Appendix A

U.S. Department of Justice

Federal Bureau of Investigation

In Reply, Please Refer to
File No. NH-43906

New Haven Division
600 State Street
New Haven, Connecticut 06511

May 19, 2005

Mr. Kenneth Sutton
Systems and Telecommunication Manager
Library Connection, Inc.
599 Matianuck Avenue
Windsor, Connecticut

Dear Mr. Sutton:

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (as amended, October 26, 2001), you are hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity related to the following:

IP Address: 216.47.180.118, Date: 02/15/2005;Time: 16:00 to 16:45 (PM) EST

In accordance with Title 18, U.S.C., Section 2709(b), I certify that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.

You are requested to provide records responsive to this request personally to a representative of the New Haven field office of the FBI. Electronic versions of the records are requested, if available. Any questions you have regarding this request should be directed only to the New Haven field office. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation or electronic communication.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Michael J. Wolf
Special Agent in Charge

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE, et al., Plaintiffs	:	
v.	:	CIVIL ACTION NO. 3:05-cv-1256 (JCH)
ALBERTO GONZALES, in his official capacity as Attorney General of the United States, et al., Defendants.	:	SEPTEMBER 9, 2005

RULING ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION [Dkt. No. 33][1]

I. INTRODUCTION

On August 9, 2005, the plaintiffs filed suit challenging the constitutionality of 18 U.S.C. § 2709. One of the plaintiffs is John Doe, the recipient of a National Security Letter ("NSL") issued pursuant to § 2709. That section requires any "wire or electronic communication service provider" to comply with requests by the Federal Bureau of Investigation ("FBI") for information. 18 U.S.C. § 2709(a)(2001). Specifically, the statute permits the FBI to "request the name, address, and length of service of a person or entity if the Director (or his designee) certifies in writing to the wire or electronic communication service provider to which the request is made that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." Id. at § 2709(b)(2).

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[1] This case was originally filed under seal. While the case itself is no longer under seal, many of pleadings are sealed. The parties have agreed to file redacted pleadings on the public docket. In this Ruling, where court documents are referenced, the court cites the unsealed, redacted pleadings.

In this lawsuit, the plaintiffs claim, first, that § 2709 violates the First Amendment by prohibiting any person from disclosing that the FBI has sought or obtained information with a NSL; second, that § 2709 violates the First Amendment by authorizing the FBI to order disclosure of constitutionally protected information without tailoring its demand to a demonstrably compelling need; third, that § 2709 violates the First and Fourth Amendments because it fails to provide for or specify a mechanism by which a recipient can challenge the NSL's validity; fourth, that § 2709 violates the First, Fourth, and Fifth Amendments by authorizing the FBI to demand disclosure of constitutionally protected information without prior notice to individuals whose information is disclosed and without requiring that the FBI justify that denial of notice on a case-by-case basis; and fifth, that § 2709 violates the Fifth Amendment because it is unconstitutionally vague. With respect to all five challenges, the plaintiffs claim that the statute is unconstitutional both on its face and as applied to them. They seek declaratory and injunctive relief.

Currently pending before the court is plaintiffs' motion for preliminary relief filed on August 16, 2005. The NSL in question tracks the language of the statute in advising the recipient "that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions [18 U.S.C. § 2709]." Redacted Exh. A to Redacted Compl. The issue before the court in connection with the motion for preliminary injunction is whether the § 2709(c) prohibition on the plaintiffs' disclosure of the identity of the recipient is unconstitutional as applied in this case such that enforcement of that prohibition ought to be enjoined pending resolution of the case on

the merits.

At a telephone status conference on August 18, 2005, the parties agreed that the relevant facts are not in dispute. See Charette v. Town of Oyster Bay, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required when the relevant facts either are not in dispute or have been clearly demonstrated at prior stages of the case . . .."). The court imposed an expedited briefing schedule. The defendants filed their brief in opposition, with a supporting affidavit, on August 29, 2005. Plaintiffs replied on August 30, 2005. The court heard oral argument on August 31, 2005. At the court's request, and only after the court reviewed the parties' post-argument briefs and relevant case law on the propriety of ex parte review of classified materials, the defendants made available to the court for review certain classified information on September 5, 2005. The court has now reviewed this material. See Section III, infra.

II. BACKGROUND

A Federal Bureau of Investigation (FBI) agent telephoned the plaintiff, John Doe ("Doe"), a member of the American Library Association. Doe possesses information about library patrons. The agent informed an individual at Doe that the FBI would be serving a NSL on Doe and asked who at Doe could accept service. Two agents delivered the NSL to Doe. The NSL is on FBI letterhead and signed by defendant John Roe ("Roe").

The NSL directs Doe "to provide to the [FBI] any and all subscriber information, billing information and access logs of any person or entity related to [ ]." Redacted Exh. A to Redacted Compl. As required by § 2709, the NSL "certif[ies] that the information sought is relevant to an authorized investigation to protect against international

terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States." Id. The NSL also includes a non-disclosure provision. Specifically the letter correctly advises the recipient that, "Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions." Id.

To date, Doe has not supplied the information demanded by the NSL, and the FBI has not sought to compel compliance. Following its receipt of the NSL, Doe sought legal counsel and retained the American Civil Liberties Union Foundation ("ACLU Foundation"), which represents Doe in this action and is also a plaintiff. The ACLU Foundation is a 501(c)(3) organization that provides free legal representation to individuals and organizations in civil liberties cases. The third plaintiff is the American Civil Liberties Union ("ACLU"), a 501(c)(4) organization that lobbies and provides public education regarding civil liberties issues.

Arguing that § 2709(c)'s ban on speech prohibits them from engaging in constitutionally protected speech that is relevant and perhaps crucial to an ongoing and time-sensitive national policy debate, the plaintiffs moved for preliminary relief to enjoin enforcement of § 2709(c) as to Doe's identity.

III. EX PARTE REVIEW OF CLASSIFIED MATERIALS

When pressed about their basis for the asserted compelling state interest for § 2709(c)'s gag provision, defendants offered at oral argument to make certain classified material available to the court, for ex parte review. The defendants contend

that classified information, appropriately reviewed ex parte, ought to inform the court's resolution of the instant motion. The plaintiffs argue that ex parte consideration of materials, on which the court's ruling on the merits is likely to turn, violates their due process rights. See Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) ("The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.") (internal quotation marks and citation omitted). For good reason, our system of justice relies on the adversarial process to bring to the attention of the finder of fact the strengths and deficiencies in parties' litigation postures. "[F]airness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring).

Nevertheless, given that the government's case rests on its ability to demonstrate a compelling state interest in preventing disclosure of information related to a counter-terrorism investigation, the court finds that it is appropriate to consider the ex parte documents for the limited purpose of determining whether to grant the preliminary injunction in a timely manner. See Jifry v. Fed. Aviation Admin., 370 F.3d 1174, 1182 (D.C. Cir. 2004) ("[T]he court has inherent authority to review classified materials ex parte, in camera as part of its judicial review function."). While it is "[o]nly in the most extraordinary circumstances [that] precedent countenance[s] court reliance upon ex parte evidence to decide the merits of a dispute," id. at 1061, the instant situation, where the executive branch determines that certain information ought to

remain classified in the interests of national security, but is necessary to its defense of this action, constitutes such an extraordinary circumstance. People's Mojahedin Org. of Iran v. Dep't of State, 327 F.3d 1238, 1242 (D.C. Cir. 2003) ("[U]nder the separation of powers created by the United States Constitution, the Executive Branch has control and responsibility over access to classified information and has compelling interest in withholding national security information from unauthorized persons in the course of executive business") (internal quotation marks and citation omitted). To find otherwise, under these particular circumstances, might deprive the defendants of their ability to oppose the instant motion.

The court remains concerned, however, about the plaintiffs' ability to participate fully in this case. Currently, neither plaintiffs nor their attorneys possess the requisite security clearance to view the classified evidence that defendants have provided this court in support of their opposition to the plaintiff's motion.[2] However, it would be appropriate, if possible, to seek to obtain clearance for plaintiffs' lead counsel in connection with subsequent proceedings so that she can review the ex parte classified evidence. Defendants would thus retain the ability to vigorously defend their case without compromising the secrecy of classified materials. For these reasons, the court directs that defendants attempt, to the extent permitted by law, to provide plaintiffs with the opportunity for their lead attorney to seek to obtain the security clearance required to review and respond to the classified materials in connection with the resolution of this

[2] The government has stated that the clearance process may take between two and four weeks. Under the circumstances, therefore, any attempt to allow plaintiffs' counsel to view those documents and respond to them came into conflict with the time sensitivity of the pending motion.

case.

IV. PRELIMINARY INJUNCTION STANDARD

The nature of the preliminary injunction sought in this case triggers a higher standard than is normally applicable.[3] A heightened standard is justified where "the issuance of an injunction will render a trial on the merits . . . partly meaningless, either because of temporal concerns . . . or because of the nature of the litigation, say, a case involving the disclosure of confidential information." Tom Doherty Associates, Inc. v. Saban Entertainment, Inc., 60 F.3d 27, 35 (2d Cir. 1995) (citing Abdul Wali v. Coughlin, 754 F.2d 1015, 1026 (2d Cir. 1985), overruled on other grounds, O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 n.2 (1987)). In this case, the parties agree that the injunction sought here would provide the plaintiffs part of the remedy they seek by way of judgment. The effect of the preliminary relief plaintiffs seek, that is, to lift the gag provision with respect to disclosure of Doe's identity, "cannot be undone." Id.

The standard for granting such an injunction in the Second Circuit is well-established. "[W]hen the injunction sought will alter, rather than maintain the status quo, or will provide the movant with relief that cannot be undone even if the defendant prevails at a trial on the merits, the moving party must show a clear or substantial likelihood of success." Beal v. Stern, 184 F.3d 117, 122-23 (2d Cir. 1999) (internal quotation marks, alteration and citation omitted). The parties agree that this heightened

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[3] Typically, the standard requires " first, irreparable injury, and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships decidedly tipped in the movant's favor." Green Party of N.Y. State v. N.Y. State Bd. of Elections, 389 F.3d 411, 418 (2d Cir. 2004)(internal quotation marks and citation omitted).

standard applies. In addition to showing a substantial likelihood of success, the plaintiffs must also show, as with every motion for preliminary relief, irreparable harm.

A. Irreparable Injury

Plaintiffs have established that they are suffering irreparable injury as a result of enforcement of § 2709(c) with regard to Doe's identity. Section 2709(c) uncategorically bars speech. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976)(plurality opinion). The subject matter of the speech at issue in the pending motion places it at the center of First Amendment protection. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." Id.at 356; see also Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838-39 (1978). ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs.") (internal quotation marks and citation omitted). Furthermore, in the specific instance at issue in the pending motion, there is a current and lively debate in this country over renewal of the PATRIOT Act. See, e.g., Shannon McCaffrey, "Librarians Angered Anew by Patriot Act," Philadelphia Inquirer, Aug. 8, 2005, at A02. In connection with that renewal, legislation has been proposed that relates to NSLs and § 2709.[4] Despite the publication of a redacted

[4] A number of bills are currently pending before the Senate and House of Representatives, which bills propose various amendments and revisions to § 2709, including the institution of judicial review with respect to NSL's investigative and gag powers and criminal sanctions for violation of the gag provision. See H.R. 3199, 109th Cong. (2005); H.R. 2715, 109th Cong. (2005); H.R. 1526, 109th Cong. (2005); S. 1389, 109th Cong. (2005); S. 737, 109th Cong. (2005); S. 693, 109th Cong. (2005); S. 317, 109th Cong. (2005); S. 3, 109th Cong.

complaint in this case – which reveals that a NSL was issued to an entity in Connecticut with library records – Doe cannot speak out as the recipient. While, as the government argues, Doe can speak about NSLs in a general manner, it is clear that § 2709(c) prevents Doe from identifying itself as a recipient of a NSL.

Considering the current national interest in and the important issues surrounding the debate on renewal of the PATRIOT Act provisions, it is apparent to this court that the loss of Doe's ability to speak out now on the subject as a NSL recipient is a real and present loss of its First Amendment right to free speech that cannot be remedied. Doe's speech would be made more powerful by its ability to put a "face" on the service of the NSL, and Doe's political expression is restricted without that ability. Doe's right to identify itself is a First Amendment freedom independent from Doe's right to speak generally about its views on NSLs. Doe's statements as a known recipient of a NSL would have a different impact on the public debate than the same statements by a speaker who is not identified as a recipient.

Defendants argue that the question of irreparable injury is intertwined with that of the plaintiff's likelihood of success on the merits, relying on several Second Circuit cases for this proposition. See Time Warner Cable v. Bloomberg L.P., 118 F.3d 917, 924 (2d Cir. 1997) ("Though impairment of First Amendment rights can undoubtedly constitute irreparable injury, we think it often will be more appropriate to determine irreparable injury by considering what adverse factual consequences the plaintiff apprehends if an injunction is not issued, and then considering whether the infliction of

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(2005).

those consequences is likely to violate any of the plaintiff's rights."); Charette v. Town of Oyster Bay, 159 F.3d 749, 755 (2d Cir. 1998) (quoting Time Warner Cable for the first part of this proposition). However, the Second Circuit has distinguished these cases from those like the instant one, where the challenged statute or regulation imposes a direct infringement on speech. "Where a plaintiff alleges injury from a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed." Bronx Household of Faith v. Bd. of Educ. of New York, 331 F.3d 342, 349 (2d Cir. 2003). Therefore, in this case, where the statute directly prohibits speech, the presumption of irreparable harm arises.

The defendants nevertheless argue that this presumption can be overcome because the plaintiffs' First Amendment right to speech is qualified by the governmental interests at stake. The defendants contend that no irreparable harm will occur because the plaintiffs have only a limited interest in the speech in which they wish to engage, in light of the government's interests at stake. For the reasons discussed, supra, at 9, the court rejects the defendants' contention that the plaintiffs' First Amendment rights here are limited. The court finds that the plaintiffs have established that they are suffering, and will continue to suffer, irreparable harm as a result of the challenged non-disclosure provision of § 2709(c).

B. Substantial Likelihood of Success On The Merits

1. Appropriate Level of Scrutiny. In addressing the question of substantial likelihood, the parties dispute the measure of scrutiny the court ought to apply to the statutory provision at issue. The plaintiffs argue that, because the statute constitutes both a prior restraint and a content-based ban on speech, it must meet strict

scrutiny in order to pass constitutional muster. Plfs.' Mem. Supp. at 11. The defendants contend that the speech restricted here is not a prior restraint and, therefore, the statute need only meet intermediate scrutiny. Defs.' Mem. Opp'n. at 16-20, 29-31. The defendants alternatively contend that the court need not determine which level of scrutiny is appropriate here because, in their view, § 2709(c) is tailored to accomplish a compelling state interest and meets both the intermediate and strict scrutiny tests. Id. at 23-29. The court holds that § 2709(c) is subject to strict scrutiny because it is both a prior restraint and a content-based restriction.

The court addresses first the question of whether § 2709(c) constitutes a prior restraint. "[A] clear definition of 'prior restraint' is elusive." Erwin Chemerinsky, Constitutional Law: Principles and Policies (2nd ed. 2002) at 918. "The essence of prior restraints are that 'they g[i]ve public officials the power to deny use of a forum in advance of actual expression.'" Beal v. Stern, 184 F.3d 117, 124 (2d Cir. 1999) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)). Section 2709(c) unquestionably prohibits speech in advance of it having occurred. See Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989) ("The relevant question is whether the challenged regulation authorizes suppression of speech in advance of its suppression.").

Defendants correctly point out that a prior restraint typically involves either a court order or a licensing scheme which vests discretion in an agency. See, e.g., Beal, 184 F.3d at 124-25 (quoting Forsyth County v. Nationalist Movement, 505 U.S. 123, 130-31 (1992)) (licensing scheme). The statute at issue here may not look like a typical prior restraint: it is not a court order, nor does it not authorize a licensing scheme

subject to arbitrary application. Contrary to defendants' assertion, however, prior restraints are not limited to these two categories of governmental restrictions.[5] For example, the Supreme Court found a prior restraint when a state commission encouraged booksellers not to sell certain books that the commission deemed objectionable. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963). There was no court or administrative order preventing such sales, but the court found sufficient "coercion, persuasion and intimidation," id. at 67, to create a prior restraint, id. at 70.

The suppression of speech here is broader than any licensing scheme. It constitutes a categorical prohibition on the use of any fora for speech, on all topics covered by § 2709(c), as contrasted with a licensing scheme, which limits only a particular forum. The statutory language in the NSL, signed by the FBI, would appear sufficient to "persuade" or "intimidate" most recipients into compliance.[6] Thus, under Bantam Books, the Doe NSL qualifies as a prior restraint.

Further, the court does not agree with defendants that Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984) requires use of the intermediate scrutiny test here. In Seattle Times, the Court wrote that, "[a]n order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny." Id. at 33. The Court noted that the accused court order did

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[5] Defendants argue that § 2709(c) is not a prior restraint because it is a gag order, "enforceable only by a penalty action after the fact." Defs.' Mem. Opp. at 30. As defendants conceded at oral argument, § 2709(c) does not provide for a penalty.

[6] Based on responses to the court's questions, it appears that the FBI has issued many NSLs under § 2709 in the past, but they have not been challenged by the recipients with the exception of the one here, the one involved in the appeal in the Second Circuit, and one in Detroit.

not constitute a prior restraint because "the party may disseminate the identical information covered by the protective order as long as the information is gained through means independent of the court's processes." Id. at 34. In Seattle Times, the trial court's protective order prevented use of material a civil litigant had requested in discovery. Id. at 27. This differs greatly from a law barring disclosure of the use of the government's authority to compel disclosure of information. See id. at 32 ("[C]ontinued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations.")

Section 2709(c) is subject to strict scrutiny not only because it is a prior restraint, but also because it is a content-based restriction. See Kamasinski v. Judicial Research Council, 44 F.3d 106, 109 (2d Cir. 1994) (holding that confidentiality rules imposed on complainants and witnesses before the Connecticut Judicial Review Council were content-based restrictions and thus subject to strict scrutiny). Section 2709(c) "has the potential for becoming a means of suppressing a particular point of view," that is, the view that certain federal investigative powers impose profoundly on individual civil liberties to the point that they violate our constitution. Forsyth County, 505 U.S. 123, 130-31 (1992) (internal quotation marks and citation omitted). The statute has the practical effect of silencing those who have the most intimate knowledge of the statute's effect and a strong interest in advocating against the federal government's broad investigative powers pursuant to § 2709: those who are actually subjected to the governmental authority by imposition of the non-disclosure provision. The government may intend the non-disclosure provision to serve some purpose other than the suppression of speech. Nevertheless, it has the practical impact of silencing individuals

with a constitutionally protected interest in speech and whose voices are particularly important to an ongoing, national debate about the intrusion of governmental authority into individual lives. The court, therefore, concludes that § 2709(c) is both a prior restraint and a content-based restriction on free speech.

The merits of the plaintiffs' motion thus turn on the defendants' ability to demonstrate that § 2709(c)'s restraint on speech, as applied to the plaintiffs, meets the strict scrutiny test. See Ashcroft v. ACLU, 124 S.Ct. 2783, 2788 (2004)("[T]he Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality.") (internal quotation marks and citation omitted); Republican Party of Minnesota v. White, 536 U.S. 765, 774-75 (2002) (holding that State government had the burden of proving constitutionality of a law restraining judicial election candidates from announcing their political views); Hobbs v. County of Westchester, 397 F.3d 133, 148-49 (2d Cir. 2005) (applying strict scrutiny to regulation that is both a prior-restraint and content-based, with burden of proving constitutionality on the government). The inquiry under the strict scrutiny test is whether the gag order currently imposed on the plaintiffs, restricting their ability to identify Doe, is narrowly tailored to meet a compelling state interest. The court will first consider whether the non-disclosure provision of the Doe NSL, as applied in this case, serves a compelling state interest. If it does, the court must then consider whether the non-disclosure provision of the Doe NSL is narrowly tailored to that interest.

2. Is § 2709(c) Narrowly Tailored to Serve a Compelling State Interest?

The defendants assert that "§ 2709(c)'s confidentiality provision is justified by the government's interest in national security and in particular its interest in conducting effective investigations to disrupt the activities of terrorist organizations and foreign intelligence agencies." Defs.' Mem. Opp'n. at 20. They also assert that "[s]ection 2709(c) is adequately tailored to the government's compelling interest in confidentiality." Id. at 23. They contend that this court ought to defer to their findings regarding the presence of a national security interest.

a. Compelling State Interest. While the court recognizes the defendants' expertise in the area of counter-terrorism and is inclined to afford their judgments in that area deference, those judgments remain subject to judicial review. Writing in a different context about the judiciary's role in a time of war, the Supreme Court recently rejected the "heavily circumscribed role for the courts" the government had suggested, and instead noted that "the United States Constitution . . . most assuredly envisions a role for all three branches when individual liberties are at stake." Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2650 (2004). "[T]he notion that the judiciary should abdicate its decision-making responsibility to the executive branch whenever national security concerns are present" is extremely troubling. In re Washington Post Co., 807 F.2d 383, 391 (4th Cir. 1986). "History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions. A blind acceptance by the courts of the government's insistence on the need for secrecy, without notice to others, without argument, and without a

statement of reasons, would impermissibly compromise the independence of the judiciary and open the door to public abuse." Id. at 391-92. Indeed, while this court recognizes that the executive is entitled to deference on issues of national security, "[n]o matter the level of deference, [the court's] review is not vacuous." Center for Nat'l Sec. Studies, 331 F.3d at 938 (Tatel, J. dissenting) (internal quotation marks and citation omitted). "[W]hile the [executive's] tasks include the protection of national security and the maintenance of the secrecy of sensitive information, the judiciary's tasks include the protection of individual rights." McGehee, 718 F.2d at 1149. This court will thus examine whether the record before it supports what the government claims: that lifting the gag provision in part to permit the recipient to identify itself will harm national security. See generally New York Times Co. v. U.S., 403 U.S. 713, 714 (1971) ("The Government . . . carries a heavy burden of showing justification for the imposition of such a restraint.") (internal quotation marks and citation omitted).

The government claims an interest that involves national security. In this instance, based on the court's review of the defendants' ex parte submission, the investigation clearly relates to national security. The government has a legitimate interest and duty in undertaking an investigation that includes this NSL. Further, it is clear to the court that the NSL was not issued solely on the basis of First Amendment activities.

The government argues that it has an interest in preventing the disclosure of Doe's identity because disclosure of the NSL recipient's identity may, inter alia, permit the subject of the NSL, or those involved in the subject matter of the NSL, to deduce that the government is aware of their/his/her identity, leading them to flee or go deeper

under cover. Defs.' Mem. Opp'n. at 2-3; see also Szady Decl. ¶¶ 29-30. Even affording the government deference in its judgment about national security concerns, the court cannot conclude on the record in this case that, in these circumstances, the government has a compelling interest in barring the disclosure of Doe's identity. Nothing specific about this investigation has been put before the court that supports the conclusion that revealing Does' identity will harm it. The record supplied by the defendants suggests that the disclosure of Doe's identity "may" or "could" harm investigations related to national security generally. See Szady Decl. at ¶¶ 20-29. Just such a speculative record has been rejected in the past by the Supreme Court in the context of a claim of national security. See New York Times Co., 403 U.S. at 725-26 (Brennan, J. concurring) ("[T]he First Amendment tolerates absolutely no prior judicial restraints of the press premised upon surmise or conjecture that untoward consequences may result.").

Further, the information that is before the court suggests strongly that revealing Doe's identity will not harm the investigation. **SEALED MATERIAL**[7]

CLASSIFIED MATERIAL[8]

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[7] The short section of the Ruling containing Sealed Material should be read here as part of the court's Ruling on Plaintiffs' Motion for Preliminary Injunction. It forms part of the court's analysis in reaching its opinion. This portion is filed under seal because it contains facts that were filed under seal and the public disclosure of which would moot the defendants' appeal.

[8] This brief portion of the Ruling relies on the ex parte classified material the court reviewed. These materials are a part of the court's analysis. Therefore, the court needs to articulate its reasoning with regard to them. The court requests the defendants to cause a proper officer with the requisite security clearance to take possession of that portion of the Ruling that contains Classified Material and transmit it to the Second Circuit in connection with any appeal. See generally In Re Guantanamo Detainee Cases, 355 F. Supp. 2nd 443, 446 (D.D.C. 2005).

The defendants, in their appeal of Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y. 2004), have argued that "the proper recourse [in evaluating § 2709(c)'s non-disclosure provision] is for district courts to entertain challenges to the non-disclosure requirement, on a case-by-case basis granting relief where, but only where, it can be shown that the compelling governmental interest underlying the non-disclosure requirement are not in jeopardy." Defendants-Appellants' Reply Brief at 25, Gonzales v. Doe, No. 05-0570 (2nd Cir.)(Feb. 3, 2005), quoted in Plfs.' Reply Mem. at 3. This is just such a case, and there is nothing in the record to demonstrate a compelling state interest in enforcing § 2709(c) against the plaintiffs with regard to Doe's identity. See generally Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) ("When the Government defends a regulation on speech as a means . . . to prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured.") (internal quotation marks and citation omitted).

The defendants further argue that the government has a compelling interest in concealing Doe's identity because, while that piece of information may appear innocuous by itself, it could still be significant to a terrorist organization when combined with other information available to it. Defendants argue that, "[t]errorist and foreign intelligence organizations can and do piece together various, seemingly innocuous items of publicly available information, along with private information already in their possession, to determine the scope, focus, and progress of ongoing counterintelligence and counter-terrorism investigations." Defs' Mem. Opp'n at 9.

Courts have considered this "mosaic" concept when determining whether individuals ought to have access to information sought pursuant to the Freedom of

Information Act (FOIA),[9] 5 U.S.C. § 552 (2002), or in the course of litigation discovery.[10] However, the plaintiffs' desire here is to exercise their First Amendment rights, which distinguishes this case from those in which an individual seeks disclosure of information in the course of discovery or pursuant to FOIA. Here, plaintiffs seek to vindicate a constitutionally guaranteed right; they do not seek to vindicate a right created, and limited, by statute. "Th[e] difference between seeking to obtain information and seeking to disclose information already obtained raises [the plaintiffs'] constitutional interests in this case above the constitutional interests held by a FOIA claimant. As a general rule, citizens have no first amendment right of access to traditionally nonpublic government information." McGehee v. Casey, 718 F.2d 1137, 1147 (D.C. Cir. 1983).

Thus, it does not appear that this "mosaic" argument has been used in this type of context. However, even if it were appropriate, the defendants' conclusory statements

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[9] The "mosaic" argument has been invoked in the context of requests pursuant to the FOIA. FOIA includes a number of statutory exemptions pursuant to which an agency may refuse to disclose requested information. Where law enforcement materials "could reasonably be expected to interfere with enforcement proceedings," 5 U.S.C. § 552(b)(7)(A), an agency may refuse to release them. "[T]he Supreme Court . . . ha[s] expressly recognized the propriety of deference to the executive in the context of FOIA claims which implicate national security." Center for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 927 (D.C. Cir. 2003). Against this backdrop, courts have "relied on . . . mosaic arguments in the context of national security," id. at 928, to allow the government to refuse to release information requested pursuant to FOIA. See also CIA v. Sims, 471 U.S. 159 (1985).

[10] Considering whether certain documents related to an ongoing investigation regarding national security ought to be discoverable by plaintiffs in a civil rights action, the D.C. Circuit Court of Appeals concluded that the state secrets privilege covered information that may appear immaterial in and of itself. "It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair . . . . Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into to place to reveal with startling clarity how the unseen whole must operate." Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978).

that the mosaic argument is applicable here, absent supporting facts, would not suffice to support a judicial finding to that effect. The court asked the defendants' counsel at oral argument if he could confirm there was a "mosaic" in this case: were there other bits of information which, when coupled with Doe's identity, would hinder this investigation. Counsel did not do so.

This court does not question that national security can be a compelling state interest, or that non-disclosure of a NSL recipient's identity could, in some circumstances, serve that interest. However, in this case, the court concludes that the government has failed to show a compelling state interest in preventing Doe from revealing its identity. Based on the foregoing, including the sealed portion about Doe, and what Doe is, the nature and extent of information about the NSL that has already been disclosed by the defendants,[11] and the nature and extent of the information that will not be disclosed, this court concludes that, in the face of the plaintiffs' as applied challenge, the government has not demonstrated a compelling interest in preventing disclosure of the recipient's identity.

The defendants' assertion of the compelling interest served by § 2709(c) is not as narrow as the court has just defined it. They define their interest as keeping secret on-going counter-terrorism investigations. The court has concluded that, in the context of the pending motion in an as applied challenge, the interest at issue is concealing Doe's identity as the recipient of the NSL. However, if the interest at issue should be

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[11] Defendants did not believe that disclosure of the issuance of a NSL to a Connecticut organization with library records would compromise national security.

more broadly defined, as defendants do, the court would agree that the defendants have demonstrated a compelling state interest in conducting its investigation in secret so that the target(s) of the investigation are not aware of it. However, if the government's interest here is defined that way, the court concludes that § 2709(c) is not narrowly tailored to serve that interest as it is applied in this case.

b. Narrow Tailoring. The various cases addressing gags on parties seeking to communicate information relevant to a grand jury or other investigation provide useful precedent against which to consider the instant case. See e.g., Butterworth v. Smith, 494 U.S. 624 (1990); Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984); Kamasinski v. Judicial Review Council, 44 F.3d 106 (2d Cir. 1994). Notably, the Supreme Court has concluded that "invocation of grand jury interests is not 'some talisman that dissolves all constitutional protections.'" Butterworth, 494 U.S. at 630 (quoting United States v. Dionisio, 410 U.S. 1, 11 (1973)).

The court accepts for the purpose of this motion that the counter-terrorism investigation at issue here differs from a criminal investigation in that the former may continue, or be of a consequence, for a very long time, whereas the latter has a shorter, defined life. The court recognizes that years, or even decades, could pass before disclosure of information relating to a counter-terrorism investigation would cease to threaten national security. However, this period is not endless. Even if such information were to remain sensitive for, say, twenty-five or fifty years, the public

interest in knowing this information would persist beyond this period.[12]

The provision of § 2709(c) that prohibits Doe from ever disclosing its identity is not narrowly tailored to the government interest of preventing the subject(s) of the government's investigation from learning of the government's investigation of him/it/they because this interest cannot continue indefinitely. At some point, even if in the distant future, the subject(s) of the investigation will cease to be of legitimate interest to government investigators. Virtually every investigation has some end point. Even if an investigation continues until a subject's or someone else's death (if an individual) or dissolution (if an entity), neither the subject nor the fact it/he/she was a subject, can remain of interest to the government indefinitely.

Courts have rejected government attempts to impose permanent gag orders. In Butterworth, the Court held that a permanent gag order on disclosure of a witness's own grand jury testimony was unconstitutional insofar as it continued after the end of the grand jury investigation. Butterworth, 494 U.S at 633. In Kamasinski v. Judicial Research Council, 44 F.3d 106 (2d Cir. 1994), the Second Circuit upheld a statutory provision prohibiting disclosure of certain information during an investigation of judicial misconduct. However, the Circuit noted that, after the close of the investigatory phase, even the state's "most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct." Id. at 110. Especially in a situation like the instant one, where the statute provides no judicial review of the NSL or the need for its non-disclosure provision, see Doe v. Ashcroft, 334 F.Supp. 2d 471, 501-03 (S.D.N.Y.

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[12] Such information would, for example, be valuable to policy-makers or historians trying to learn from the past.

2004), the permanent gag provision compels the conclusion that § 2709(c) is not narrowly drawn to serve the government's broadly claimed compelling interest of keeping investigations secret.

Section 2709(c) is also overbroad as applied with regard to the types of information that it encompasses. All details relating to the NSL are subject to the gag order without any showing that each piece of information, if disclosed, would adversely affect national security. The defendants themselves did not believe that disclosure of the fact of the issuance of this NSL to an organization with library records, a fact clearly within the scope of § 2709(c), would harm national security by compromising their investigation. Further, there is nothing before the court that would suggest that prohibiting the disclosure of Doe's identity serves the government's interest in preventing the subject of the investigation or others from learning about it. Therefore, § 2709(c) is not narrowly tailored in its scope to serve the government's interest.

The government argues that § 2709(c) is narrowly tailored to serve its interest because the information the plaintiffs seek to disclose is of a nature that the courts have recognized can be subject to a gag order in furtherance of an investigative interest. They base this conclusion on the fact that Doe only learned of the information by virtue of its participation in the government investigation. Defs'. Mem. Opp'n. at 16 In the instant case, Doe seeks not to communicate the substance of the NSL or the underlying investigation, but merely the fact of service of the NSL. Although Doe did not possess that information prior to service of the NSL, this case is factually distinguishable from the cases on which the government relies.

In Butterworth, 494 U.S. at 635, the Supreme Court did not reach the issue of

whether disclosure of the mere fact that a grand jury was ongoing could be subject to a gag order. There, the Supreme Court focused on the "dramatic" impact of the statutory restriction imposed by Florida statute on grand jury witnesses: "before he is called to testify . . . respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information." Id. Concurring, Justice Scalia noted that the Court did not reach the question of whether the fact of the investigation was protected. "I join the Court's opinion because I interpret that to refer to the information contained within the witness' testimony, but not necessarily to the fact that the witness conveyed that information to the grand jury." Id. at 636 (Scalia, J. concurring). The information gagged here is of the type identified by Justice Scalia as not addressed in the holding of the case.

The Seattle Times Court addressed this question in the context of civil litigation, which is distinguishable from the present context. "As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984). Where those discovery processes contemplate a protective order with respect to discovered information, "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." Id. Seattle Times's analysis is particular to the context of pretrial discovery. "Although litigants do not surrender their First Amendment rights at the courthouse door, those rights may be subordinated to other interests that arise in this setting." Id. at 32 n. 18 (internal quotation marks and citation omitted). The Seattle Times Court considered the nature, history, and goals of the

discovery process in particular in holding that where "a protective order is entered on a showing of good cause . . . , it is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."[13] Id. at 37 (emphasis added).

The Second Circuit has also examined this question in the context of sealed inquiries into judicial misconduct. Kamasinski v. Judicial Research Council, 44 F.3d 106, 110 (2d Cir. 1994). The Circuit identified three categories of information: (1) the information known to a person before an investigation begins or a complaint is filed; (2) the fact there is a complaint or investigation; and (3) what occurs in connection with the investigation (e.g., testimony before a hearing panel or questions asked). Id. The Kamasinski court concluded that temporarily prohibiting communication of the fact of an inquiry (i.e., the second category) is less likely to "run afoul of the First Amendment" than is "[p]enalizing an individual for publicly disclosing complaints about the conduct of a government official" (i.e., the first category). Id. at 110-11. The information plaintiffs seek to disclose initially would appear to fall within the second category. For several reasons, however, the first and second categories of information are more difficult to distinguish in the instant case than they are in the context of an inquiry into a complaint of judicial misconduct or a grand jury investigation of governmental corruption.

First, in this case, the existence of an investigation is already public: the defendants agreed to the docketing of the Redacted Complaint, which reveals that an

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[13] As discussed earlier, the protective order in Seattle Times was examined only under the immediate scrutiny test because the court concluded that it was neither a prior restraint nor content based. 467 U.S. at 34.

investigation (of unknown topic) exists and that a NSL was issued in Connecticut to an organization with library records. Thus, information of the sort the defendants claim Kamasinski identified as protectable (an investigation or complaint), id. at 110-11, is already public.[14]

Second, § 2709(c) creates a unique situation in which the only people who possess non-speculative facts about the reach of broad, federal investigatory authority are barred from discussing their experience with the public. This ban is particularly noteworthy given the fact that advocates of the legislation have consistently relied on the public's faith in the government to apply the statute narrowly in order to advocate for passage and reauthorization of various provisions of the Patriot Act. See, e.g., "Attorney General John Ashcroft, Protecting Life and Liberty (Address in Memphis, Tennessee, Sept. 18, 2003), http://www.usdoj.gov/archive/ag/speeches/2003/091803memphisremarks.htm (accusing those who fear executive abuse of the increased access to library records under the PATRIOT Act of "hysteria" and stating that "the Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans. No offense to the American Library Association, but we just don't care.") The potential for abuse is written into the statute: the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public and with the legislators who empower the executive branch with the tools used to

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[14] The subject of the instant investigation is not known, but plaintiffs do not seek to disclose that information. To the extent the defendants have argued that revealing Doe's identity may reveal the subject's identity, the court has rejected that argument. See pp. 15-21, supra.

investigate matters of national security. Thus, while the speech at issue here appears to fall into Kamasinski's second category, it is in substance more like the first: a citizen complaining about governmental action. Therefore, while Kamaninski stands as support for the imposition of gag orders in certain contexts, as narrowly drawn to serve a compelling state interest in protecting an investigation from disclosure, it does not support the conclusion here that the all-encompassing non-disclosure provision in § 2709(c), which covers the identity of the NSL recipient, is narrowly tailored to serve a compelling government interest.

The court concludes that the application of § 2709(c) to the plaintiffs in this case on the topic of Doe's identity does not pass strict scrutiny. The defendants have failed to show a compelling state interest that is served by gagging the plaintiffs with regard to Doe's identity. If the government's interest is more broadly defined as preventing an unknown subject of the government's investigation from learning of the government's investigation, which would support a finding of a compelling interest, the gag provision as to Doe's identity is not narrowly tailored to serve that interest. Because § 2709(c) as applied cannot survive strict scrutiny, the plaintiffs have shown a substantial likelihood of success on the merits, as well as irreparable harm. Therefore, the court grants their motion to enjoin enforcement of § 2709(c) against them with regard to Doe's identity.

V. STAY

The defendants requested a stay in the event the court granted the Motion for Preliminary Injunction. "To determine whether a stay of an order pending appeal is appropriate, a court must evaluate the following factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the

applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" Rodriguez v. DeBuono, 175 F.3d 227, 234 (2d Cir. 1999) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). "[W]here the order stayed involves a preliminary injunction . . . it is logically inconsistent, and in fact a fatal flaw, to subsequently find no irreparable nor even serious harm to the plaintiffs pending appeal." Id. at 234-35. The Second Circuit has therefore concluded that, "the grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm that is imminent as required to sustain the same preliminary injunction." Id. at 235. An exception to this rule is the grant of a stay pending an expedited appeal. It is appropriate for a district court to grant "a brief stay of a preliminary injunction in an appropriate case in order to permit the Court of Appeals an opportunity to consider an application for a stay pending an expedited appeal." Id. at 235.

The instant action presents such an appropriate case. The court has concluded that the plaintiffs have demonstrated a substantial likelihood of success on the merits and irreparable harm. The court therefore cannot find that the defendants, the stay applicants, can demonstrate a likelihood of success on the merits for the purposes of their stay application. However, in this case, the defendants would also be irreparably harmed should the preliminary injunction enter and the circuit court later reverse this court. Once revealed, Doe cannot be made anonymous again. Furthermore, colorable claims exist that the public interest lies in favor of granting the stay (if this court is in error), as well as in denying it (if this court is correct in its judgment).

The court finds that it is appropriate to grant a brief stay of a preliminary injunction in order to permit the Court of Appeals an opportunity to consider an application for a stay pending an expedited appeal. See Rodriguez, 175 F.3d at 235. The court will stay enforcement of the preliminary injunction until **September 20, 2005**. The court does so based on its expectation that the defendants will file an expedited appeal and submit an application for a stay pending appeal to the Court of Appeals.

CONCLUSION

For the reasons discussed above, the plaintiffs' motion for preliminary relief is GRANTED. The defendants are hereby enjoined from enforcing 18 U.S.C. § 2709(c) against the plaintiffs with regard to Doe's identity.

This preliminary injunction is STAYED until **September 20, 2005**.

Furthermore, the court directs the government to attempt, to the extent permitted by law, to allow plaintiffs' lead counsel to seek security clearance for plaintiffs' lead counsel. The government will proceed with that process in as expeditious a manner as possible, in good faith, and pursuant to all current policies and rules.

SO ORDERED

Dated at Bridgeport, Connecticut this 9th day of September, 2005.

Janet C. Hall
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

JOHN DOE, ET AL Plaintiffs	:	
v.	:	CIVIL ACTION NO. 3:05-cv-1256 (JCH)
ALBERTO GONZALES, in his official capacity as Attorney General of the United States; ET AL Defendants.	:	SEPTEMBER 9, 2005

SEALED PORTION OF RULING (9/9/05)[1]

The plaintiff, Library Connection, is a consortium of 26 Connecticut public and private libraries. Library Connection's member libraries serve over 288,000 library card holders as well as many other library users who do not hold library cards. Of its members, nineteen utilize internet service provided by Library Connection, which service is the reason for the NSL. Even if the court assumed that the nineteen libraries are the smallest of the 26, and only cardholders (and employees) may use the library computers to access the internet, the universe of people who could be the subject of this investigation would likely be in the tens, if not hundreds, of thousands. In addition, while the NSL has a specific date of use of the internet, plaintiffs do not seek to disclose that. Thus, ungagging the plaintiffs will reveal that sometime in the unknown past, someone who may or may not have been a card holder of that unknown library,

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[1] This Sealed Portion should be read as part of the court's Ruling on Plaintiffs' Motion for Preliminary Injunction, at the place indicated. It forms part of the court's analysis in reaching its opinion.

This portion is filed under seal because it contains facts that were filed under seal, the public disclosure of which would moot the defendants' appeal.

used an internet service at one of 19 libraries located in various cities and towns in Connecticut.

This portion of the Ruling is ordered to be filed under seal.

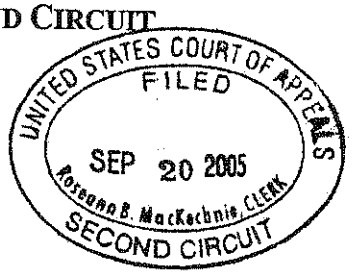
SO ORDERED.

Dated at Bridgeport, Connecticut, this 9th day of September, 2005.

Janet C. Hall
United States District Court Judge

Appendix D

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL UNITED STATES COURTHOUSE
40 FOLEY SQUARE
NEW YORK, NEW YORK 10007



John Doe v. Attorney General

Docket No. 05-4896-cv

Before: Hon. Sonia Sotomayor, Hon. Richard C. Wesley, *Circuit Judges*, and Hon. Charles L. Brieant, *District Judge**.

ORDER

Appellants move for a stay pending expedited appeal and sealing of appellate papers. Upon due consideration, it is hereby ORDERED that Appellants' motion for continuation of the stay pending appeal from the District Court's Order issued September 9, 2005 is GRANTED. Although there is a question as to the likelihood of Appellants' success on the merits and some injury to Appellees if a stay is granted, the Appellants have demonstrated that they will suffer irreparable harm and the public interest significantly injured if a stay is not granted. The balance of harms tilts in favor of appellants. *Mohammed v. Reno*, 309 F.3d 95, 100 (2d Cir. 2002). This appeal is hereby expedited and the following briefing schedule is in effect: Appellants' brief shall be filed no later than September 27, 2005; Appellees' brief shall be filed no later than October 4, 2005; Appellants' reply brief shall be filed no later than October 10, 2005. This appeal shall be consolidated with *John Doe v. Alberto Gonzales,* Appeal No. 05-0570, for the purpose of argument and disposition. IT IS FURTHER ORDERED that the parties' motions to file motion and appeal documents *under seal* are GRANTED subject to the same terms entered in the sealing order in Appeal No. 05-0570.

9/20/05
Date

FOR THE COURT:
ROSEANN B. MACKECHNIE, CLERK
By: Tracy W. Young
Tracy W. Young, Motions Staff Attorney

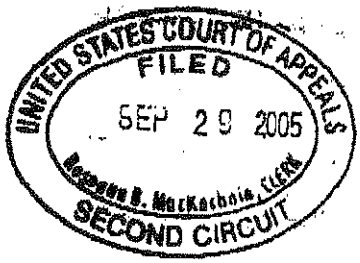
*The Honorable Charles L. Brieant, Judge of the United States District Court for the Southern District of New York, sitting by designation.

Appendix E

CONN / NEW HAVEN
05-cv-1256
HALL

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse at Foley Square, in the City of New York, on the 29th day of September, two thousand and five,



Present:

Hon. Sonia Sotomayor,
Hon. Richard C. Wesley, *Circuit Judges*,
Hon. Charles L. Brieant, *District Judge**.

John Doe, American Civil Liberties Union
& American Civil Liberties Union Foundation,

Plaintiffs-Appellees,

Docket Number: 05-4896 -cv

v.

Alberto Gonzales, in his official capacity as Attorney General of the United States, Robert S. Mueller III, in his official capacity as Director of the Federal Bureau of Investigation & John Roe, Federal Bureau of Investigation,

Defendants-Appellants.

Upon due consideration of plaintiffs-appellees' emergency motion to vacate stay pending appeal, it is Ordered, Adjudged and Decreed that appellees' emergency motion is denied on the ground that the additional circumstances relied upon by appellees do not materially alter the balance of harms in favor of appellants.

FOR THE COURT:
Roseann B. MacKechnie, Clerk of Court

By: Oliva M. George
Oliva M. George, Deputy Clerk

* The Honorable Charles L. Brieant, United States District Court Judge for the Southern District of New York, sitting by designation.

SAOTLN

Appendix F

JOHN DOE; AMERICAN CIVIL LIBERTIES UNION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION,

Plaintiffs-Appellees,

v.

ALBERTO GONZALES, 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; JOHN ROE, Federal Bureau of Investigation, in his official capacity,

Defendants-Appellants.

DECLARATION OF MELISSA GOODMAN

No. 05-4896

(No. 3:05cv1256 JCH) (D.Conn.)

SEALED

DECLARATION OF MELISSA GOODMAN

I, Melissa Goodman, of Brooklyn, New York, do declare:

1. I am an attorney at the American Civil Liberties Union ("ACLU") and counsel to plaintiffs-appellees in the above-captioned action.

2. This case was originally filed under seal in the United States District Court for the District of Connecticut on August 9, 2005. From August 9, 2005 until August 31, 2005, all pleadings in this action were filed under seal. On August 31, 2005, the district court entered an order unsealing the case and adopting the proposed sealing procedures for specific documents. The government prepared and filed redacted versions of previously-sealed pleadings on the public docket.

3. On August 31, 2005, fifteen minutes prior to an oral argument before Judge Hall in the District Court of Connecticut on Plaintiffs' Motion for a Preliminary Injunction,

the government provided me with a copy of redacted versions of previously sealed documents that had just been filed in the public docket.

4. In quickly reviewing the redacted versions of the declarations submitted in support of Plaintiffs' Motion for a Preliminary Injunction, I noticed that one of the names of the declarants (Peter Chase), who is a representative of the John Doe plaintiff Library Connection, was not redacted. I also noticed that in another declaration, filed by Library Connection Executive Director George Christian, the number of library card-holders served by Library Connection (288,000) was not redacted in paragraph 3. I knew that the government had redacted this information elsewhere in the documents, and believed these redactions were necessary under 18 U.S.C. § 2709.

5. Upon discovering the government's failure to redact this information, I promptly alerted United States Attorneys for the District of Connecticut Lisa Perkins and William Collier, who were counsel for defendants before the district court. Counsel thanked me for alerting them, redacted the information in question, and gave me a copy of the newly-redacted declarations. Upon information and belief, counsel for defendants then filed newly-redacted versions of the documents on the public docket.

6. On September 21, 2005, *The New York Times* published an article about this case that reported: "A search of a court-operated Web site offered a pointer to the plaintiffs' identity. There, a case numbered 3:2005cv-1256 is listed under the caption, 'Library Connection Inc. v. Attorney General.'" Alison Leigh Cowan, *Librarians Must Stay Silent in Patriot Act Suit, Court Says,* N.Y. TIMES, Sept. 21, 2005, at B2), available at http://www.nytimes.com/2005/09/21/nyregion/21library.html.

7. According to *The New York Times'* corporate website, the print version of *The New York Times* is circulated to "more than 1.1 million [subscribers] on weekdays." *See* http://www.nytadvertising.com/was/circulation/pages/contentCirculation/0,1067,,00.html ?11Id=5. Moreover, 12,482,000 people in the United States are registered users of *The New York Times* website, and have access to articles even if they are not print subscribers. *See* "Audience Profile," available at http://www.nytimes.com/marketing/adinfoaudince/audience profile.html. The number of worldwide registered users is 17,232,000 people. *Id.*

8. In order to ascertain where *The New York Times* had found Library Connection's identity, I logged onto the PACER Service Center Home Page at http://pacer.psc.uscourts.gov. PACER is a service of United States Judiciary, and the PACER Service Center is run by the Administrative Office of the United States Courts. From the PACER Service Center Home Page it is possible to log on to the service and search for information about all cases filed in the federal courts, as well as case docket sheets, using a case docket number or the name of any party to a lawsuit.

9. I initiated a search in the U.S. Party/Case Index. Specifically, I clicked on the link for searches of civil cases and entered the district court docket number (05-1256) in this case. This search returned a long list of cases with the docket number 05-1256. Among the cases listed was "Library Connection Inc. v. Attorney General." Thus, since August 31, 2005, when redacted versions of certain documents filed in the district court were made available to the public, Library Connection's identity as a plaintiff was revealed to any member of the public who simply went to the PACER Service Center webpage and searched for the case by docket number.

10. In the early afternoon of September 21, 2005, the parties had a phone conference with Judge Hall of the District of Connecticut. During that conference, in addition to identifying the disclosure of Library Connection's identity in *The New York Times,* counsel for the government alerted the plaintiffs and Judge Hall that a document filed by the government on the public docket contained an unredacted reference to Library Connection. This document, Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, had resided on the public docket since August 31, 2005.

11. I personally reviewed the publicly-filed version of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction and confirmed that Library Connection was identified as a plaintiff on page 18 of the document.

12. During the phone conference with Judge Hall, the government requested that the publicly-filed version of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction, which disclosed the identity of Library Connection, be removed from the public docket and replaced with a version in which Library Connection's name was redacted. The government also requested that the Court attempt to remove the reference to Library Connection as the plaintiff in this action on the PACER website. Plaintiffs objected because the information is now in the public domain and thus there is no longer any justification for sealing it.

13. At the end of the phone conference, the district court ruled that it would remove the document that disclosed John Doe's identity from the public docket, and it would attempt to remove the reference to Library Connection that could be found on the PACER system.

14. After the conference, I promptly directed our website team to remove the document that disclosed Library Connection's identity from the ACLU website.

15. In the early evening of September 21, 2005, I logged on to the United States District Court of Connecticut's website to ascertain whether the version of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Preliminary Injunction that disclosed the plaintiffs' identity remained on the docket. The document had been removed and could not be accessed.

16. I also logged on to PACER and initiated the same search that had previously revealed the caption "Library Connection Inc. v. Attorney General." The caption now read "John Doe v. Attorney General."

17. On the morning of September 22, 2005, I visited *The New York Times*' website at www.nytimes.com. The article that reported Library Connection's identity as the plaintiff remained available to the public at http://www.nytimes.com/2005/09/21/nyregion/21library.html. I also initiated a search on the Internet search engine, Google for the term "Library Connection" with "NSL." That search listed *The New York Times* article as the second result.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief. Executed on this day, September 22, 2005.

Melissa Goodman

Appendix G

The New York Times
nytimes.com

September 21, 2005
Librarians Must Stay Silent in Patriot Act Suit, Court Says
By ALISON LEIGH COWAN

The librarians who challenged the nation's antiterrorism act must continue to keep quiet about their role in the case while a federal appeals court reviews the order of confidentiality that bars them from speaking out, the court ruled yesterday.

A three-judge panel of the United States Court of Appeals for the Second Circuit in Manhattan handed the federal government a partial victory yesterday in agreeing to a temporary stay of a lower court ruling that would have allowed the plaintiffs, as of today, to discuss the case. Government lawyers had argued that they needed the stay to give them time to appeal the lower court decision.

At least two members of the appellate panel echoed those arguments. "Absent a stay, this appeal is moot," Judge Sonia Sotomayor commented during the questioning.

In the case involved in the dispute, the F.B.I. sent a library consortium in Connecticut a demand, known as a national security letter, that it turn over patron information and not disclose the request publicly.

Lawyers for the American Civil Liberties Union have argued that the consortium's constitutional right to free speech was violated because the confidentiality order prevented it from participating in the debate over the USA Patriot Act while Congress was considering whether to reauthorize the law.

Emerging from the courthouse yesterday, Ann Beeson, the lead lawyer for the civil liberties group, called the appeals court ruling "extremely frustrating." She said it was unfair that "the government can say all they want about the Patriot Act," but not people like the plaintiffs who have firsthand knowledge of its reach. She said she took some comfort from the appellate court's promise to expedite the appeal.

The case landed in Federal District Court in Bridgeport this summer, with government lawyers citing national security as the grounds for sealing large parts of the record.

On Sept. 9, Judge Janet C. Hall ruled in Bridgeport that the nondisclosure provision in the national security letter violated the plaintiffs' First Amendment rights. She said she would allow the plaintiffs to identify themselves, but gave the government until yesterday to appeal.

Though the plaintiffs' organization has not been named in the various proceedings, a close reading of the court record suggests that it is Library Connection in Windsor, Conn.

A search of a court-operated Web site offered a pointer to the plaintiffs' identity. There, a case numbered 3:2005cv01256 is listed under the caption, "Library Connection Inc. v. Attorney General."

Appendix H

and the ACLUF has been to stem the backlash on civil liberties that has taken place in the name of national security. *Id.* ¶7. In particular, the ACLU and the ACLUF have been the leading voice of opposition to certain provisions Patriot Act. *Id.* Through their combined public education, litigation, and lobbying efforts, the ACLU and the ACLUF continue to play a critical role in influencing the public debate over the Patriot Act. *Id.* Lawyers for the ACLUF represent Library Connection in this action. *Id.* ¶21; [redacted] Decl. Exh. A.

C. The National Security Letter Served on Library Connection

On [redacted] FBI agent [redacted] of the FBI [redacted] Division, telephoned [redacted] to inform him that the FBI would be serving an NSL on [redacted] Decl. ¶16. [redacted] did not describe the substance of the letter, and did not notify [redacted] about the NSL's non-disclosure provision. *Id.* [redacted] asked [redacted] who could receive service of the NSL, and [redacted] told him that [redacted] as [redacted] of [redacted] would receive service. *Id.*

On [redacted] and another [redacted] delivered the NSL (hereinafter [redacted] NSL") to [redacted] Decl. ¶17. The letter, which is dated [redacted] is on FBI letterhead and signed by defendant [redacted] FBI [redacted] Division. *Id.*; [redacted] Decl. Exh. A. The NSL states that [redacted] s "hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity" related to [redacted] Decl. ¶19; [redacted] Decl. Exh. A. The NSL does not specify any procedure by which [redacted] can challenge the validity of the NSL. [redacted] Decl. ¶23. The NSL states that 18 U.S.C. § 2709(c) "prohibits any

libraries and library associations, both locally and nationally, to discuss and develop standardized procedures and policies for responding to the receipt of future NSLs. [redacted] Decl. ¶15; [redacted] Decl. ¶¶31-32. Since the [redacted] NSL was served, [redacted] has received phone calls from libraries asking questions about the Patriot Act. Chase Decl. ¶16. For fear of violating the gag, he has "remained silent about any and all aspects of the NSL power, including its mere existence." *Id.*

[redacted] directors are also gagged from informing library patrons about the NSL. [redacted] Decl. ¶¶13, 20. Library patrons are "generally not aware that the FBI can demand their electronic and paper records without their knowledge and consent." *Id.* ¶13. This information is critical to many library patrons, because many library patrons "take the right of privacy within libraries very seriously," and "use books and computers within libraries under the assumption that what they read and view is private and free from government monitoring." [redacted] Decl. ¶20; *see also* [redacted] Decl. ¶15. But for the gag, [redacted] would disclose the threat that NSLs pose to intellectual freedom, and discuss that threat with other libraries, library associations, and the public. [redacted] Decl. ¶¶ 11, 13-14, 16-17, 20; [redacted] Decl. ¶¶28-29, 31, 33, 35.

The gag is also preventing plaintiffs from disclosing information about the NSL to Congress, who is currently considering legislation to amend Section 2709 and other provisions of the Patriot Act. Romero Decl. ¶¶21-24, 27-30; [redacted] Decl. ¶¶35-36; *see also* [redacted] Decl. ¶¶18-20. The question of whether the FBI has used Patriot Act provisions to obtain information about library patrons has been of extraordinary interest in the library community, in the media, and in Congress. Romero Decl. ¶24; [redacted] Decl. ¶20; [redacted] Decl. ¶¶32, 36. Plaintiffs, ACLU, and ACLUF have worked closely with librarians and library associations in publicizing

injunction has been satisfied."); *Beal v. Stern*, 184 F.3d 117, 123 (2d Cir. 1999) ("A statute that threatens freedom of expression to a significant degree by its nature gives rise to irreparable injury."); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996) ("Violations of First Amendment rights are commonly considered irreparable injuries for the purposes of a preliminary injunction.").

Plaintiffs are entitled to preliminary relief because the gag is irreparably harming their First Amendment rights. The gag is preventing plaintiffs from disclosing fully protected speech about the government's use of expanded powers under the Patriot Act to demand sensitive records from libraries. *See* [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶28-36; Romero Decl. ¶¶21-24, 27-30. [redacted] wants to communicate this information to [redacted] and their patrons, to other libraries and library associations in [redacted] and around the country, to the general public, and to elected officials. *See* [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶28-36. [redacted] is particularly concerned that many libraries around the country do not know the FBI can use the NSL power to demand sensitive records about library patrons. *See* [redacted] Decl. ¶11. But for the gag, Plaintiff Library connection would disclose this information. [redacted] Decl. ¶¶11-20; [redacted] Decl. ¶¶38-36.

Plaintiff ACLU, which has been the leading voice in opposing expanded surveillance powers under the Patriot Act, wants to disclose the information to its members, to the media, to the general public, and to Congress. *See* Romero Decl. ¶¶7-24; 27-30. In particular, plaintiffs wish to disclose the information immediately in order to contribute vital information to the public debate about whether to limit or expand Patriot Act powers. *Id.* ¶¶27-29. If Congress were aware that the FBI is using the NSL provision against libraries, it would be more inclined to

Appendix I

Statement by the Honorable Jerrold Nadler
September 28, 2005

Good morning. I am Congressman Nadler, Democrat from New York.

I have repeatedly expressed my concern about Section 505 of the PATRIOT Act. I am concerned that national security letters (NSLs) could be used by the FBI to collect information, including library and book store records, about innocent Americans. What is especially disturbing is the fact that these records can be obtained in secret and without the appropriate protections afforded by the judicial process. What is even worse, is that the recipients of these letters are prohibited from telling anyone else that the records were demanded (even their lawyers).

Since the passage of the PATRIOT Act in October 2001, the FBI and the Justice Department have repeatedly claimed they have no interest in using the PATRIOT Act to obtain Americans' library records. The government has said so in my presence at various Judiciary Committee hearings.

Yet, despite the FBI's and DOJ's assurances under oath, a recent court case in Connecticut reveals that our concerns were warranted and, in fact, the FBI requested records from a Connecticut library using a Section 505 National Security Letter (NSL). In *ACLU v. Gonzales*, Judge Hall of the U.S. District Court in Bridgeport, Connecticut ruled that a Section 505 national security letter gag order be lifted and that the librarian who received an FBI demand for records about library patrons be allowed to exercise his/her First Amendment right to participate in the public debate over the Act. Judge Hall issued a temporary stay of his decision to give the government a chance to appeal. The government did appeal this decision, and a three-judge panel of the Court of Appeals for the Second Circuit in Manhattan agreed to a extend the stay of a lower court ruling thereby further prohibiting the librarian from coming forward publicly.

This was not the first time that the constitutionality of NSLs has been challenged in court. In *Doe v. Ashcroft*, a New York federal judge ruled National Security Letters unconstitutional. The court held that the absence of judicial review violates the Fourth Amendment right to be free from unreasonable searches and seizures, and the statutory prohibition against disclosing the FBI request to "any person" violates the First Amendment right to freedom of speech.

As you know, both houses of Congress have passed bills to renew the expiring 16 provisions of the PATRIOT Act, and conferees will be named soon. Unless the conferees properly and responsibly amend section 505 NSL, the FBI may lose its ability to use this power since it has been ruled unconstitutional. If we want to allow this power to be used at all to stop real terrorists, it needs to be revised so that it no longer violates the first and fourth amendments. We will be urging the conferees to do this in the coming weeks.

Remember, in America, we can be both safe and free. I am working with many people everyday to make us more safe, but at the same time I am fighting to reasonable checks and

balances on federal powers so that we can also be free. I applaud the ACLU and others for ensuring that we focus on both goals at the same time.

Thank you.

RICHARD J. DURBIN
ILLINOIS

COMMITTEE ON APPROPRIATIONS

COMMITTEE ON THE JUDICIARY

COMMITTEE ON RULES
AND ADMINISTRATION

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Statement of Senator Dick Durbin, Assistant Democratic Leader
National Security Letters and PATRIOT Act Reauthorization
September 28, 2005

The USA PATRIOT Act greatly expanded the government's authority to use National Security Letters, documents issued by FBI agents without judicial or grand jury approval that allow the government to obtain sensitive information about innocent American citizens. The recipient of a National Security Letter is subject to a permanent automatic gag order.

The Justice Department claims that they are not interested in the library records of innocent Americans. However, they acknowledge that they do not know how often FBI agents have obtained library records since enactment of the PATRIOT Act. And just three weeks ago, the Justice Department again refused my request to make public the number of National Security Letters that FBI agents have issued since the PATRIOT Act became law. As a result, the American people have no idea how often the FBI is using this controversial power to obtain their sensitive personal records, including library records.

I commend our nation's librarians for defending our Constitution and leading the fight to reform the PATRIOT Act. Unfortunately, in the past this Justice Department has criticized librarians for exercising their First Amendment rights. Now they have gone even further – preventing a librarian from speaking publicly about a legal challenge to the National Security Letter power.

In our democracy, the government is supposed to be open and accountable to the people and the people have a right to keep their personal lives private. This Justice Department seems to want to reverse this order, keeping their activity secret and prying into the private lives of innocent American citizens.

The President has asked Congress to reauthorize the PATRIOT Act. In order to have a fully informed public debate, the American people should know how often the National Security Letter authority has been used and they should be able to hear from librarians and others who are concerned about this power.

ACLU, American Library Association, Patriot Act Gag Order Press Conference
Statement by Rep. Bernard Sanders
September 28, 2005

Thank you to the American Library Association and the ACLU for the invitation to participate in today's press conference.

As recently as March of this year, Attorney General Gonzales stated before the House Judiciary Committee that Section 215 of the Patriot Act, often called the library records provision, had never been used to obtain library records and that the Justice Department had no interest in the reading records of Americans. Mr. Gonzales' predecessor, John Ashcroft, also repeatedly stated that librarians did not need to worry that the FBI would use the Patriot Act to demand private patron information—referring to the librarians' concerns as "baseless hysteria."

Well, our "baseless hysteria" has been justified. In August we learned that the FBI had used powers afforded by the Patriot Act to obtain library records—not Section 215, but Section 505 National Security Letters (NSLs). NSLs, like Section 215 orders, prohibit the recipient from discussing the order with anyone. This recent news that the FBI has used an NSL to obtain library patron records confirms that the Justice Department *is* interested in library reading records and those of us in Congress concerned about this

issue are justified in wanting legislative safeguards to protect reader privacy. The use of NSLs to obtain library patron information is distressing, particularly because with the strict gag order in place, we know next to nothing about whose records are sought and why.

Additionally, one of the major problems concerning NSLs is this: the Justice Department refuses to release all requested information to Congress regarding the use of National Security Letters—how many times they have been used since the passage of the Patriot Act and what types of records have been seized. I believe that Congressional oversight of the Patriot Act is a critical safeguard, yet the Justice Department continually places roadblocks in the way of members who attempt to learn how provisions in the Patriot Act are being used.

I am extremely pleased that the ACLU is continuing its important work to protect the civil liberties of all Americans by acting as counsel to the NSL recipient.

I am pleased to hear that so many Americans have signed the ACLU's petition urging Attorney General Gonzales to stop gagging librarians from participating in the Patriot Act debate. This latest drive to add some transparency to the Patriot Act can be added to the long list of initiatives we have seen throughout this country to amend the Patriot Act. To

date, nearly 400 communities and seven states have passed resolutions expressing opposition to the anti-liberty and anti-privacy sections of the Patriot Act.

The importance of the Connecticut NSL case cannot be emphasized enough. Right now, Members of Congress of the conference committee are preparing to draft a final version of the Patriot Act reauthorization bill, and all members will soon have the opportunity to vote on the conference report. It is extremely important to lift the gag that is imposed on the NSL recipient in question here so that the ALA member can participate in the debate surrounding the reauthorization of the Patriot Act. With a final version of a Patriot Act reauthorization bill set to emerge from conference in the next few months, I believe an exception should be granted and the recipient of the NSL should be allowed to speak about the order. If the ALA member were allowed to speak, he or she may be able to provide valuable insight which could help Members of Congress in their work to reauthorize the Patriot Act.

Again, I want to reiterate that it's not just the general public that knows little about National Security Letters. Members of Congress still don't have all of the facts because the Justice Department refuses to provide us with pertinent information, even though U.S. courts have ruled on two separate occasions that the gag order is unconstitutional. We are seeing the Justice Department, again, taking the position of "just trust us." This

position is simply not good enough—members of Congress, as well as the American people need and deserve to know how these powers about being used and for what.

I cannot stress the importance of the recipient of the NSL participating in the debate to reauthorize the Patriot Act. There is no more appropriate time for Members of Congress and the American people to hear about this person's experience.

We all believe that the United States government should do all that it can to protect American citizens from another terrorist attack, yet this should not be done at the expense of Americans' cherished civil liberties.

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Statement of U.S. Senator Russ Feingold

National Security Letters and Reauthorization of the USA PATRIOT Act

September 28, 2005

I am pleased to join Congressman Sanders, Congressman Nadler and these hard-working organizations in calling on the Administration to provide more information about how it is using its National Security Letter authority. This lawsuit demonstrates just how little we know about the use of this unrestrained power, which permits government agents to obtain certain types of business records without any court approval at all.

This is a critical time in our review of the USA PATRIOT Act, which expanded the government's authority to issue National Security Letters. Congress and the American public have the right to understand fully how the Patriot Act is being used before any provisions are reauthorized or amended, regardless of whether the courts ultimately decide that the gag rule on National Security Letters is unconstitutional. The Justice Department should immediately release as much information as possible about the records request challenged in this lawsuit.

In the past few months, the Administration has repeatedly assured us that it has not used Section 215 of the PATRIOT Act to obtain library records, and Attorney General Gonzales told Congress in April that the Justice Department "has no interest in rummaging through the library records" of Americans. While this lawsuit has to do with a different Patriot Act provision, it demonstrates that the Administration has not been candid. The Administration needs to come clean on whether it has asked for reading records.

I also want to speak briefly about reauthorization of the Patriot Act. In July, I joined my Senate colleagues in unanimously passing a consensus, bipartisan bill that significantly improves the most controversial provisions of the USA PATRIOT Act. It is not perfect, but it makes meaningful improvements to the law.

For example, with respect to Section 215 of the Patriot Act, which can be used to obtain library, medical and other sensitive business records, the Senate bill would require the government to convince a judge that a person is connected to terrorism or espionage before obtaining those records. It would also require the government in most circumstances to notify the target of a "sneak and peek" search warrant within seven

days, instead of the undefined delay that is currently permitted by the Patriot Act. It would eliminate "John Doe roving wiretaps," impose new four-year sunsets on three of the most troublesome provisions, and provide recipients of intrusive business records orders and National Security Letters with the explicit right to challenge them in court.

In the House, unfortunately, the outcome was quite different. House leadership refused to allow meaningful amendments to come to a vote on the House floor. While some improvements were incorporated, the end result is still a far cry from what Congress owes the American people – reining in the parts of the Patriot Act that went too far so as to protect innocent people from government surveillance.

The House bill also includes a variety of provisions that have nothing to do with the Patriot Act, such as dramatic and unnecessary expansions of the federal death penalty. Congress must resist the temptation to turn the must-pass Patriot Act reauthorization bill into legislation full of half-baked ideas that have only a tangential relationship to the fight against terrorism. We need to stick to the issue, which is ensuring that American's civil liberties are protected while protecting national security.

The Senate's bipartisan compromise takes a big step in the right direction. I will support it in the form that it passed the Senate, but I will continue to push for additional changes to the law. I also have made clear that if the conference committee moves away from the Senate version and ignores public demands for improvements in the Patriot Act, I will strongly oppose the resulting conference report. I was able to support the Senate bill only because it contained meaningful improvements to the most controversial provisions of the Patriot Act.

Appendix J

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

September 8, 2005

The Honorable Richard J. Durbin
United States Senate
Washington, DC 20510

Dear Senator Durbin:

This is in further response to your letter, dated July 27, 2005, which asked the Attorney General to declassify the aggregate number of national security letters issued under all legal authorities for each of the last three calendar years. On July 28, 2005, we replied to your letter, committing to review your request and respond to your letter substantively by September 8, 2005. The Department has completed that review and determined that the aggregate numbers of national security letters issued by the Department properly should remain classified.

As the July 28th letter noted, the Department reports to several committees of Congress twice yearly on our use of the national security letter authorities by the Federal Bureau of Investigation (FBI). The Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence receive semiannual reports of requests for telephone subscriber or toll billing/electronic communication transactional records obtained under 18 U.S.C. § 2709, for financial institution and consumer identifying information and consumer credit reports under 15 U.S.C. § 1681(u), and for financial records under 12 U.S.C. § 3414. The House and Senate Judiciary Committees, the Senate Banking Committee, and the House Financial Services Committee also receive some of these reports. Although the reports are classified, they are available for review by all members of Congress and by staff with appropriate security clearances and a need to know the information. The most recent of these semiannual reports was transmitted to Congress in April of this year, and the next set will be transmitted before the end of this year. The FBI's use of national security letters also has been subject to vigorous oversight by those Committees, particularly in the last year.

Information that has been properly classified for reasons of national security may be publicly disclosed in exceptional situations if the public interest in doing so is sufficiently important that it outweighs the legitimate need to keep the information classified. Section 3.1(b) of Executive Order No. 13292, amending Executive Order No. 12958, provides:

> It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information

should be declassified. When such questions arise, they shall be referred to the agency head or the senior agency official. That official will determine, as an exercise of discretion, whether the public interest in disclosure outweighs the damage to the national security that might reasonably be expected from disclosure.

After careful consideration of your request, including an evaluation of whether the need to protect such classified information may be outweighed by the public interest in disclosure of the information, the Department has determined that this information should remain classified at this time. The public interest your letter cites as grounds for justifying the declassification of this properly classified information is that it will assist public debate of the re-authorization of the Patriot Act. Congress has conducted vigorous oversight of the government's use of national security letters over the past year in conjunction with the recent votes in both chambers of Congress to reauthorize provisions of the USA PATRIOT Act that are scheduled to sunset this year. (The national security letter authorities predated the USA PATRIOT Act, were not subject to its sunsets and, thus, did not require reauthorization.) As noted above, Congress regularly is informed about the FBI's uses of national security letters as a tool in furthering national security investigations authorized under applicable Attorney General guidelines, including the number of times those authorities have been used. In addition, we will continue to provide Congress with information on our use of those authorities as required by law. Public disclosure of the information is not, however, appropriate at this time in light of the national security interests in question.

For these reasons, the Department respectfully declines your request to declassify the number of national security letters that the Department of Justice, through the FBI, has issued. Please do not hesitate to contact this office if you have any questions or if we may be of any further assistance.

Sincerely,

William E. Moschella

William E. Moschella
Assistant Attorney General