



April 30, 2004

By Hand

Hon. Victor Marrero
United States District Judge
United States Courthouse
40 Centre Street, Room 414
New York, NY 10007

Re: *ACLU et al. v. Ashcroft*, 04-CV-2614 (VM)

Dear Judge Marrero,

Plaintiffs respectfully submit this letter in connection with the above-captioned action and in response to the government's letter to the Court dated April 29, 2004.

As the government's April 29 letter indicates, the government contacted the ACLU on April 28 to object to two paragraphs in an ACLU press release, asserting that the paragraphs were inappropriately disclosed because the case is under seal. One paragraph disclosed the briefing schedule in this case, which was agreed to by the parties and then subsequently reduced to a joint letter that was filed with the Court.

[REDACTED] On the morning of April 29, the government again contacted the ACLU, this time to direct it to remove the two paragraphs from its website. When undersigned counsel could not say immediately whether the ACLU would comply with the direction, the government delivered a letter to the Court asking it to direct the ACLU to remove the speech from its website.

The government has thus demanded that the ACLU remove from its website information that is not sensitive, that poses no possible threat to national security, and that the public has a right to know. Indeed, the public clearly has a constitutional right to communicate and receive the specified information. *See Video Software Dealers Assoc. v. Orion Pictures Corp.*, 21 F.3d 24, 26 (2d Cir. 1994) ("The preference for public access is rooted in the public's first amendment right to know about the administration of justice. It helps safeguard the integrity, quality and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies."). However, because the ACLU

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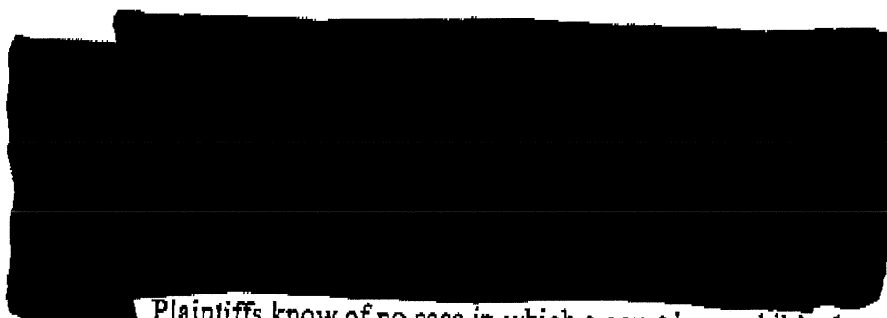
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is determined to take every precaution in order to avoid inadvertently violating an order of this Court, the ACLU and the New York Civil Liberties Union have reluctantly removed the information from their web sites pending the Court's resolution of this dispute.

Plaintiffs respectfully submit that none of the information cited by the government falls within the scope of the Court's April 6 sealing order. The proposed briefing schedule is wholly non-sensitive and entirely tangential to the substance of this litigation. Plaintiffs understood the Court's sealing order to restrict public access to the materials filed in this case, not to restrict the communications of the parties about matters incidental to the substance of the litigation.

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Plaintiffs know of no case in which a court has prohibited a party from publishing a description of a federal statute.

Because the sealing order does not bar disclosure of the information at issue here, the government's demand that the ACLU remove the information from its website constitutes an unconstitutional prior restraint. See *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 559 (1976) ("prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights"); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (prior restraints may be issued only in "extraordinary circumstances," such as when necessary to prevent the overthrow of the government). The government has offered no argument to justify the imposition of a prior restraint.

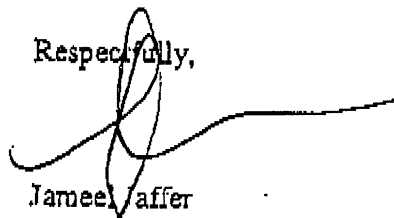
Plaintiffs therefore urge that the Court reject the government's position and that it hold that the sealing order does not prohibit plaintiffs from publishing the specified information. In the alternative, plaintiffs request that the Court modify the April 6 sealing order (an order that was entered upon plaintiffs' motion) so that the ACLU may publish the specified information. Because the First Amendment rights of plaintiffs

and the public are at stake, plaintiffs respectfully request that the Court resolve this narrow issue as expeditiously as possible.

Because of the broader issues raised by the government's demand that plaintiffs refrain from publishing non-sensitive information about a matter of public concern, plaintiffs are also attaching a Motion to Unseal the Case. Despite numerous attempts to reach the government by telephone today, plaintiffs have not been able to reach defendants' counsel in order to negotiate a briefing schedule. Plaintiffs therefore propose that the Court direct the government to submit its opposition to plaintiffs' motion by May 3 and that argument be held as soon as possible thereafter.

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Respectfully,

A handwritten signature in black ink, appearing to read 'Jameel Jaffer', with a long horizontal line extending to the right.

Encl.

cc: Meredith Kotler
Assistant United States Attorney
Southern District of New York
86 Chambers Street
New York, NY 10007