function, a journalist asked me about our clients in this challenge to the NSL power. I told him that the ACLU was a client, and that I could not confirm or deny whether we represented any other client in the case. He then asked what type of client we might represent in such a challenge. I told him that, due to the lack of clarity about the extent of the gag, I could not respond. I felt that my limited responses came across as cagey, and frustrated a reporter who wanted to provide more information to the public on the government's use of NSLs.

21. The gag is also preventing lawyers and staff of the ACLUF from providing relevant information to members of Congress. For example, legislation was recently introduced (H.R. 3179) that would amend the NSL power to clarify the penalties for failing to comply with NSLs and for violating the nondisclosure provisions. The ACLU has information that would help Congress evaluate the wisdom of this legislation. But for the gag, we would disclose to members of Congress the kinds of information sought by the NSL that was served on our client. We would also tell members of Congress that

the Justice Department is relying on the gag provision to forbid disclosure of non-sensitive information. If a member of Congress knew that an NSL recipient could be jailed for up to five years for merely confirming that an NSL had been served, or for disclosing the general categories of information sought, that member might be disinclined to approve the legislation. Because of the gag provision, Congress is considering new legislation without the benefit of all the facts. The gag provision is also limiting our ability to mobilize ACLU members and other activists in opposition to the expansion of the NSL power.

22. Other new powers under the Patriot Act have gag provisions that are similar or identical to the NSL gag provision. Information about the government's application of the gag provision in this case would also inform the ongoing debate about those provisions. But for the gag, the ACLU and the ACLUF would disclose this information to the public.

23. The gag is also creating potential liability for ACLU and ACLUF staff who are not even privy to the sensitive information in this case. Because these staff members work for or are associated with an organization that represents the client served with the NSL, they could risk penalties if they state publicly, that we represent a client served with an NSL. To avoid this risk, I reviewed and approved a memo that was distributed to all staff of the ACLU, the ACLUF, and our state affiliate offices. See Exh. 2. ACLU and ACLUF staff around the country were understandably confused by the memo because they did not understand how they could be gagged from stating a fact that is evident from the redacted Complaint.

