

UNDER SEAL

05-4896-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

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, and JOHN ROE, Federal Bureau of Investigation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

SUPPLEMENTAL APPENDIX

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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] [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] [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] "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] [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

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Highlights indicate public information later redacted by the government

American Library Association, Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users, adopted January 29, 2003.

[REDACTED] is also a member of the Connecticut Library Association (CLA).
[REDACTED] Decl. ¶11. [REDACTED] who is the [REDACTED] of [REDACTED] Board of Directors, currently serves as the [REDACTED] Decl. ¶¶1, 6. In that position [REDACTED] regularly plans and participates in events and programs to educate the library community and the public about threats to intellectual freedom. *Id.* ¶¶6, 8. [REDACTED] defines “intellectual freedom” in the library context as the right of patrons to use public libraries as a space to explore different ideas, even controversial and unpopular ones, in privacy and absent the risk of government surveillance or monitoring.” *Id.* ¶9. He believes that, “in order to participate in the democratic process, citizens need access to a wide variety of viewpoints on different topics.” *Id.* [REDACTED] strictly guards the confidentiality and privacy of its library and Internet records, and believes it should not be forced to disclose such records without a showing of compelling need and approval by a judge. [REDACTED] Decl. ¶25.

Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with over 500,000 members dedicated to the constitutional principles of liberty and equality. Romero Decl. ¶2. The primary mission of the ACLU, which is a 501(c)(4) organization, is to educate the public about the civil liberties implications of pending and proposed legislation in Congress and in state and local legislatures; to directly lobby legislators and to provide analyses of such pending or proposed legislation; and to mobilize our members and other activists to lobby their legislators. *Id.* The ACLU Foundation is a separate 501(c)(3) organization that provides legal representation free of charge to individuals and organizations in civil liberties cases, and educates the public about civil liberties issues. *Id.* ¶3. In the past two years, one of the core priorities of the ACLU

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[REDACTED];
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ALBERTO GONZALES, in his official
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ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation;
[REDACTED] in his official capacity
as [REDACTED] Federal Bureau of
Investigation,

Defendants.

DECLARATION OF [REDACTED]

[REDACTED]

Civ. Action No. 3:05cv1256 JCH

SEALED CASE

DECLARATION OF [REDACTED]

I, [REDACTED] of [REDACTED], do declare:

1. I currently serve as the [REDACTED] of [REDACTED] [REDACTED] one of the plaintiffs in this case. I have been the [REDACTED] [REDACTED] for two years. Prior to becoming the [REDACTED], I was employed by the predecessor of [REDACTED] [REDACTED] as the manager of their library automation system. I served in that capacity for one year.
2. I have a Bachelor of Arts degree in psychology from [REDACTED] I also have a Master of Arts degree in Business Administration and a Master of Arts

degree in Urban and Suburban Administration from the [REDACTED]

[REDACTED] I have a professional background in computer technology and software development. Prior to working at [REDACTED] I was employed by [REDACTED] and [REDACTED] to manage software development projects. I also am an adjunct professor at the [REDACTED] although I have not taught for the past year..

3.

[REDACTED]
[REDACTED]
[REDACTED] serve over [REDACTED] library-cardholders, as well as many other library users that do not have library cards.

[REDACTED] provides a number of services to [REDACTED] It administers an [REDACTED] [REDACTED] for the cataloging and circulation of library materials, and to track community borrowing and library usage. Library patrons [REDACTED] [REDACTED] search library collections, to reserve library materials, and to check the status of their accounts. [REDACTED]

[REDACTED]. To the best of my knowledge, several thousand other libraries also use the [REDACTED]

[REDACTED] also provides telecommunications links to its [REDACTED] [REDACTED] and Internet access for use by staff and patrons at [REDACTED]
[REDACTED]

5. [REDACTED] also provides staff expertise, training, consultation, troubleshooting and customization services to its [REDACTED]
6. [REDACTED] is governed by a fifteen-person Board of Directors composed of twelve representatives of [REDACTED] and three representatives of the communities served by the [REDACTED]. The Board of Directors is responsible for the legal and financial obligations of the organization. The Board of Directors has an Executive Committee comprised of the President, Vice-President, Secretary, and Treasurer of the Board. The [REDACTED] serves as staff liaison to the Executive Committee. The Executive Committee is empowered to act on behalf of the entire Board when necessary.
7. [REDACTED] possess a wide array of sensitive information about library patrons, including information about the reading materials borrowed by library patrons and about the Internet usage of library patrons.
8. [REDACTED] contains the borrowing history of all patrons at all its [REDACTED] since converting to the [REDACTED] in 2001. [REDACTED] and its [REDACTED] have always felt that this information is extremely private and confidential. The system has been configured so that [REDACTED] staffs only have access to information about items that are currently on loan. Once materials have been returned to a library (and any associated overdue fines paid), only [REDACTED] staff can retrieve historical information on patron borrowing. Such retrievals

are only used to resolve disputes between patrons and libraries on whether materials have been returned and/or fines paid, or to resolve apparent malfunctions in the system software.

9. The libraries using [REDACTED] the software that runs [REDACTED] [REDACTED] have organized themselves into a User Group. The software is extremely complex, and, by sharing experiences, libraries can often achieve more from the software than they could on their own. Over time, the focus of the User Group has broadened to include the sharing of information and experiences on almost all topics of library administration. Within the user group community, there are Special Interest Groups (SIGs) that focus on the concerns of different portions of the User Group community (such as public libraries, law libraries, system administrators, circulation specialists, etc.). I served as the [REDACTED] of the [REDACTED] from [REDACTED] to [REDACTED]. I am currently still an active member of the [REDACTED]. There are about fifty library consortia, from around the country, in the [REDACTED]. The [REDACTED] was established so that library consortia using [REDACTED] have a forum to exchange information about the software, about the vendor [REDACTED] and to discuss the general operations of consortia and the challenges they face. The [REDACTED] meets both with and without [REDACTED] representatives present.

10. I have also been instrumental in getting the Executive Directors of the four [REDACTED] to meet on a quarterly basis to exchange

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FOR THE DISTRICT OF CONNECTICUT

██████████;
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ALBERTO GONZALES, in his official
capacity as Attorney General of the United
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ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation;
██████████, in his official capacity
as ██████████, Federal Bureau of
Investigation,

Defendants.

DECLARATION OF ██████████

Civ. Action No. 3:05cv1256 JCH

SEALED CASE

DECLARATION OF ██████████

I, ██████████, of ██████████, do declare:

1. I currently serve as the ██████████ of ██████████

██████████ one of the plaintiffs in this case. I have been the ██████████

██████████ of ██████████ for ██████████. Prior to becoming the ██████████

I was employed by the ██████████ of ██████████ as the ██████████

██████████. I served in that capacity for ██████████

2. I have a ██████████ from ██████████. I also

have a ██████████ and a ██████████ in

██████████ I have a

[REDACTED] Prior to working at [REDACTED]. I was employed by [REDACTED] and [REDACTED] [REDACTED] to [REDACTED] I also am [REDACTED] [REDACTED] [REDACTED]

3. [REDACTED] [REDACTED] [REDACTED] cardholders, as well as many other library users that do not have library cards. [REDACTED] provides a number of services to [REDACTED]. It administers an [REDACTED] [REDACTED] use for the cataloging and circulation of library materials, and to track community borrowing and library usage. Library patrons [REDACTED] [REDACTED] search library collections, to reserve library materials, and to check the status of their accounts. [REDACTED] [REDACTED] To the best of my knowledge, several thousand other libraries [REDACTED]

4. [REDACTED] also provides telecommunications links to its [REDACTED] [REDACTED] and Internet access for use by staff and patrons at [REDACTED] [REDACTED]

5. [REDACTED] also provides staff expertise [REDACTED] [REDACTED]

6. [REDACTED] is [REDACTED] [REDACTED]

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.. from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.”

3. I am currently employed as the [REDACTED] of the [REDACTED] in [REDACTED]. I have been the [REDACTED] of the [REDACTED] for [REDACTED]. I have been a librarian for [REDACTED].

4. I received a Master's in Library Science from the [REDACTED] in [REDACTED].

5. I have been an active member of the [REDACTED] American Library Association (“ALA”). I served as [REDACTED]. I also served a [REDACTED] as the [REDACTED] from [REDACTED]. During [REDACTED] and [REDACTED] of the [REDACTED], I regularly spoke out about and challenged policies endangering the intellectual freedom of libraries. In [REDACTED], I was honored [REDACTED] from the [REDACTED]. In addition, as the [REDACTED], it [REDACTED] to communicate with [REDACTED] about the importance of intellectual freedom in the library context. It was also [REDACTED] to lobby for increased protection of the privacy of library patrons and their records.

6. I currently serve as the [REDACTED] of the [REDACTED] of [REDACTED]. I have held this position for [REDACTED]. My duties and responsibilities include keeping the [REDACTED] library community and the general public informed about intellectual freedom issues affecting both [REDACTED] and the nation. For example, I regularly plan and participate in events and programs on important intellectual freedom

issues, including the relationship between the government and libraries. As the [REDACTED] [REDACTED] it is also my duty and responsibility to speak out about any infringement to the intellectual freedom of libraries of which I have knowledge.

7. I am currently also a [REDACTED] I have held this position for [REDACTED] Under this program [REDACTED] [REDACTED] It is [REDACTED] to inform their legislator about any legislative concerns facing their local library communities. As a [REDACTED] [REDACTED] in my community about issues impacting libraries in general and intellectual freedom issues in particular. For example, every year the [REDACTED] [REDACTED] [REDACTED] This year's docket highlighted laws protecting the privacy of patron records. I advocated for a revision to the [REDACTED] state statute protecting the confidentiality of library records to clarify that privacy protections apply to all library records, not just circulation records. In particular, I advocated for privacy protection for computer records, including Internet records. As a [REDACTED] I argued that the laws protecting the privacy of both patron Internet and computer records and reading records needed to be strengthened in order to preserve the democratic function of libraries in our society.

8. In addition, [REDACTED] [REDACTED] to serve as a liaison between the [REDACTED] library community and the American Library Association, as well as other libraries and library associations

[REDACTED] In addition, [REDACTED]. For example, in [REDACTED] I was a panelist in a discussion sponsored by the [REDACTED]. The presentation was entitled [REDACTED] [REDACTED] [REDACTED] over the appropriateness of the Patriot Act and its application to libraries.

11. I had no knowledge of the NSL provision of the Patriot Act until [REDACTED] [REDACTED] was served with the NSL at issue in this case. I have never heard the NSL power discussed in any of the many forums relating to intellectual freedom and libraries I have attended. I did not know that a library could be construed as an "electronic communications service provider" under the NSL statute, or that the FBI could use NSLs to demand sensitive information about library patrons. To the best of my knowledge, the existence of the NSL provision and its applicability to libraries is not generally known within the library community. Now that I know about the NSL power, the gag is preventing me from educating my own library, CLA, ALA, and other libraries and library associations about the NSL power and the threat that it poses to the privacy of library patrons.

12. But for the gag, I would inform the staff and trustees of the library [REDACTED] [REDACTED], that [REDACTED] had been served with an NSL. I would work with the staff and trustees to develop procedures for responding to future NSLs were we to receive one directly.

13. But for the gag, I would also inform the patrons of the [REDACTED] [REDACTED] that [REDACTED] had been served with an NSL, and would explain the

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NSL statute. Activism on behalf of librarians against the Patriot Act has focused primarily on the threat posed to intellectual freedom under Section 215. But for the gag, the ACLU and ACLUF would inform librarians and library associations that the FBI is now using the NSL power to demand records about library patrons.

27. But for the gag, the ACLU and ACLUF would also inform the media that the FBI has now used the NSL power to demand records about library patrons. That information would undoubtedly influence the public debate about whether the NSL power should be limited, expanded, or reauthorized.

28. The gag is also preventing lawyers and staff of the ACLUF from providing vital information to members of Congress. On July 21, 2005, the House passed a bill to reauthorize the Patriot Act. *See* H.R. 3199, 109th Cong. (July 21, 2005). On July 29, 2005 the Senate passed its own version of a Patriot Act reauthorization bill. *See* S. 1389, 109th Cong. (July 29, 2005). When Congress returns from its recess in the early fall, the House and Senate will meet in conference to reconcile their versions of the Patriot Act reauthorization bills. Both versions contain amendments to the NSL provision. Neither bill would prevent the use of NSLs against libraries. Nor would either bill allow a library to disclose the mere fact that it had been served with an NSL. But for the gag, the ACLU would disclose to members of Congress that the FBI had used the NSL authority to obtain information from libraries. If Congress were aware that the FBI is using the NSL provision in this way, it would undoubtedly be more inclined to adopt additional safeguards that would limit the NSL power. Indeed, Members of Congress introduced numerous bills that would have explicitly prohibited the FBI from serving NSLs on libraries or altered the standards for issuance of NSLs on libraries. *See* H.R. 3352, 108th

Cong. (Oct. 21, 2003), S. 317, 109th Cong. (Feb. 8, 2005), H.R. 1526, 109th Cong. (Apr. 6, 2005).

29. The gag is also preventing lawyers and staff of the ACLUF from providing vital information to members of Congress about other provisions of the Patriot Act that have gag provisions that are similar or identical to the NSL gag provision. For example, Section 215 of the Patriot Act states that "No person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things" through a Section 215 order. 50 U.S.C. § 1861(d). Both versions of the House and Senate Patriot Act reauthorization bills contain amendments to the 215 gag provision. Neither bill, however, would prevent the use of 215 against libraries. Nor would either bill allow a library to disclose the mere fact that it had been served with a Section 215 order. But for the gag, the ACLU would disclose to members of Congress that the FBI is using the Patriot Act to seek information from libraries, and that the libraries are gagged from disclosing this fact. If Congress were aware that libraries were being gagged in this way, it would undoubtedly be more inclined to adopt additional safeguards that would limit the 215 power. Indeed, the House recently adopted a measure that would explicitly prohibit the use of appropriated funds to access library and bookstore records through Section 215 orders. See H.R. 2862, H. Amdt. 280, 109th Cong. (June 15, 2005).

30. Because of the gag in this case, Congress is considering new legislation without the benefit of all the facts. The gag is also limiting our ability to mobilize ACLU members and other activists to limit Patriot Act powers.

31. The ACLU and ACLUF recognize that limited secrecy may sometimes be necessary if justified by the government in a particular case. The ACLU and ACLUF do not now seek to disclose the particular records the FBI demanded in the NSL served on

[REDACTED] in this case. But the government has no legitimate interest in gagging us from disclosing the mere fact that the FBI has used the NSL power to demand sensitive records from [REDACTED]. The gag has straitjacketed our ability to inform the press, the public, and Congress about the government's use of a dangerous new power. More importantly, the public and Congress are being denied information essential to the public and legislative debate that is at the heart of democratic self-governance.

32. It is particularly troubling that, while the ACLU and ACLUF have been gagged from disclosing the FBI's use of the NSL power against a consortium of libraries, President Bush, FBI and Justice Department Officials, and Members of Congress are engaged in a vigorous public campaign in support of the Patriot Act and new, more expansive, surveillance powers. *See, e.g., Open Hearing: USA PATRIOT Act of 2001*, Senate Select Committee on Intelligence, 109th Cong., Apr. 27, 2005 (testimony of Attorney General Alberto Gonzalez, FBI Director Robert Mueller, and CIA Director Porter Goss urging the renewal of the Patriot Act); *Open Hearing on USA PATRIOT ACT*, House Select Committee on Intelligence, 109th Cong., May 11, 2005 (testimony of Deputy Attorney General James Comey urging renewal of the Patriot Act and discussing Section 215); *Oversight of the USA PATRIOT Act*, Senate Judiciary Committee, 109th Cong., Apr. 5, 2005 (testimony of Attorney General Alberto Gonzalez urging renewal of the Patriot Act and denying use of Section 215 against libraries); *id.* (testimony of FBI Director Robert Mueller urging renewal of the Patriot Act and an expansion of the FBI surveillance power); 2004 State of the Union Address, Jan. 20, 2004, at <http://www.whitehouse.gov/news/releases/2004/01/20040120-7.html> (President Bush

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be used to target library records. This lack of awareness also stems from the fact that NSLs are directed at "electronic communication service provider[s]" ("ECSP") and many librarians and libraries are unaware that a library would be considered an ECSP under the NSL statute. Activism on behalf of librarians against the Patriot Act has focused primarily on the threat posed to intellectual freedom under Section 215. But for the gag, the ACLU and ACLUF would inform librarians and library associations that the FBI is now using the NSL power to demand records about library patrons.

27. But for the gag, the ACLU and ACLUF would also inform the media that the FBI has now used the NSL power to demand records about library patrons. That information would undoubtedly influence the public debate about whether the NSL power should be limited, expanded, or reauthorized.

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safeguards that would limit the NSL power. Indeed, Members of Congress introduced numerous bills that would have explicitly prohibited the FBI from serving NSLs on libraries or altered the standards for issuance of NSLs on libraries. *See* H.R. 3352, 108th Cong. (Oct. 21, 2003), S. 317, 109th Cong. (Feb. 8, 2005), H.R. 1526, 109th Cong. (Apr. 6, 2005).

29. The gag is also preventing lawyers and staff of the ACLUF from providing vital information to members of Congress about other provisions of the Patriot Act that have gag provisions that are similar or identical to the NSL gag provision. For example, Section 215 of the Patriot Act states that "No person shall disclose to any other person . . . that the Federal Bureau of Investigation has sought or obtained tangible things" through a Section 215 order. 50 U.S.C. § 1861(d). Both versions of the House and Senate Patriot Act reauthorization bills contain amendments to the 215 gag provision. Neither bill, however, would prevent the use of 215 against libraries. Nor would either bill allow a library to disclose the mere fact that it had been served with a Section 215 order. But for the gag, the ACLU would disclose to members of Congress that the FBI is using the Patriot Act to seek information [REDACTED] are gagged from disclosing this fact. If Congress were aware that [REDACTED], it would undoubtedly be more inclined to adopt additional safeguards that would limit the 215 power. Indeed, the House recently adopted a measure that would explicitly prohibit the use of appropriated funds to access library and bookstore records through Section 215 orders. *See* H.R. 2862, H. Amdt. 280, 109th Cong. (June 15, 2005).

30. Because of the gag in this case, Congress is considering new legislation without the benefit of all the facts. The gag is also limiting our ability to mobilize ACLU members and other activists to limit Patriot Act powers.

31. The ACLU and ACLUF recognize that limited secrecy may sometimes be necessary if justified by the government in a particular case. The ACLU and ACLUF do not now seek to disclose the particular records the FBI demanded in the NSL served on [REDACTED] in this case. But the government has no legitimate interest in gagging us from disclosing the mere fact that the FBI has used the NSL power to demand sensitive records from [REDACTED]. The gag has straitjacketed our ability to inform the press, the public, and Congress about the government's use of a dangerous new power. More importantly, the public and Congress are being denied information essential to the public and legislative debate that is at the heart of democratic self-governance.

32. It is particularly troubling that, while the ACLU and ACLUF have been gagged from disclosing the FBI's use of the NSL power against a [REDACTED], President Bush, FBI and Justice Department Officials, and Members of Congress are engaged in a vigorous public campaign in support of the Patriot Act and new, more expansive, surveillance powers. *See, e.g., Open Hearing: USA PATRIOT Act of 2001*, Senate Select Committee on Intelligence, 109th Cong., Apr. 27, 2005 (testimony of Attorney General Alberto Gonzalez, FBI Director Robert Mueller, and CIA Director Porter Goss urging the renewal of the Patriot Act); *Open Hearing on USA PATRIOT ACT*, House Select Committee on Intelligence, 109th Cong., May 11, 2005 (testimony of Deputy Attorney General James Comey urging renewal of the Patriot Act and discussing



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:

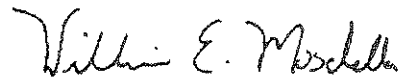
It is presumed that information that continues to meet the classification requirements under this order requires continued protection. In some exceptional cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases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

**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 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
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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.

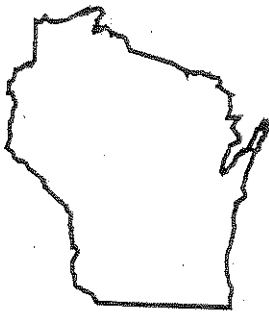
The importance of the Connecticut NSL case cannot be emphasized enough. Right now, Members of Congress of the conference committee are preparing to draft a final version of the Patriot Act reauthorization bill, and all members will soon have the opportunity to vote on the conference report. It is extremely 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.



News From: _____

U.S. Senator Russ Feingold

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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

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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.