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

REPLY BRIEF FOR THE DEFENDANTS-APPELLANTS

KEVIN J. O'CONNOR
United States Attorney

WILLIAM COLLIER
LISA E. PERKINS
Assistant United States Attorneys
450 Main Street
Hartford, CT 06103
860-947-1101

The government originally gagged the ACLU from disclosing the text that appears in white on black background, originally arguing that its release would threaten national security. The government has now given up its legal battle over the gag and agreed that the information could be released to the public.

ROBERT D. McCALLUM, Jr.
Acting Deputy Attorney General

PETER D. KEISLER
Assistant Attorney General

GREGORY G. KATSAS
Deputy Assistant Attorney General

DOUGLAS N. LETTER
SCOTT R. McINTOSH
Attorneys, Appellate Staff
Civil Division, Room 7259
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
202-514-4052

temporarily on web sites maintained by the federal courts. Br. 22-27. That argument is misconceived both legally and factually.

To begin, the plaintiffs' argument regarding the *New York Times* article assumes that the target has actually seen the article. The plaintiffs offer nothing more than speculation for that assumption. They provide no reason to assume that the target reads the New York Times at all, much less that he happened to read the Times on September 21 and saw the article in question. The New York Times's own circulation data suggest that the opposite assumption is more likely to be correct. For example, the weekday circulation of the Times in the Hartford and New Haven markets is less than 22,000, meaning that the great majority of residents in two of Connecticut's largest population centers do not read the Times. See (http://www.nyadvertising.com/was/circulation/pages/contentCirculation/0,1067,00.html?11Id=5&12Id=23>. Thus, there is a very real likelihood that the target has never even seen the article on which the plaintiffs place so much weight.

Moreover, even if the target had seen the article, the plaintiffs' argument requires one of two further assumptions: either that the target gave the article credence without any confirmation, or that he sought and obtained confirmation from the unnamed judicial web site referenced in the article. At a time when public confidence in the accuracy of news reporting has reached historic lows, and when

only 21 percent of readers in a recent media study stated that they believe most or all of what the New York Times reports,[2] the first assumption is dubious at best. And as explained in our opening brief, the second assumption is even more improbable – because the information was removed from PACER within hours after the article appeared, because the target could not access PACER without disclosing a substantial amount of personal information that he would be unlikely to want to disclose to a government-operated web site, and because the article did not identify PACER as the database in the first place.

Nor is it likely that the target of the investigation learned of Doe's identity simply because a single document containing unredacted references to Doe was available on the district court's electronic docket for several weeks prior to September 21. The few unredacted references in that document evidently were never discovered by the news media, despite the close attention that the New York Times and other newspapers paid to the case, and there is no evidence whatsoever that they were discovered by anyone else, particularly by the target of the NSL. The plaintiffs do not seriously suggest that the target is likely to have registered with PACER (as required to access the disctrict court's electronic docket), scoured the hundreds of pages of

---

[2] See <http://people-press.org/reports/display.php3?PageID=838> (results of study by Pew research Center for the people and the Press, June 2004).

redacted filings in search of an accidental omission, and discovered this particular one prior to the publication of the Times article. And because the document was removed from the electronic docket the same day that the Times article was published, the likelihood that the target read the article and then accessed the document is even more improbable.

In short, there is no reason to assume that the target of the NSL in this case actually *is* aware of Doe's identity. In contrast if the plaintiffs themselves undertake to publicize Doe's identity "to Congress and the public" (Br. 16) as part of a general lobbying campaign against the Patriot Act, as they are seeking to do, the likelihood that the target will become aware of that disclosure will increase dramatically. That prospect amply justifies the continued application of Section 2709(c) in this case.

In conjunction with their factual arguments regarding the disclosure of Doe's identity, the plaintiffs point to a number of cases in which courts have overturned disclosure restrictions on the ground that the information in question had already been made public (Br. 23-24). But in each of those cases, the anticipated harms underlying the disclosure restrictions were ones, such as invasion of privacy, that would result from dissemination of the information to the public at large, regardless of whether