07-4943-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellees,

v.

MICHAEL B. MUKASEY, in his official capacity as Attorney General of the Unites States, ROBERT S. MUELLER III, in his official capacity as Director of the Federal Bureau of Investigation, and VALERIE E. CAPRONI, in her official capacity as General Counsel to the Federal Bureau of Investigation,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES

Peter T. Barbur
Chair, Committee on Civil Rights
ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 West 44th Street
New York, NY 10036
(212) 382-6600

Claire E. Coleman
BRUNE AND RICHARD LLP
80 Broad Street
New York, NY 10004
(212) 668-1900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Rules

Other Authorities

CONSENT OF THE PARTIES

All parties have consented to the filing of this *amicus curiae* brief by the Association of the Bar of the City of New York.

The Association of the Bar of the City of New York respectfully submits this brief *amicus curiae* in support of affirmance of the district court's judgment in *Doe v. Mukasey*, 500 F.Supp.2d 379 (S.D.N.Y. 2007) and in support of Appellees' challenge to the NSL.

I. INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York was founded in 1870 and has been dedicated since that date to maintaining the highest ethical standards of the profession, promoting reform of the law, and providing service to the profession and the public. With its nearly 23,000 members, the Association is among the nation's oldest and largest bar associations.

The Association has long been committed to protecting, preserving, and promoting civil liberties, civil rights, and the democratic process. Through its standing committees, including those on Civil Rights, Immigration and Nationality Law, Federal Courts, Federal Legislation, International Security Affairs, Military Affairs and Justice, and International Human Rights, the Association is interested in the need to balance the fundamental interests of civil liberties and individual freedom with the needs of national security, and to assure that concerns for national security do not

undermine the guarantees of civil liberties that are the hallmark of our constitutional democracy and a beacon to the world.

The Association has filed amicus briefs in a number of cases in which such issues have been raised, including an amicus brief in this Court urging affirmance of the District Court's September 28, 2004 decision holding the prior version of the National Security Letter ("NSL") provisions of the USA PATRIOT Act unconstitutional. The Association now submits this brief, as a friend of the Court, in support of Appellees and the September 6, 2007 Decision by the District Court holding unconstitutional 18 U.S.C. § 2709 and the newly enacted 18 U.S.C. § 3511 (the "NSL Statute") of the "USA PATRIOT Improvement and Reauthorization Act of 2005" (the "Reauthorization Act"), Pub. L. No. 109-177, 120 Stat. 192 (2006).

II. PRELIMINARY STATEMENT

In 2004, the District Court held that the former NSL statute, 18 U.S.C. § 2709, was unconstitutional because, *inter alia*, "it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request." *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 475 (S.D.N.Y. 2004). While the appeal of this Court's decision was *sub judice* in the Second Circuit, Congress amended the NSL statue by passing the Reauthorization Act, which, in relevant part, amends 18 U.S.C. § 2709(c) and adds 18

U.S.C. § 3511. On remand, the District Court once again struck down the NSL Statute, finding it violated the First Amendment and principals of Separation of Powers. Plaintiffs-Appellees memorandum of law demonstrates in detail why the Reauthorization Act fails to remedy the constitutional defects in the previous statute. In this *amicus* brief the Association explains why it believes the amended NSL Statute impermissibly infringes on the role of the Judiciary under our constitutional system of separation of powers, and to highlight the particular threat that the newly enacted Section 3511 and amended Section 2709(c) pose to the essential role of the courts in defining and protecting constitutional rights.

While the NSL Statute authorizes NSL recipients to bring petitions in the federal courts challenging an NSL and any related non-disclosure ("gag") orders, Section 3511 reduces the role of the Judiciary to a sham.

First, by requiring the courts to uphold gag orders unless there is "no reason to believe" the disclosure of the NSL may endanger national security or interfere with criminal or counterterrorism investigations or diplomatic relations, Section 3511 conflicts with established constitutional standards for evaluating restraints on speech under the First Amendment. It thus subverts the long established principle that it is "the province and duty of the judicial

department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Second, by requiring the courts to accept the FBI Director's certification that disclosure may endanger national security or interfere with diplomatic relations, unless the court concludes the Director is acting in bad faith, Section 3511 effectively reduces the court to a rubber stamp for the Executive, mocking the promise of judicial review. Section 3511 thus subverts the federal courts' role as a check on abuses of constitutional rights by the Executive that is not only critical under our system of checks and balances but fundamental to the rule of law and the principle that no one, including the President and the FBI Director, is above the law. The emasculated judicial review provisions of the NSL Statute thus subvert key principles of our constitutional democracy.

Finally, though the revised Section 2709(c) no longer provides for universal non-disclosure orders, the provision still allows FBI agents unbridled discretion in determining whose speech should be suppressed, and places an impermissible burden on the recipient of an NSL to challenge the non-disclosure order. Section 2709(c) therefore renders the judicial review provision under Section 3511(b) meaningless and still violates the First Amendment.

As we discuss below, history shows that judicial review is an essential check on executive abuses of power, and is necessary to the protection of constitutional guarantees, especially where heightened concerns about national security tempt both the Executive and Legislative branches to disregard our most cherished rights and liberties. As the Supreme Court recently observed, "[i]t is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi v. Rumsfield*, 542 U.S. 507,532, 124 S. Ct. 2633, 2648, 159 L. Ed.2d 578 (2004). There will certainly be times when individual rights may have to be curtailed for national security reasons. However, as the framers of the Constitution clearly intended, that decision is one that must be made by the courts.

In the end, it is the judiciary that must stand as a check on the Executive and Legislative branches when they overstep constitutional bounds. There is nothing more fundamental to our democratic constitutional system than the ability to have one's grievances heard and liberties protected by a neutral tribunal. Sections 3511 and 2709(c) of the NSL statute violate the Constitution by limiting both the practical likelihood of judicial review, and the scope of judicial review, rendering the protections guaranteed under

the First Amendment meaningless. Although the NSL Statute is ostensibly intended to provide the Executive branch with a tool to protect the United States from harm from "international terrorism or clandestine intelligence activities," the statute, on its face and as applied, effectively eviscerates meaningful judicial oversight and is harmful to our Constitutional democracy that it is supposedly designed to protect. The District Court's decision striking down the Statute should therefore be affirmed.

III. ARGUMENT

A. THE JUDICIARY MUST BE ALLOWED TO FULFILL ITS ESSENTIAL ROLE OF DEFINING AND PROTECTING CONSTITUTIONAL RIGHTS

A fundamental premise of our form of government is that each branch of government must serve as a check on the powers of the other branches. The Framers understood that a concentration of power in one branch of government was unwise and, if left unchecked, tended inevitably toward tyranny:

> Basic to the constitutional structure established by the Framers was their recognition that '[the] accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.' To ensure against such tyranny, the Framers provided that the Federal Government would consist of three distinct Branches, each to exercise one of the governmental powers recognized by the Framers as inherently distinct.

N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57, 102 S. Ct. 2858, 73 L. Ed. 2d 598 (1982) (quoting *The Federalist No. 47* (James Madison)). "The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other." *Id.* at 57-58 (quoting *Buckley v. Valeo*, 424 U.S. 1, 122, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam)).

Within this system of checks and balances, it is "emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). As the final arbiter of the law, the duty of the Judicial branch is to ensure that the Constitution is the supreme, "fundamental and paramount law of the nation," *id.*, and to "declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist No. 78* (Alexander Hamilton).

> "[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior

> obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Id. "This is of the very essence of judicial duty." *Marbury*, 5 U.S. at 178.

This judicial power "can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (quoting *The Federalist No. 47* (James Madison)).

The Constitution is the supreme law of the land, and Congress may not legislate away a constitutional requirement. "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or that the legislature may alter the constitution by an ordinary act." *Marbury*, 5 U.S. at 177.

As discussed by the District Court, in *Dickerson v. United States*, 530 U.S. 428, 437, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000), the Supreme Court held that Congress could not legislatively alter a court-established procedure, if such procedure was constitutionally required. *Dickerson*

involved a federal statute that dispensed with "*Miranda*" rights. In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966), the Court had previously held that the admissibility into evidence of any statement by someone in custody would depend on whether the suspect was given what has come to be known as *Miranda* warnings. Two years following the *Miranda* decision, Congress passed a statute dispensing with the *Miranda* warnings; the statute required only that a statement be voluntary for it to be admissible. *Dickerson*, 530 U.S. at 435. Stating that *Miranda* warnings were required by the Constitution, the Court held that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution," and declared the statute unconstitutional. *Id.* at 437.

Likewise, in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997), the Court stated that:

> Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.

City of Boerne, 521 U.S. at 535-36 (citation omitted). As the District Court correctly concluded,

> What these cases make clear is that when the judiciary has established a 'constitutional rule,' such as requiring that any prior restraint or content-based restriction on speech be narrowly tailored to support a compelling government interest, the courts must respect and apply such previously established rules in reviewing a challenge to a government curtailment of constitutionally protected expression, even if congress and the executive branch urge otherwise.

Based on these principles, the District Court properly found that Section 3511(b) of the NSL Statute attempts legislatively to overrule a constitutional requirement established by the Judicial branch, and is therefore unconstitutional. Section 3511(b) of the NSL Statute purports to remedy the constitutional defects of § 2709(c) by authorizing NSL recipients to petition a United States district court to set aside or modify an NSL and any nondisclosure requirement associated with the NSL. Reauthorization Act, Pub. L. No. 109-177, § 115(2), 120 Stat. 192, 212 (2006) (*codified at* 18 U.S.C. §§ 3511(a), 3511(b)). However, this judicial review provision is illusory, falling far short of what the First Amendment requires. Rather than fixing the statute's constitutional infirmities, Section 3511(b)—like the statute dispensing with *Miranda* warnings held unconstitutional in *Dickerson*—is itself unconstitutional because it seeks legislatively to overturn what the Judicial branch has said the Constitution requires.

After authorizing NSL recipients to petition a district court, the statute provides that, for petitions filed within one year of the request, "the court may modify or set aside such a nondisclosure requirement if it finds that there is *no reason to believe* that disclosure may endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." 18 U.S.C. § 3511(b)(2) (emphasis added). The Statute goes on to provide that, if the FBI Director (or other agent of the Executive branch listed in the statute) "certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, *such certification shall be treated as conclusive unless the court finds that the certification was made in bad faith*." *Id.* (emphasis added).

As thoroughly analyzed by the District Court, the standard set forth in 3511(b) is "plainly at odds with First Amendment jurisprudence which requires that courts strictly construe content-based restrictions and prior restraints to ensure they are narrowly tailored to advance a compelling government interest." 500 F.Supp.2d at 409. *See also, Sable Communications of Cal. v. Federal Communications Comm'n*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989); *Nebraska Press Ass'n.*

v. Stuart, 427 U.S. 539, 559, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976); *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S. Ct. 2140, 29 L. Ed. 2d 822 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S. Ct. 631, 9 L. Ed. 2d 584 (1963).

Through the enactment of the Reauthorization Act, Congress impermissibly sought to legislate away the judiciary's power—and duty—to determine whether individual gag orders violate the Constitution. Far from the constitutionally required spotlight of strict scrutiny, through Section 3511(b)(2) Congress has legislated that the courts must defer to *any* reason that the Executive gives among a broad range of "reasons" for non-disclosure, negating the constitutional strict scrutiny test by relieving the Executive of its burden of establishing both the "compelling interests" for a restraint on speech and the absence of less restrictive means of satisfying those interests.

Moreover, by requiring a court to accept, absent a finding of "bad faith," the Executive's "certification" as to two of the permissible kinds of "reasons" deemed to justify the restraint on speech, the court is precluded from fulfilling its constitutional role in determining whether the challenged Executive action comports with permissible constitutional limits on speech. Section 3511(b)(2) thus purports legislatively to alter a constitutional

requirement and prohibits the courts from discharging their constitutional duty to "say what the law is." Section 3511 clearly interferes with the role assigned to the Courts under our constitutional system of separation of powers, and the District Court's conclusion that the statute is unconstitutional should be affirmed.

B. THE JUDICIARY MUST BE ALLOWED TO EXERCISE ITS ROLE AS A CHECK ON EXECUTIVE ACTION THAT VIOLATES THE CONSTITUTION

One of our nation's fundamental constitutional principles is that the Judicial branch should serve as a check on the unconstitutional use of Executive power during times of war or other national crises, when the temptation to test, or exceed, the limits of Executive power is strongest. During the Korean War, for example, the steel workers union voted to strike at a time when reliable steel production was essential for the military. President Truman, believing that a strike would jeopardize national defense, ordered the federal government to take possession of and run the steel mills. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582-83, 72 S. Ct. 863, 96 L. Ed. 2d 1153 (1952) (cited by District Court, 500 F.Supp.2d at 415).

In the ensuing litigation, the government asserted that even a brief disruption of steel production would "so endanger the well-being and safety

of the Nation that the President had 'inherent power' to do what he had done – power 'supported by the Constitution, by historical precedent, and by court decisions.'" *Youngstown*, 343 U.S. at 584. Despite the wartime emergency, the Supreme Court upheld the rule of law and concluded that the Executive branch had no such inherent power: "we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities." *Id.* at 587.

More recently, the Supreme Court again reigned in the Executive branch's efforts to override the rule of law when the Court held that military tribunals ordered by the President and convened by the Defense Department to try terrorism suspects were unlawful. *Hamdan v. Rumsfeld*, __ U.S. __, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (2006). Two months after the attacks of September 11, 2001, President Bush issued a comprehensive military order which, in relevant part, authorized the Secretary of Defense to establish military commissions to try suspected terrorists. Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001). The petitioner in *Hamdan*, Salim Ahmed Hamdan, was captured in

Afghanistan during the conflict with the Taliban and is detained at the American prison in Guantanamo Bay, Cuba. *Hamdan*, 126 S. Ct. at 2759. In the government's charging documents, Hamdan was alleged to be a member of al Qaeda *Id.* at 2761. Despite Hamdan's alleged affiliation with al Qaeda, the Court recognized that "trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure." *Id.* at 2759. The Court then held that the military tribunals lacked power to try Hamdan because the structure and procedures of the military tribunals violated both the Uniform Code of Military Justice ("UCMJ") and the Geneva Conventions, including the fundamental right to be present at one's own trial. *Id.* at 2759, 2791-92.

Despite the potential danger that Hamdan and detainees like him may pose to the United States, the Court held that the Executive branch must abide by the rule of law:

> We have assumed, as we must, that the allegations made in the Government's charge against Hamdan are true. We have assumed, moreover, the truth of the message implicit in that charge-viz., that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity…. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction.

Id. at 2798.

Section 3511(b) of the NSL Statute effectively prohibits the Judicial branch from reviewing the constitutionality of Executive action, and therefore disregards the rule of law. As noted, Section § 3511(b)(2) requires the court to accept the FBI Director's certification that disclosure may endanger national security or interfere with diplomatic relations, unless the court concludes that the FBI Director or other senior administration official acted in "bad faith." 18 U.S.C. § 3511(b)(2). This effectively divests the court of its role in determining whether the restraint on speech imposed by the Executive meets the requirements of the First Amendment. For all practical purposes, the Executive branch would have the power to determine the constitutionality of its own action, leaving the court only the narrow issue of determining whether the Director of the FBI (or other official) acted in bad faith. This effectively nullifies the principle, fundamental to the rule of law and our system of separation of powers, under which the Judiciary is to act as a check on unlawful or unconstitutional Executive conduct. *See* pp. 5-11 supra.

As precedent and history demonstrate, the Executive branch is a poor check on its own powers. More importantly, the Constitution *requires* an independent judicial forum when a constitutional right is at stake. "In cases brought to enforce constitutional rights, the judicial power of the United

States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function." *Crowell v. Benson*, 285 U.S. 22, 60, 52 S. Ct. 285, 76 L. Ed. 598 (1932). The Court also noted that "when fundamental rights are in question, this Court has repeatedly emphasized 'the difference in security of judicial over administrative action.'" *Id.*

The importance of judicial oversight is not diminished in cases involving national security. When the Supreme Court recently was called upon to address the reach of the President's authority to indefinitely detain "enemy combatants," it declared: "We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens." *Hamdi v. Rumsfeld*, 542 U.S. 507, 536, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004); s*ee also Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 426, 54 S. Ct. 231, 235, 78 L. Ed. 413 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.").

As amply demonstrated by the District Court opinion, history has shown that the Executive, particularly during times of war or other national crises when its power is greatest, is ill-suited to exercise the restraint needed

to protect individual rights. Under these circumstances, the Judicial Branch has a special responsibility to act as a check on Executive Power.

For example, in *United States v. United States District Court*, the Supreme Court considered whether warrantless wiretaps to protect domestic security comported with the Fourth Amendment. The Court stated that "[t]hese Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates." 407 U.S. 297, 316-17, 92 S. Ct. 2125, 32 L. Ed. 2d 752 (1972). The Court emphasized that the Executive, charged with enforcing the law, was not an adequate judge of its own actions:

> Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.

407 U.S. at 317 (citations omitted). These same principles apply where, as here, foreign threats to national security are used by the Executive to justify restrictions on fundamental rights like freedom of speech.

The Supreme Court, in *Ex parte Milligan*, 71 U.S. 2, 4 Wall. 2, 18 L. Ed. 281 (1866), rejected the proposition that wartime—even a civil war—justified a departure from our founding values:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

Id. at 120-21. The Court concluded that "the very time when a constitutional provision is wanted, is the time of war, and that in time of war, of civil war especially, and the commotions just before and just after it, the constitutional provisions should be most rigidly enforced." *Id*. at 104.

The importance of the judiciary's role in upholding constitutional rights and the rule of law in times of war becomes even more apparent when viewed in the context of our history in times of national crisis, which reveals a troubling pattern of sacrificing civil liberties in the name of security. As the District Court eloquently stated,

> [t]he pages of this nation's jurisprudence cry out with compelling instances illustrating that, called upon to adjudicate claims of extraordinary assertions of executive or legislative or

> even state power, such as by the high degree of deference to the executive that the Government here contends §3511(b) demands of the courts, when the judiciary lowers its guard on the Constitution, it opens the door to far-reaching invasions of liberty.

500 F.Supp.2d at 414 (citing *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944).)

During the Civil War, for example, President Lincoln took various measures to curtail civil liberties, including arresting individuals for speech critical of the administration. The most egregious act, however, was the suspension of the writ of habeas corpus. *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. With habeas corpus suspended, Lincoln detained tens of thousands of people without charges, simply because they were suspected of being disloyal, dangerous, or disaffected. *See generally* Daniel Farber, *Lincoln's Constitution* at 157 (2003); Mark E. Neely, Jr., *The Fate of Liberty: Abraham Lincoln and Civil Liberties* (1991). They remained detained indefinitely, some receiving no trials at all, others receiving a military trial that lacked basic procedural safeguards.

Perhaps the starkest reminder of the dangers that can result when the Judicial Branch fails to assert its constitutional role is the government's establishment of internment camps for Americans of Japanese ancestry during World War II, an action that the Supreme Court declined to halt. *See*

Korematsu v. United States, 323 U.S. 214, 65 S. Ct. 193, 89 L. Ed. 194 (1944). Forty years later, the judiciary lamented its earlier inaction:

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive, and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

If upheld, Section 3511 of the NSL statute would impair the system of constitutional checks and balances wisely established by the nation's founders by allowing Congress to legislatively alter the Constitutional requirements for the protection of speech and by forbidding the Judicial branch from performing its role under the Constitution to adjudicate the constitutionality of Executive action. As the District Court correctly found, this trivialization of the Judicial branch violates the separation of powers that is at the heart of our constitutional system, and, if upheld, would vitiate both the role of our courts and the rule of law in our nation. The District Court's decision should be affirmed.

C. THE NSL'S GAG PROVISION FAILS TO PROVIDE PROCEDURAL SAFEGUARDS REQUIRED TO PREVENT UNCONSTITUTIONAL CENSORSHIP CONDUCTED IN THE NAME OF NATIONAL SECURITY

As discussed above, when, in times of crisis, the government has sought to curtail civil liberties in the name of national security, the public has depended on the courts to reign in unconstitutional action. Where, however, government conduct escapes judicial review and public oversight, there is great danger and opportunity for abuse.

In 1976, a Senate Select Committee considered covert executive action and concluded that the absence of judicial review and public oversight increased the risk of abuse. The Committee, led by Senator Church, was charged with investigating the "conduct of domestic intelligence, or counterintelligence operations against United States citizens." S. Res. 21, sec. 2 (12), 94th Cong. (1975). The "critical question" before the Committee was whether "the fundamental liberties of people can be maintained in the course of the Government's effort to protect their security." *See* Senate Select Comm. to Study Governmental Operations With Respect to Intelligence Activities, Final Report, S. Rep. 755, 94th Cong., 2d Sess., Book II (1976) (the "Church Committee Report"), at 1,

available at:

http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm.

The Committee concluded that "intelligence activity in the past decades has, all too often, exceeded the restraints on the exercise of governmental power which are imposed by our country's Constitution, laws, and traditions." *Id*. at 2. In summarizing its findings, the Committee wrote:

> Too many people have been spied upon by too many Government agencies and too much information has been collected. The Government has often undertaken the secret surveillance of citizens on the basis of their political beliefs, even when those beliefs posed no threat of violence or illegal acts on behalf of a hostile foreign power. . . . Investigations of groups deemed potentially dangerous – and even of groups suspected of associating with potentially dangerous organizations – have continued for decades, despite the fact that those groups did not engage in unlawful activity. . . . Investigations have been based upon vague standards whose breadth made excessive collection inevitable.

Id. at 5.

More recently, senior members of the Senate Judiciary Committee issued a bipartisan report expressing deep frustration with the United States Department of Justice's refusal to submit to public oversight concerning its implementation of the Patriot Act. *See* FBI Oversight in the 107th Congress by the Senate Judiciary Committee: FISA Implementation Failures, An Interim Report by Senators Patrick Leahy, Charles Grassley, & Arlen Specter (February 2003) ("the Leahy Report"), available at

http://www.fas.org/irp/congress/2003_rpt/fisa.pdf. The Leahy Report was issued "so that . . . information is available to the American people and Members of Congress as we evaluate the implementation of the USA PATRIOT Act amendments to the FISA [Foreign Intelligence Surveillance Act] . . . ." *Id*. at 7. Among the Leahy Report's conclusions was that:

> The secrecy of individual FISA cases is certainly necessary, but this secrecy has been extended to the most basic legal and procedural aspects of the FISA, which should not be secret. This unnecessary secrecy contributed to the deficiencies that have hamstrung the implementation of the FISA.

Id. at 6.

The Leahy Report also noted the need for accountability and oversight as a prophylactic against government abuse:

> So, too, is oversight important in order to protect the basic liberties upon which our country is founded. Past oversight efforts, such as the Church Committee in the 1970s, have exposed abuses by law enforcement agencies such as the FBI. It is no coincidence that these abuses have come after extended periods when the public and Congress did not diligently monitor the FBI's activities. . . . Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and FBI are critical to explaining the actions to the citizens to whom these agencies are ultimately accountable.

Id. at 8.

As the Church and Leahy Reports note, past governmental abuses arose when agencies were permitted to conduct secret activities outside of the view of either the public or the courts. These reports demonstrate that, in

the absence of public accountability, and especially judicial review, our nation risks infringing on fundamental liberties without material increases in security. For these compelling reasons, regulations limiting freedom of speech are only constitutional if they provide procedural safeguards sufficient to minimize the risk that protected speech will be suppressed.

The Association recognizes that a certain degree of secrecy is necessary for effective investigations of international terrorist activities. Thus, some ban on disclosure of the existence and nature of a government investigation for some period of time may be needed to prevent the destruction of evidence, the flight of suspects, or the protection of information sources. In order to be consistent with the First Amendment, however, any gag order statute would have to have in place procedural safeguards to assure that the secrecy will be limited in ways that will achieve the legitimate ends of national security without unnecessarily compromising individual rights.

The amended Section 2709(c)—while an improvement from the categorical, blanket prohibition on disclosure of NSLs prescribed in the prior version of Section 2709(c)—still violates the First Amendment because it lacks sufficient procedural safeguards to ensure that protected speech will

not be suppressed without sufficient cause.[1] Under the amended Section 2709(c), nondisclosure orders are still imposed by the FBI unilaterally, without prior judicial review. While the statute requires a "certification" that the gag is necessary, the certification is not examined by anyone outside the executive branch before the gag order is issued. Before the gag order is imposed, no judge considers whether secrecy is necessary or whether the gag order is narrowly tailored. 18 U.S.C. § 2709(c).

As the District Court discusses at great length, "[i]n granting the FBI authority to certify that an NSL recipient cannot disclose to any person information about receipt of the NSL, and in including this prescription in the actual NSL letter issued, the amended § 2709(c) 'authorizes suppression of speech in advance of its expression.'" 500 F. Supp. 2d at 397 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 795 n. 5 (1989).) Such a content-based restriction on speech which acts as a prior restraint is "*presumed* unconstitutional, and the government bears the burden of

[1] While The Association fully agrees with the District Court's determination that 2709(c) that "is constitutionally deficient under the First Amendment in several respects," because the other First Amendment deficiencies are being addressed by the Appellees and other *amici curiae*, the Association confines itself to addressing the lack of procedural safeguards in 2709(c) to ensure appropriate judicial review.

demonstrating that the provision satisfies strict scrutiny." *Id.* at 398 (emphasis in original).

Moreover, because, as the District Court correctly found, 2709(c) constitutes a form of licensing—granting broad discretion to the FBI to allow some recipients of an NSL to disclose information pertaining to their receipt of the NSL, and to deny others that freedom—Section 2709(c) must "take[] place under procedural safeguards designed to obviate the dangers of a censorship system." *Id.* at 400 (quoting *Freedman v. Maryland*, 380 U.S. 51, 58 (1965)). In order for such a licensing scheme to pass strict scrutiny and comport with the First Amendment, it must place the burden of going to court to suppress the speech and the burden of proof once in court on the government, not the NSL recipient. *Id.* at 406 (quoting *FW/PBS v. City of Dallas*, 493 U.S. 215, 241-42 (1990) ("Mistakes are inevitable; abuse is possible. In distributing the burdens of initiating judicial proceedings and proof, we are obliged to place them such that we err, if we must, on the side of speech, not on the side of silence."). Section 2709(c) of the NSL statute impermissibly places the burden of obtaining judicial review on the NSL recipient.

As amply demonstrated by the District Court opinion, challenging an NSL would be time consuming and financially burdensome, and since the

NSL recipient is not the real party interest, "NSL recipients generally have little or no incentive to challenge nondisclosure orders is suggested by empirical evidence." *Id.* at 405 (noting that the FBI issued 143,074 NSL requests from 2003 to 2005 alone, and only two challenges have been made in federal court since the original enactment of the statute in 1986.) Moreover, the potential for abuse resulting from the unbridled discretion provided to the FBI in determining to suppress speech is further compounded by the fact that the amended NSL statute continues to authorize nondisclosure orders that *permanently* restrict an NSL recipient from engaging in *any* discussion related to its receipt of the NSL.

The combination of the permanent nature of the gag order (that stays in place unless the NSL recipient challenges the restriction in Court), and the absence of any incentive for the NSL recipient to commence judicial proceedings against the government, means that the vast majority of the non-disclosure orders issued will never be subjected to judicial review. Thus, as the District Court correctly concluded, Section 2709(c) has the effect of giving the FBI "broad, unchallenged, and 'in practice ... final' power,

Freedman, 380 U.S. at 58, 85 S.Ct. 734, to restrict a wide band of protected speech–a result prohibited by the Constitution." *Id.* at 406.[2]

This presumption of secrecy without adequate procedural safeguards to assure judicial review cannot be justified by appeals to national security. As described above, history proves that such secrecy and the absence of judicial oversight are not only inimical to individual liberties guaranteed by our Constitution, but do not further national security. The lack of procedural safeguards in 2709(c) renders the judicial review procedures meaningless and do not adequately protect against the risk of the Government infringing on fundamental liberties guaranteed under the First Amendment.

[2] The insufficient protections in 2709(c) are compounded by the fact that judicial review is further limited by Section 3511(b)(3). If a petition is filed one year or more after the request for records, and a court denies that petition, then the NSL recipient is barred for a full year from filing another petition to modify or set aside the gag requirement. 18 U.S.C. 3511(b)(3). Thus, as the Appellees ably argue in their brief, the Statute arbitrarily and impermissibly bars judicial review for an entire year, even if the reason for the gag requirement has disappeared, such as a situation where the media or the government itself has disclosed information about that NSL.

CONCLUSION

For the reasons stated above, the decision of the District Court should be affirmed.

Dated New York, New York
March 17, 2008

Respectfully Submitted,

BRUNE AND RICHARD LLP

By /s/ Claire E. Coleman

Claire E. Coleman
80 Broad Street
New York, NY 10004
(212) 668-1900

PETER T. BARBUR
Chair, Committee on Civil Rights
The Association of the Bar of the City of New York
42 West 44th Street
New York, NY 10036
(212) 382-6600

Attorneys for Amicus Curiae The Association of the Bar of the City of New York

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,653 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: March 17, 2008

/s/ Claire E. Coleman
Claire E. Coleman
Attorney for Amicus Curiae

Brune & Richard LLP
80 Broad Street
New York, NY 10004
(212) 668-1900

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: 07-4943-cv

DOCKET NUMBER: 04 Civ. 2614(VM).

I, (please print your name) Peter T. Barbur, certify that I have scanned for viruses the PDF version of the

- ☐ Appellant's Brief
- ☐ Appellee's Brief
- ☐ Reply Brief
- ☑ Amicus Brief

that was submitted in this case as an email attachment to <briefs@ca2.uscourts.gov> and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used Symantec Antivirus, Version 10.1.5.5000

If you know, please print the version of revision and/or the anti-virus signature files _____

(Your Signature)_____

Date: March 17, 2008