



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT


**AMERICAN CIVIL LIBERTIES UNION;
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;
 in his official capacity
as  Federal Bureau of
Investigation,

Defendants.

**DECLARATION OF ANTHONY
ROMERO**

Civ. Action No. 3:05cv1256 JCH

SEALED CASE

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”).
2. The ACLU is a nationwide, non-profit, non-partisan organization with over 500,000 members 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 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.

3. 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. 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 and have filed more briefs in the Supreme Court than any organization other than the Department of Justice.

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 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 about legislative advocacy and litigation impacting civil liberties to the print and broadcast media, through media releases, live briefings, and media interviews with staff and clients. We also place paid and public service advertisements on current civil

liberties issues in print and broadcast media. We are also producing an in-depth television series on civil liberties, which will cost over \$2.2 million for the first year. 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 speak in public forums and at community meetings on 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.

7. In the past two years, one of the core priorities of the ACLU and the ACLUF has been to stem the backlash on civil liberties that has taken place in the name of national security. In particular, the ACLU and the ACLUF have been the leading voice of opposition to certain provisions of the USA PATRIOT ACT ("Patriot Act"). Many of these provisions vastly expand the federal government's ability to spy on innocent people. Through our 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.

8. 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 site 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.

9. As part of the Safe & Free campaign, the ACLU and ACLUF have published and distributed a number of public education reports, including *Science Under Siege: The Bush Administration’s Assault on Academic Freedom and Scientific Inquiry* (June 2005) (which describes how certain post-9/11 policies and practices threaten academic freedom and scientific inquiry); *Independence Day 2003: Main Street America Fights the Federal Government’s Insatiable Appetite for New Law Enforcement Powers* (July 2003) (which documents the growing movement to pass local community resolutions in opposition to the Patriot Act); *Seeking Truth From Justice* (July 2003) (which highlights 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) (which describes how Section 215 violates the First and Fourth Amendments); *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society* (January 2003) (which describes new surveillance technology and examines how post-9/11 policies have weakened privacy protections); *The Dangers of Domestic Spying by Federal Law Enforcement: A Case Study of FBI Surveillance of Dr. Martin Luther King* (January 2002) (which compares past government actions against African-Americans with current government actions that unfairly target individuals based on race and ethnicity); and *Not Moderate, Not Compassionate, Not Conservative: John Ashcroft’s Radical Revisionism Of Basic*

Constitutional Values in America (January 2001) (which analyzes John Ashcroft's poor record on key civil liberties issues).

10. As part of the Safe & Free Campaign, the ACLU and ACLUF have also placed paid advertising in targeted media featuring renowned actors, authors, musicians, and directors. Pictured with the provocative headline "I Am Not An American Who...", each celebrity describes a civil rights issue and cites the ACLU's commitment to defend civil rights. For example, an ad that features actor Martin Sheen states in its headline: "I am Not An American Who Will Sit Silently & Witness The Steady Erosion of Our First Amendment Freedoms." The bottom right-hand corner of the ad states: "I Am An American who speaks truth to power & who will stand up for the right of all Americans to free speech, free press & the freedom to practice their religion," and expresses Sheen's support for the ACLU's commitment to keep America "Safe and Free." In addition to Sheen, participants have included Al Pacino, Holly Hunter, Kristin Davis, Kurt Vonnegut, Samuel L. Jackson, and Jake Gyllenhaal.

11. ACLU and ACLUF staff members have made numerous media appearances to discuss our concerns with 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: CNN, Wolf Blitzer Reports; PBS, NOW with Bill Moyers; and CSPAN, Washington Journal. In addition, I routinely discuss the Patriot Act with print journalists. *See, e.g.,* Edward Epstein, *Bush Pushes Congress to Renew Patriot Act*, SAN. FRAN. CHRON., Jun. 10, 2005 at A17; 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 at A26.

12. ACLU and ACLUF staff routinely speak to the public about the Patriot Act. For example, in June 2005, I gave a commencement address at the University of California at Santa Barbara, in which I discussed the threat posed to civil liberties by the Patriot Act. I also discussed the Patriot Act on a panel in May 2005 for The Minnesota Foundation, a prominent public affairs forum in the Midwest. In April 2005, I discussed the Patriot Act during a lecture at Vassar College, and in March 2005, I discussed the Act during a class presentation at Harvard Law School.

13. The ACLU is also working 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.

14. The ACLU has played a key role in informing congressional debate about the Patriot Act. Under the terms of the Act, several provisions were set to expire on December 31, 2005 unless reauthorized by Congress. The reauthorization process led to the introduction of a significant number of bills over the past year that would either limit, expand, or make 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. In the last five months alone, ACLU staff members provided either written or oral testimony at the following congressional hearings about the Patriot Act: *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; *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. Prior to April 2005, ACLU staff members 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.

16. The ACLU recently launched a "Reform the Patriot Act" campaign on the web, which provides citizens with detailed information about pending legislation that would

limit, expand, or make permanent certain provisions of the Patriot Act; urges citizens to call their legislators or send an email to their legislators directly from the ACLU web site to express their opinion about the Patriot Act; and provides a toolkit for citizens who want to become active in their communities to oppose the Patriot Act.

17. 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 Section 215 of the Act, a provision that allows the FBI to obtain an order from the Foreign Intelligence Surveillance Court ordering any organization to disclose records or "tangible things" without first establishing probable cause or providing any opportunity to challenge the demand before compliance; the case is pending before the Eastern District of Michigan. In addition, we filed an amicus brief in the first case ever considered by the Foreign Intelligence Surveillance Court of Review, in which we argued that the Patriot Act's expansion of the FBI's intelligence wiretap authority is unconstitutional.

18. In particular, the staff of the ACLU and the ACLUF have repeatedly criticized the Patriot Act's expansion of the National Security Letter (NSL) power, the legal authority at issue in this case. We have argued that the NSL provision violates the Fourth Amendment by effectively authorizing the FBI to compel the production of records without judicial oversight. We have also argued that the provision violates the First Amendment by permanently and categorically foreclosing NSL recipients from disclosing even the mere fact that the FBI sought or obtained information from them. We have made these criticisms in the courts, before Congress, and in the media.

19. To educate the public about the NSL power, we developed a special feature on the ACLU web site that explains the law and provides copies of documents that we obtained through the FOIA. One such document, titled "Transactional Records NSLs Since 10/26/2001," appears to list the NSLs issued between October 26, 2001, and January 21, 2003. The five-page list is almost entirely redacted.

20. We have also filed previous litigation challenging the NSL power. In April of 2004, the ACLU, ACLUF, and a John Doe Internet Service Provider filed a challenge to an NSL issued under 18 U.S.C. § 2709, as amended by the Patriot Act. That challenge resulted in a decision declaring the amended statute to be unconstitutional and enjoining the FBI from issuing further NSLs under the statute. (The district court stayed its decision pending appeal.)

21. In the present lawsuit challenging the NSL provision, lawyers employed by the ACLUF represent [REDACTED]. The NSL gags the ACLUF from disclosing the mere fact that the FBI demanded sensitive records about library patrons from our client. The gag is preventing us from communicating information that is vital to the public debate about the Patriot Act. But for the gag provision, we would provide this information to the press and the public, to Congress, and to ACLU and ACLUF staff and ACLU members.

22. During August and September 2005, the ACLU will be spending hundreds of thousands of dollars in 501(c)(4) political advertisements in print, radio and Internet media that specifically address the legislative proposals about the Patriot Act. These advertisements will run in states selected to influence the views of key members of the House-Senate conference committee considering reauthorization of the Patriot Act. The

content, cost, and geographic locus of these advertisements would change dramatically if ACLU could disclose that that the NSL power is being used against libraries. In addition, ACLU will spend of thousands of dollars facilitating telephone contacts between key members of the House-Senate conference committee and their constituents about the Patriot Act. The cost, content and geographic locus of this effort, too, would change dramatically if ACLU could disclose that that the NSL power is being used against libraries.

23. The gag is also preventing the ACLUF from completing the production of a September television show entitled "The Patriot Act and Beyond." This first half-hour of the ACLU television series has been designed, produced and promoted with the specific effect of helping to inform the public debate and policy discussions around the Patriot Act reauthorization. Prominently discussed in the current version of the television show is the use of Patriot Act powers, including the NSL power, on library records. The impact of the show would be significantly enhanced if the ACLUF could discuss the current litigation. The final rough cut of this show is expected on August 23, 2005, and ACLUF staff have only two days to turn around further comments, edits and additions before the show is due to air on LINK television stations in early September.

24. The gag is preventing the ACLU and the ACLUF from educating the public about the government's use of new powers under the Patriot Act generally, and the NSL power in particular. Specifically, the gag is preventing the ACLU and the ACLUF from informing the public that the FBI has now used an NSL against a [REDACTED]. 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. Since the Patriot Act was enacted, the ACLU has worked closely with librarians and library associations in criticizing the threat the Act poses to intellectual freedom in libraries. Our FOIA lawsuit specifically sought information about whether Patriot Act provisions, including the NSL power, had been used against libraries. The government refused to provide any responsive documents.

25. On a number of occasions, the government has said publicly that it has never used Patriot Act provisions against a library. In fact, in a September 2003 speech, then-Attorney General Ashcroft characterized concerns voiced by libraries and librarians about the use of the Patriot Act, as “baseless hysteria.” Norman Oder, *Ashcroft Agrees to Release Report on FBI Library Visits*, Library Journal, Oct. 15, 2003, at <http://www.libraryjournal.com/article/CA325063.html>. Later that month, in response to widespread public concern about Section 215 of the Patriot Act, then-Attorney General Ashcroft announced that the FBI had never used the provision against a library. See Shannon McCaffrey, *Big Brother Not Taking Peeks at What We Read*, MIAMI HERALD, Sept. 18, 2003 at A11. As recently as April 5, 2005, in testimony before the Senate Judiciary Committee, Attorney General Gonzalez again announced that the FBI had never used Section 215 of the Patriot Act to seek information or records from a library. See *Oversight of the USA PATRIOT Act*, Senate Judiciary Committee, 109th Cong., Apr. 5, 2005 (statement of Attorney General Alberto Gonzalez).

26. Because of the high level of secrecy about the FBI’s use of the NSL power, librarians and library associations appear to be largely unaware that the NSL power could 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.

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

' remarking that "[k]ey provisions of the Patriot Act are set to expire next year" and calling for renewal of the Act). The gag provision silences those who are most likely to oppose the Patriot Act – those who know from first-hand experience exactly how the FBI is using its provisions. The First Amendment rights of the ACLU and the ACLUF will be irreparably harmed if this gag continues.

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, August 15, 2005.

Anthony D. Romero