


UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

 AMERICAN
CIVIL LIBERTIES UNION; and
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION,

Plaintiffs,

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; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

SECOND DECLARATION OF
ANTHONY ROMERO

04 Civ. 2614 (VM)

SEALED CASE

SECOND DECLARATION OF ANTHONY D. ROMERO

I, Anthony D. Romero, of New York, New York, do declare:

1. I am the Executive Director of the American Civil Liberties Union ("ACLU") and the American Civil Liberties Union Foundation ("ACLU Foundation" or "ACLUF").

The Mission and Activities of the ACLU and ACLUF

2. The ACLU is a nationwide, non-profit, non-partisan organization that has over 500,000 members and that is dedicated to the constitutional principles of liberty and equality. 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 lobby legislators and to

provide analyses of such pending or proposed legislation; and to mobilize our members and other activists to lobby their legislators.

3. The ACLU Foundation is a separate 501(c)(3) organization that provides legal representation to individuals and organizations free of charge in civil liberties cases, and educates the public about civil liberties issues. Lawyers at the ACLUF represent individuals and organizations in numerous civil liberties cases in federal and state courts around the country. ACLUF lawyers routinely litigate before the United States Supreme Court; only the U.S. Department of Justice has filed more briefs in the Supreme Court than that ACLUF.

4. The ACLU and the ACLUF are funded through a combination of donations from ACLU members and other individuals, foundation and corporate grants, and attorneys' fees generated from successful lawsuits.

5. All of the ACLU's and the ACLUF's fundraising efforts depend on our ability to discuss and describe our current work, including active litigation. We routinely raise money by publicizing our work in a particular case or on a particular set of civil liberties issues. We publicize our work in newsletters to members and donors, on our web site, in paid advertisements, in a television series, in donor visits and briefings, at fundraising events, and through direct mail campaigns.

6. The communications departments of the ACLU and the ACLUF educate the public about civil liberties through a variety of means. We provide detailed information to the print and broadcast media about legislative advocacy and litigation impacting civil liberties, through media releases, live briefings, and media interviews with staff and clients. We highlight and take positions on current civil liberties issues by placing paid

and public service advertisements in print and broadcast media. We produce an in-depth television series on civil liberties; the first season included ten separate shows, and a second season is in development. We publish in-depth public education reports on specific issues, and prepare and distribute brochures to inform individuals of specific rights. ACLU and ACLUF staff routinely appear in public forums and at community meetings to speak about a wide range of civil liberties issues. The ACLU and ACLUF host a web site that provides extensive information to the public about civil liberties, offers online newsletters and action alerts regarding current issues, and hosts interactive forums to engage the public in debate about constitutional rights. We also distribute print newsletters and action alerts to activists and ACLU members.

The ACLU/ACLUF and the Patriot Act

7. In the past two years, one of the core priorities of the ACLU and the ACLUF has been to stem the backlash against civil liberties that has taken place in the name of national security. The ACLU and ACLUF communications departments have launched a national multi-million dollar campaign, called "Safe & Free," to inform the public about the erosion of rights after September 11. This multi-faceted campaign includes a special "Safe & Free" web page that offers extensive information about our ongoing advocacy in courts, in Congress, and in local communities, and includes frequent action alerts to mobilize the public on key issues. We have highlighted our "Safe & Free" campaign through direct mail, online newsletters, paid advertisements, and in our television show. Our work has led to a significant increase in new members and donations.

8. Through the Safe & Free Campaign, the ACLU and the ACLUF have been the leading voice of opposition to certain provisions of the USA PATRIOT ACT ("Patriot Act"). Through our combined public education, litigation, and lobbying efforts, the ACLU and the ACLUF have played and continue to play a critical role in influencing the public debate over the Patriot Act.

9. As part of the Safe & Free campaign, the ACLU and ACLUF have published and distributed a number of public education reports, including *Independence Day 2003: Main Street America Fights the Federal Government's Insatiable Appetite for New Law Enforcement Powers* (July 2003) (documenting the growing movement to pass local community resolutions in opposition to the Patriot Act); *Seeking Truth From Justice* (July 2003) (highlighting a misinformation campaign by the Ashcroft Department of Justice and its allies about the Patriot Act); *Unpatriotic Acts: The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You* (July 2003) (describing how Section 215 of the Patriot Act violates the First and Fourth Amendments); *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society* (January 2003) (describing new surveillance technology and examines how post-9/11 policies have weakened privacy protections); and *The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study of FBI Surveillance of Dr. Martin Luther King* (January 2002) (comparing past government actions against African-Americans with current government actions that unfairly target individuals based on race and ethnicity).

10. ACLU and ACLUF staff members have made numerous media appearances to discuss our concerns about the Patriot Act. I personally speak to journalists about the Patriot Act routinely. For example, I personally have discussed the Patriot Act on the

following television programs: Wolf Blitzer Reports (CNN); NOW with Bill Moyers (PBS); and Washington Journal (CSPAN). In addition, I routinely discuss the Patriot Act with print journalists. *See, e.g.,* Jeff Stein & Ethan P. Sommer, *ACLU Claims Partial Victory in Library Spying Law*, Congressional Quarterly, April 12, 2006; James Ramage, *ACLU head, Colorado governor debate over Patriot Act*, Shreveport Times, Mar. 16, 2006; Dan Eggen, *Justice will look into spy charge; Eavesdropping under scrutiny*, Wash. Post, Dec. 31, 2005; Eric Lichtblau, *F.B.I., Using Patriot Act, Demands Library's Records*, N.Y. Times, Aug. 26, 2005; Steve Ritea, *Big Easy good for hard work; 5 military lawyers to receive top honors*, New Orleans Times-Picayune, July 21, 2005; Spencer Ackerman, *Patriot Games: Loosening oversight of the FBI*, New Republic, June 20, 2005; L.A. Chung, *Renewal of Patriot Act offers time for full debate*, San Jose Mercury News, June 10, 2005; Josh Richman, *ACLU chief blasts PATRIOT Act; Romero shares concerns about revisions to anti-terror legislation*, Oak. Trib., June 10, 2005; Herbert Sample, *ACLU Calls Expansion Of Patriot Act Harmful*, Sac. Bee, June 10, 2005; Edward Epstein, *Bush Pushes Congress to Renew Patriot Act*, San. Fran. Chron., June 10, 2005; Frank Davies, *Patriot Act Gets Heated Debate; FBI Seeks More Search Powers*, Det. Free Press, May 25, 2005; Dan Eggen, *Gonzalez Wins Friend With Openness, Listening As He Holds Ashcroft Line*, Wash. Post, May 16, 2005; Julia Preston, *Judge Strikes Down Section of Patriot Act Allowing Secret Subpoenas of Internet Data*, N.Y. Times, Sept. 30, 2004.

11. ACLU and ACLUF staff routinely speak to the public about the Patriot Act. For example, in May 2006, I spoke about the Patriot Act and other civil liberties issues at the Hugh M. Hefner First Amendment Awards Luncheon in New York City. April 2006, I

spoke about the Patriot Act and other civil liberties issues at Franklin Pierce Law Center in New Hampshire. In March 2006, I participated in a debate about the Patriot Act and other civil liberties issues with Colorado Governor Bill Owens; the debate took place at Northwestern State University in Louisiana. In June 2005, I gave a commencement address at the University of California at Santa Barbara, in which I discussed the threat the Patriot Act poses to civil liberties. I also discussed the Patriot Act on a panel for The Minnesota Foundation, a prominent public affairs forum in the Midwest, in May 2005. I also discussed the Patriot Act during an April 2006 lecture at Hudson County Community College in Jersey City, New Jersey; an October 2005 lecture at Hunter College at the City University of New York; an April 2005 lecture at Vassar College; and a March 2005 class presentation at Harvard Law School.

12. The ACLU has worked with community groups around the country to pass local resolutions opposing the Patriot Act. These resolutions have now passed in more than three hundred communities in forty-one states, including Norwalk, Connecticut; New York City; Jackson, Mississippi; Tacoma Park, Maryland; Coos County, Oregon; Savannah, Georgia; and Carbondale, Colorado. In addition, the ACLU worked with community groups in Montana, Alaska, Hawaii, Maine, and Vermont to pass five statewide resolutions opposing the Patriot Act.

13. Under the terms of the original Act, several provisions were set to expire on December 31, 2005, unless reauthorized by Congress. In March 2006, in spite of the ACLU's opposition, Congress reauthorized and amended the Patriot Act. Though some of the amendments changed the Act somewhat, the amended Act retains the core elements the ACLU most strenuously opposes.

14. The ACLU played a key role in informing congressional debate about the reauthorization of the Patriot Act. The reauthorization process led to the introduction in this Congress of a significant number of bills that would have limited, expanded, or made permanent particular Patriot Act provisions. Congress held numerous hearings to discuss these bills, and ACLU staff members provided testimony at many of those hearings.

15. Specifically, ACLU staff members provided either written or oral testimony at the following congressional hearings about the Patriot Act during this Congress: *Oversight Hearing on the Implementation of the USA Patriot Act: Sections 505 and 804*, House Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong., May 26, 2005; *Reauthorization of the USA PATRIOT Act*, House Select Committee on Intelligence, 109th Cong., May 19, 2005; *Hearing on Patriot Act Sections 213 and 215*, House Select Committee on Intelligence, 109th Cong., May 11, 2005; *Oversight Hearing on the Implementation of the USA PATRIOT Act: Prohibition of Material Support Under Sections 805 of the USA PATRIOT Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004*, House Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong., May 10, 2005; *Oversight Hearing on the Implementation of the USA PATRIOT Act: Foreign Surveillance Intelligence Act (FISA), Part II*, House Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong., Apr. 28, 2005; *USA PATRIOT Act of 2001*, Senate Select Committee on Intelligence, 109th Cong., Apr. 19, 2005; *Oversight Hearing on the Implementation of the USA PATRIOT Act: Effect of Sections 203(b) and (d) on Information Sharing*, House Subcommittee on Crime, Terrorism, and Homeland Security, 109th Cong., Apr. 19, 2005.

16. During previous Congresses, ACLU staff members have provided testimony at congressional hearings about the Patriot Act on numerous other occasions. See, e.g., *America after 9/11: Freedom Preserved or Freedom Lost?*, Senate Judiciary Committee, 108th Cong., Nov. 18, 2003; *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*; Senate Judiciary Committee, 107th Cong., Dec. 4, 2001; *Oversight Hearing on the Administration's Draft Anti-Terrorism Act of 2001*, House Judiciary Committee, 107th Cong., Sept. 24, 2001.

17. As part of its advocacy pertaining to the Patriot Act reauthorization, the ACLU launched a "Reform the Patriot Act" campaign on the web, which provided citizens with detailed information about various proposals to limit, expand, or make permanent certain provisions of the Patriot Act. Through this web campaign, the ACLU urged citizens to contact their legislators to express their opinions about the Patriot Act and provided a toolkit to help citizens oppose the Patriot Act.

18. During Congress's consideration of the reauthorization of the Patriot Act, the ACLU spent hundreds of thousands of dollars on 501(c)(4) political advertisements that specifically addressed the legislative proposals about the Patriot Act. Many of these print, radio, and Internet advertisements were strategically placed to reach the constituents of members of Congress who were likely to play key roles in the reauthorization process.

19. In 2005, the ACLU produced 80 press events, releases, and press statements discussing the Patriot Act. Thus far in 2006, the ACLU produced 52 press events, releases, and press statements discussing the Patriot Act. The ACLU's Washington Legislative Office has fielded hundreds of press calls about the Patriot Act.

20. Lawyers for the ACLUF have also litigated a number of cases involving the Patriot Act. For example, we filed two lawsuits under the Freedom of Information Act to obtain information about the government's use of the Patriot Act. In federal court in Michigan, we have challenged the constitutionality of the Act's Section 215, a provision that allows the FBI to obtain an order from the Foreign Intelligence Surveillance Court requiring any organization to disclose records or "tangible things". In the first case ever considered by the Foreign Intelligence Surveillance Court of Review, we filed an amicus brief in which we argued that the Patriot Act's expansion of the FBI's intelligence wiretap authority is unconstitutional. Finally, in the instant case and another filed in federal court in Connecticut, we have challenged the statutory provisions governing the issuance of National Security Letters ("NSLs").

21. In litigating all of these cases, the staff of the ACLU and the ACLUF have repeatedly criticized the Patriot Act's expansion of the NSL power, the legal authority at issue in this case. We have made these criticisms in the courts, before Congress, and in the media.

Effect of NSL Gag Orders on the ACLU and ACLUF

22. Lawyers employed by the ACLUF represent [REDACTED] and [REDACTED] in this lawsuit. Because the NSL served on our client contains a gag order, the ACLUF is prohibited from disclosing to any other person that the FBI sought information from our client through an NSL. The gag order has prevented us from communicating information relevant to the public debate about the reauthorization of the Patriot Act. But for the gag order, we would have provided this information to the press and the public, to Congress, and to ACLU and ACLUF staff,

the ACLUF would be in violation of the gag order if we stated publicly that we represent a client served with an NSL, even if we did not identify the name of our client, the subject of the NSL, or any other details about the specific NSL served.

25. During the period in which the government interpreted the gag order most broadly, the gag order also created potential liability for ACLU and ACLUF staff who were not even privy to the sensitive information in this case. Because these staff members worked for or were associated with an organization that represents the client served with the NSL, they could have risked penalties if they stated publicly that we represented a client served with an NSL. To avoid this risk, I reviewed and approved a memo that was distributed to all staff of the ACLU, the ACLUF, and our state affiliate offices. *See* Exh. 2. ACLU and ACLUF staff around the country were understandably confused by the memo because they did not understand how they could be prohibited from stating a fact that was evident from the redacted Complaint.

26. Before this Court's September 2004 ruling, the gag order also prevented me from providing non-sensitive information about the case to journalists. For example, on one occasion, a journalist asked me about our clients in this challenge to the NSL power. I told him that the ACLU was a client and that I could not say whether the ACLUF represented any other client in the case. The gag order compelled me to say this even though anyone who looked at the redacted Complaint could see for himself that we represented a client that had been served with an NSL. The journalist then asked what type of client we might represent in such a challenge. I told him that, due to the lack of clarity about the scope of the gag order, I could not respond. I felt that my limited

responses came across as evasive, and frustrated a reporter who wanted to provide more information to the public about the government's use of NSLs.

27. Before this Court's September 2004 ruling, the gag order also prevented me from providing non-sensitive information about the case to ACLU board members. For example, when discussing the case at a meeting with two board members, I was impeded from telling them about the litigation or our client. I told them that I did not feel comfortable disclosing the information to them given the lack of clarity about the scope of the gag order. Both board members expressed surprise at my response. As Executive Director, I am employed at will by the ACLU board, which consists of over eighty board members. Open and honest communications are an essential ingredient of my relationship with the ACLU board. The gag order is compromising that relationship.

28. Before this Court's September 2004 ruling, the gag order also impeded my discussions with donors. In one discussion about this lawsuit, a donor asked follow-up questions, and I told him that I could not confirm or deny that we represented any party other than the ACLU. He then asked me, theoretically, whether we could challenge the NSL power at all if we did not represent an entity that had already been served with one. He also asked me why there would be any gag order in the case if we did not represent an entity that had already been served with an NSL. I told him that I could not answer these questions due to the gag order. He persisted with similar questions for several minutes. This cat-and-mouse game was subsequently repeated with several other donors and ACLU members.

29. Most troubling of all, the gag order prevented lawyers and staff of the ACLUF from providing relevant information to members of Congress during the debate over the

reauthorization of the Patriot Act. But for the gag order, we would have disclosed to members of Congress the kinds of information sought by the NSL that was served on our client. We also would have told members of Congress that the Justice Department has relied on the gag provision to forbid disclosure of non-sensitive information. Had we been able to share with members of Congress the full extent of our knowledge about the government's use of NSLs and their effects, members might have insisted upon serious reforms to the Patriot Act or declined to reauthorize it altogether. Because of the gag provision, Congress voted to reauthorize the Patriot Act without the benefit of all the facts. The gag provision also limited our ability to mobilize ACLU members and other activists in opposition to the expansion of the NSL power.

30. While the Patriot Act reauthorization debate was ongoing, lawyers employed by the ACLUF represented Library Connection, Inc., in another challenge to the constitutionality of the NSL power. In that case, as in this one, the NSL gagged the ACLUF and its staff from discussing a range of information pertaining to the particular NSL at issue. Although the government eventually abandoned its efforts to suppress the identity of ACLUF's client Library Connection, the government did not reverse course until after the Patriot Act had been reauthorized by Congress. The ACLU's advocacy concerning the Patriot Act's reauthorization – including the content, cost, and geographic locus of the ACLU's print, radio and Internet advertisements – would have changed dramatically if the ACLU could have disclosed that that the NSL power is being used against libraries. Once Library Connection's identity was disclosed, media interest in the case was overwhelming.

31. Other new Patriot Act powers have gag provisions that are similar or identical to the NSL gag provision. Information about the government's application of the gag provision in both this case and the Library Connection case would have informed the debate about those provisions. But for the gag order, the ACLU and the ACLUF would have disclosed this information to the public.

32. The ACLU and ACLUF recognize that limited secrecy may sometimes be necessary if justified by the government in a particular case. But the scope and duration of the gag order in this case, along with the government's initial refusal to clarify what material was gagged, have been intolerable. The gag has severely disrupted our ordinary course of business, and has straitjacketed our ability to inform the press, the public, and Congress about the government's use of a dangerous new power. Worst of all, the public and even members of Congress have been denied non-sensitive information essential to the public and legislative debate that is at the heart of democratic self-governance.

33. It is particularly troubling that, while the ACLU and ACLUF have been prohibited from discussing the government's use of the NSL power, President Bush and representatives of the FBI and Justice Department engaged in a public campaign in support of the Patriot Act. *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 that Section 215 had been used 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 remarking that “[k]ey provisions of the Patriot Act are set to expire next year” and calling for renewal of the Act).

34. In several congressional hearings, administration officials denied that the government had ever abused its Patriot Act powers. Because of our involvement with this case, the ACLUF had information with which to dispute the government’s sweeping claims, but because of the gag, we could not share this information with the public. The gag provision silences those who are most likely to oppose the Patriot Act – those who know from first-hand experience exactly how the Act is being used. The ACLU and ACLUF believe we have the right to inform the public of a great deal of the information that the gag is suppressing. By abridging our right to disclose this information, the gag provision effectively skewed the Patriot Act debate in favor of reauthorization.

35. Our interest in speaking publicly about this case has only increased since Congress amended the NSL statute. Government spokespeople have insisted that recent amendments “fixed” problems with the Patriot Act and added new protections for civil liberties. The fact that the government ultimately abandoned the gag order in the *Library Connection* case has perhaps contributed to a misimpression that the Patriot Act’s deficiencies have been addressed. In fact, some of the new amendments make the law worse. This is particularly true with respect to the gag provisions, which now make it

virtually impossible for those served with NSLs to obtain judicial relief from gag orders issued by the FBI. The gag order issued in this case continues to prevent the ACLU and ACLUF from disclosing information that is critical to the public debate.

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 7, 2006.

Anthony D. Romero