

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[REDACTED], and
AMERICAN CIVIL LIBERTIES UNION,

Plaintiffs,

v.

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

Defendants.

MEMORANDUM IN SUPPORT
OF MOTION TO UNSEAL CASE
AND TO FILE THE ATTACHED
REDACTED DOCUMENTS ON
THE PUBLIC DOCKET

04 Civ. 2614 (VM)

SEALED

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION TO UNSEAL CASE AND TO FILE THE ATTACHED
REDACTED DOCUMENTS ON THE PUBLIC DOCKET

Plaintiffs [REDACTED] and American Civil Liberties

Union (ACLU) hereby move to unseal the above-captioned case and to file the attached
redacted documents on the public docket.

Plaintiffs originally filed the case under seal because their Complaint includes
numerous allegations that might be construed to fall within the scope of 18 U.S.C.
§ 2709(c), which provides that "[n]o wire or electronic communication service provider,
or officer, employee, or agent thereof, shall disclose to any person that the Federal
Bureau of Investigation has sought or obtained access to information or records under
this section." Judge Greisa granted plaintiffs' Motion for Leave to File Case Under Seal
on April 6, 2004.

After extensive negotiations, defendants agreed that neither they nor their agents would seek to impose any legal sanction or penalty on the ACLU (or its attorneys) for filing publicly a redacted Complaint and redacted Motion for Leave to File Case Under Seal, or for otherwise disclosing in any form the information contained in the redacted documents. On April 28, 2004, this Court ordered that the redacted documents be placed on the public docket. Rec. Doc. 8.

After the Court issued its April 28 Order, the ACLU issued a press release and launched an Internet web feature about its challenge to Section 2709. Plaintiffs have attached a printout of the press release. *See* Exh. 1. The government contacted the ACLU on April 28 to object to two paragraphs in the press release, asserting that they were improperly 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 and filed with the Court. The second paragraph generically describes the type of information that the government can obtain by using an NSL, employing language almost identical to the language in the statute itself. On the morning of April 29, the government again contacted the ACLU, this time to direct it to remove the information from its website. *See* Exh. 2. 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 specified information from its website. *See id.*

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 clearly has a right to know. Indeed, the ACLU and the public clearly have

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 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. By separate letter to this Court, the ACLU has asked the Court to rule that the sealing order does not prohibit the ACLU from publishing the specified information, or in the alternative, to modify the sealing order so that the ACLU may disclose the specified information to the public.

Because this episode has made it clear that the government is committed to keeping even non-sensitive information from the public domain, plaintiffs now respectfully ask the Court to unseal the entire case. The Supreme Court has recognized that “[p]ublicity is the soul of justice. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (quoting Jeremy Bentham, *Rationale of Judicial Evidence* 524 (1827)). An essential function of the First Amendment is to ensure that citizens can witness and monitor the functioning of all branches of government – legislative, executive and judicial.

Thus, the Court has observed, “[w]hat transpires in the court room is public property.” *Craig v. Harney*, 331 U.S. 367, 374 (1947). See also *Maryland v. Baltimore*

Radio Show, 338 U.S. 912, 920 (1949) (Frankfurter, J.) (“One of the demands of a democratic society is that the public should know what goes on in the courts. . . .”).

Although this is true in all cases, this litigation is of particular public concern. This case involves a constitutional challenge to a federal statute; it is not a dispute between two private parties. Moreover, the statute at issue in this case, the National Security Letter power under the USA Patriot Act, has been the subject of particular controversy and criticism. *See, e.g.*, Editorial, *Too Much Power*, Washington Post (Jan. 4, 2004) (“The use of ‘national security letters’ is not new, but in light of new authorities provided the FBI in the USA Patriot Act, Congress should be finding way to curtail their use, not expand it.”). The press and the public now know that the constitutionality of Section 2709 has been formally questioned in a judicial proceeding.

There is simply no justification for keeping this entire case under seal. There are numerous documents pertaining to this case that contain wholly innocuous information that the public has the right to know. Specifically, the April 26 joint letter regarding the filing of redacted documents would be of tremendous interest to the press and the public. There is also no conceivable reason, as the government itself concedes, to withhold the briefing schedule in this case from the public. Furthermore, the docket sheet itself provides valuable information to those who want to monitor the progress and resolution of this dispute. Finally, the instant motion to unseal and the government’s April 29 letter to the Court contain non-sensitive information that should be available to the public.

The press has already contacted the ACLU and expressed interest in this case. For this reason, it is vital that the scheduled motions for summary judgment, and responses to those motions, be available to the public, and that any argument on those

motions be open to the public. Of course plaintiffs recognize that certain documents in this case will need to be redacted for inclusion on the public docket, but such documents can and should be dealt with on a document-by-document basis through stipulations between the parties or motions to the Court. With respect to documents that are currently filed under seal, plaintiffs have attached proposed redacted versions and ask the Court to file these redacted versions on the public docket. See Exhs. 3 - 9.

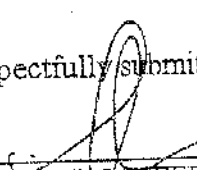
The presumption in this case, as in all cases, should be one of openness. Any party wishing to deviate from this constitutional norm should be required to advance specific and narrowly tailored arguments justifying the need for secrecy. A blanket of secrecy over all proceedings in this case is unwarranted. As the Sixth Circuit recently noted, "Democracies die behind closed doors." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

For the reasons stated above, plaintiffs respectfully request that the Court grant Plaintiffs' Motion to Unseal Case and to File the Attached Redacted Documents on the Public Docket.

Respectfully submitted,

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