UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

JOHN DOE, ET AL)
)
Plaintiffs) NO: 3:05CV1256(JCH)
vs.)
)
ALBERTO GONZALES,)
ET AL)
Defendants)

August 31, 2005
915 Lafayette Boulevard
Bridgeport Connecticut

10:01 A.M.

ORAL ARGUMENT

B E F O R E:

THE HONORABLE JANET C. HALL
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

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Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: Good morning, everyone. We're here this morning in the matter of Doe versus Gonzales 3:05CV1256. We're scheduled to have an argument on a motion for preliminary injunction by the plaintiff. If I could have appearances first from the plaintiff.

MS. BEESON: Ann Beeson with the American Civil Liberty Union on behalf of all of the plaintiffs. These are my co-counsel. Next to me is Jameel Jaffer, Melissa Goodman, also both with the national office of the ACLU and Annette Lamoreaux with the ACLU of Connecticut, our local counsel.

THE COURT: Good morning to all of you.

MR. O'CONNOR: Kevin O'Connor for the United States. Joining me at counsel table is Assistant United States Attorney Carlton Green and Assistant United States Attorney William Collier. Lisa Perkins who is resolving last minute filings, will be joining us.

THE COURT: Good morning to all of you as well.

I would like to make a few preliminary remarks. Obviously we still need to work on the state of the docket I gather and thus the docket is not yet open to the public despite my efforts to get it that way. What I'm going to request at the end of this hearing that at least one attorney from each side with authority to act

remains and sits down with Chrys Cody or Cathy and identifies exactly what has to happen, makes a list of

what they are responsible to prepare, arranges to meet with the other side, if there's issues about what can be redacted or shouldn't be redacted from memoranda, things of that sort. That lawyer isn't going to leave the building until Chrys tells me that everything that has to be done will be done by tomorrow afternoon at 3:00.

MS. BEESON: Can I say that I'm not entirely certain that you have been brought up to date where we are. We did just this morning both file motions to unseal the procedures to go forward. My understanding is also that the defendants have filed redacted versions of the documents and so we may be -- I think we're fairly far along in that process. The clerk's office does have all of that.

MR. O'CONNOR: I think she's exactly right, your Honor. The issue is just a logistical one. How we get them on Pacer and the system. I don't think it is a substantive issue. Substantively we're okay. It's logistically.

THE COURT: I ask that one of you stay to make sure those logistical issues are ironed out so I can sign the unsealed order as soon as possible so the public can have access to the docket. I'm mindful of the fact

that court proceedings should be open to the public. The public has an interest even when there's a matter in which the government invokes something as national security. I have obviously told counsel that it is my intention to have this argument be in the public domain, make it

available and open to the public and, of course, I'm always pleased to have members of the public present. That being said, there's certain things that none of us, counsel or myself, can say because if we did, we will, in effect, moot the issue raised in the preliminary injunction motion and, in effect, deny the defendant its rights to argue that that information should not be public. So we have all agreed that, counsel and myself, that we're going to attempt to do this argument by not mentioning certain things which I hope we all agree and understand what those are. However, since I have been known to misspeak on simple things like people's names, it is quite possible that I will open my mouth during this argument and say something that counsel's heart is going to start beating. This is one time I will not be offended if you interrupt me. You should be out of your seat as fast as you can. If that doesn't stop me, interrupt me. Make me think of what I'm going to say. I will say the same thing for counsel. You folks are more into this than I am. It is possible one of you may misspeak. If one

thinks that's happening, likewise stand up and interrupt. I'm not entirely certain we can have this argument completely in the public. That's my objective right now and that's what I intend to do. If it develops that I ask you a question and you cannot answer it fully without revealing something which we have all agreed should be sealed at least until I rule and depending on how I rule,

may be continued to be sealed or not, then you need to tell me that. And we'll try to keep track of those questions. At the end, I will have to make a judgment whether I feel I have enough to work with by way of trying to get to the right result, if I need to have more argument on those topics only, that our topics we can't discuss without revealing sealed information. Okay with everyone? Does that make sense?

MR. O'CONNOR: Yes.

MS. BEESON: Yes.

THE COURT: I guess we'll start with plaintiffs' counsel if I could.

MS. BEESON: Yes, your Honor, if I may, I have one other logistical question in an abundance of caution, I will ask to approach the bench to ask you about it.

THE COURT: Sure.

(Sidebar held between counsel and Judge

Hall)

THE COURT: I would like to put one more thing on the record. That is the John Doe, the plaintiff party in this matter is actually connected to this courtroom as I speak. He can see us but we can't see or hear him but he can hear us. This was done in order to permit -- obviously a party litigant has an interest in participating --

MR. O'CONNOR: If I may presume to interject, could you try to refrain from he or she because

it is an entity. Representative of the entity. I don't mean to --

THE COURT: He doesn't mean anything. That's what comes out I'm afraid. I should tell people that doesn't mean anything but thank you. It is an it. I should write that down on my list of words to say. That I can say.

So, in any event, I want to make that a part of the record so the record reflects that. Attorney Beeson, would you come to the podium and proceed.

MS. BEESON: Good morning, your Honor, and before I begin the substance of my argument, I also just want to clarify on the record that we have an agreement with the government that we can say in open court anything that was made publicly available by the documents that

were filed this morning with the clerk. There are some new facts that are disclosed in those documents. I want to confirm with the government on the record that we will not suffer any sanction if we disclose those facts at this point. The unredacted facts.

MR. COLLIER: Your Honor, Attorney Goodman brought to my attention two redactions this morning that should have been made and they were made then and the copy substituted. I'm assuming you are not talking about those.

MS. BEESON: Yes.

THE COURT: In other words, you are up to

speed to what your colleague has agreed to.

MS. BEESON: It was me that noticed the mistake and corrected it.

THE COURT: It sounds like we'll be fine.

If you have an argument that you would like to proceed with, that's fine. Obviously -- maybe it is not obvious. I have a lot of questions for both sides. If you wish to proceed, you can go ahead but I will probably jump in.

MS. BEESON: I'm very happy to answer all of your questions. I will make a very brief opening statement and perhaps we can move straight into your questions.

We're here today because the FBI is gagging the plaintiffs from disclosing the mere fact that the FBI used a National Security Letter to demand records about library patrons. The narrow question before the court today is whether plaintiffs are entitled to a preliminary injunction to lift that gag. We think the answer is yes for two reasons. We have shown a likelihood of success and our claim is that the gag is unconstitutional prior restraint that has not been justified by any compeling government interest and, two, our First Amendment rights are irreparably harmed every day the gag continues. In fact, the need for preliminary relief is acute. The John Doe plaintiff in the case remains unable to speak at all. The organization and its representatives are gagged completely from participating in the ongoing public and

Congressional debate about the Patriot Act.

THE COURT: Doesn't that reach too far? You say in your reply brief. If I'm quoting something I'm not supposed to, let me know. You are now able to -- it is public that an NSL has been served for library records. I can say that, right? Okay. And I don't understand how Doe is gagged to the extent you are arguing. In other words, Doe, like any other person with library records, can complain about the service of the NSL, can argue to Congress, look here, they said they wouldn't do it and now

they have done it. Congress you should do X, Y and Z. All he can't do is say I'm the one who happened to have got it or the organization is the one that happened to have got it. Is that really -- obviously Doe can't speak in that sense but in terms of your -- Even Judge Marrero in 518 that you like, that you cite a lot talks about lesser First Amendment rights. It is in another context. I would like you to respond sort of to whether the agreement of the government to release the redacted complaint, I don't want to say moots your claim for preliminary relief but certainly lessens the extent of the harm.

MS. BEESON: Your Honor, the John Doe client wants to speak for itself, and its representatives want to speak for themselves. Under the First Amendment, I would refer you, in particular, to the Hurley decision 515 U.S. 557. The speaker has the autonomy --

THE COURT: That's the parade case in Boston?

MS. BEESON: That's right. A speaker has the autonomy to choose the content of his own message. Our client wants to craft his own message and advocate, you know, in the way it desires. It wants to appear before Congress and to talk to the public and the press and to tell the story from their point of view about why

they believe the power of the FBI to demand library records through a National Security Letter is a bad idea and is, in fact, unconstitutional.

THE COURT: But the head librarian of the City of New York could go give that testimony now that he or she knows that the NSL has been directed to someone that keeps library records. This isn't a person who has suffered excessive force and been personally brutalized about to speak about how they felt when they were thrown in the trunk of the car, whatever. I don't mean to diminish. I'm trying to press you. I don't understand why even John Doe couldn't go to Congress or ask to speak without saying it is the subject of this particular NSL.

MS. BEESON: John Doe wants to communicate a very powerful message which, in fact, we know that Congress wants to hear from someone with first-hand knowledge. I have had this power used against me and here having had that experience, I don't think that Congress should expand the Patriot Act. I think they should limit it. And I would refer you also to the declaration that

was filed yesterday with our reply brief by a representative of the American Library Association. It is public knowledge that our client is a member of the American Library Association and the ALA declaration asserted they have had communications with members of

Congress who up until now have been quite skeptical about the claims in the abstract by ALA that the Patriot Act threatens library records and they are sort of insisting and want to hear from someone who has personal knowledge of the use of the FBI's power.

THE COURT: But all you are asking in your preliminary injunction is that I enjoin enforcement of the statute to the extent that it prohibits Doe from disclosing that it received an NSL, right?

MS. BEESON: Right.

THE COURT: You are not asking me to let Doe to be able to tell the world what the NSL said even when it was served or by whom or how. None of those facts are the subject of your preliminary injunction, correct?

MS. BEESON: That's right.

THE COURT: So if it is only the fact that who Doe is that is now still secret that you argue should not be secret, why can't the head of the ALA knowing that one of their members has been served this, be just as forceful a spokesperson?

MS. BEESON: Your Honor, again under the First Amendment and under the case law, every individual

has their own First Amendment right to speak.

THE COURT: Not always. I mean how about oh, gosh, Kamasinski I will say that wrong. That gives

lesser First Amendment protection to the fact of the existence of an information or the service of a subpoena that would tell you there's an information. I mean how do you cope with that Second Circuit precedent which I'm obviously bound by?

MS. BEESON: Sure, your Honor. Before I address Kamasinski, I want to say one additional thing about what the plaintiff wants to communicate and how the gag on the client's mere identity is preventing the client from communicating these messages. As they explain in their affidavits, it is not at all clear that they could suddenly appear before Congress or talk to the press and even in a general way about the National Security Letter power. The fact is before they receive this NSL, they had no idea that a National Security Letter could be used to obtain records so it would be an enormous red flag if they subjectively wrote a generic memo and distributed it to all the libraries in Connecticut which said here is how the National Security Letter power works and here is how it threatens intellectual freedom. They want to be able to do that. They feel that would be a risk. There's been nothing in our negotiations over the gag so far that would indicate to us that as our client's counsel, that it would be permissible for the John Doe client to do any of that. And particularly to do it with first-hand knowledge by

saying the reason I'm an authority on the subject is because it happened to me.

THE COURT: You got to the end. I think you should reread the defendant's brief unless I'm mistaken. I would ask Attorney O'Connor to correct me. I understand their brief to say that the Doe plaintiff is free to speak about the NSL and the fact an NSL has been served on someone. The only thing that Doe plaintiff cannot speak about is that it was served on Doe. So I agree with your last piece there. I can understand why you haven't reached agreement on that. That's the guts of your motion. I think on anything else I don't understand that the government is standing there. If they are, I need to know that. It will affect my view. I understood them to basically say no, you are free to go off and talk about anything you want, just like any other person with library records might speak up now that everyone knows this NSL has been served.

MS. BEESON: I think we have asked them to address that. That's not my understanding given how concerned they were about allowing the client to come into an open public courtroom. They seem to be concerned that somehow through some information disclosed that I can't refer to here publicly the public could triangulate and figure out who, in fact, Doe is.

14

I was going to turn your Honor to the Kamasinski question unless you had a follow up.

THE COURT: Go ahead.

MS. BEESON: The Kamasinski case is distinguishable in a couple of ways. The one thing that I would start out by saying is under the Supreme Court precedent and the Second Circuit precedent, there's a distinction between a gag -- between gags that prevent a witness or in our case a client from disclosing the substance of an investigation and a gag on disclosing the mere fact that there is an ongoing investigation.

THE COURT: Wait a minute. I thought Kamasinski identified three categories. The first was the information that the person knew, our Doe, before they came to know there was a government interested in the subject. The second is the fact that the government is interested in the subject, i.e., is service of a subpoena or something of that sort or I suppose the filing of the complaint by the plaintiff and the third I thought was what happened in front of either the grand jury or the investigative body. I would think that the information you seek to ungag is in the second category. In other words, there's nothing our Doe knew before the NSL appeared on its door stop, right?

MS. BEESON: Right. I will go back to my

15

argument in a minute. Talk just about Kamasinski for a

second. We would argue, first of all, what our client wants to say is more akin to the first category of information.

THE COURT: Why?

MS. BEESON: Because in that case the plaintiffs' identity was not gagged. The plaintiff was complaining about a judge's conduct and what the Kamasinski court held that that fact alone, the criticism of government action, was fully entitled to First Amendment protection.

THE COURT: The criticism there wasn't the fact he went and filed the complaint against the judge and there was a hearing or going to be an investigation. The information is what he already knew. He thought the judge was a bad judge. Here your client can say we think it is bad that the government does NSLs on people with library records. It is different to say we think it is bad because they have served one on us. That's just like serving a subpoena.

MS. BEESON: They want to be able to say the FBI used its power against me and it shouldn't have. That's the message. We believe that message is more akin again to the criticism of the government official that the plaintiff was allowed to say which, in fact, the Second

Circuit strongly affirmed the long standing rule in the First Amendment context that any sort of criticism of government power is entitled to the highest degree of

government protection. That's the first thing we argue. There's another case that falls into this category the Seattle Times v. Rhinehart and Kamasinski. Both are distinguished because and the courts discuss this in the opinion -- because there the plaintiffs were being gagged from disclosing information about a process that they had affirmatively availed themselves of.

THE COURT: Seattle Times is quite distinguishable but I think that I'm not rejecting your argument about this is more like category one of Kamasinski than two but I would have to say that you would have me breaking new ground. There aren't any new cases out there that analyze the first category of Kamasinski to be as broad as something that arises from the act of the government upon the speaker, right?

MS. BEESON: I don't have a case that's precisely the same. What I would say again I think this was clear from Judge Marrero's opinion in the other NSL case -- I don't think Kamasinski deserved this. The normal rule is that any prior restraint on speech is presumptively unconstitutional and that it must be justified on a case by case basis.

THE COURT: I'm with you on that.

MS. BEESON: This is Globe Newspaper and a number of the other cases and Kamasinski did not disturb that. And as Judge Marrero explained, any departure from that norm would be extraordinary and could be justified only by the very highest interest. Here we believe using

that case by case approach to this gag in this case, the government has done nothing to justify the gag.

THE COURT: The problem with that is the first leg of your stool. The first pin that you have to rest on is it's First Amendment protected. In effect cases like Butterworth and Kamasinski suggest when it is in certain types of information obtained because of something the government has sought from you, the fact they have sought it, First Amendment protection doesn't reach to that information, at least not while as long as the investigation is pending. That's, of course, a different question. We may get to that in a minute.

MS. BEESON: That's where I wanted to go back to Butterworth. Butterworth is different than Kamasinski in this respect and not been overruled. In Butterworth, there was a question about whether the First Amendment could allow a witness in the Butterworth case to disclose the mere fact that they were a witness. Okay. And all of the justices -- the justices didn't reach that

specific question. Scalia wrote a concurrence in which he said -- he agreed that that issue was not presented here and they were not deciding here. But the other justices, you know, implied that that mere fact that a witness has been asked to testify or the analogy here the FBI used its power against the client, is that there is no obvious justification for that kind of gag.

THE COURT: All right. The defendant cites

a lot of cases about other statutes with gag orders. Because I just got their brief, we haven't had an opportunity to run each one of them down and I wonder if you had and if any of them had been challenged, upheld, constitutional, unconstitutional. Are they like the grand jury cases?

MS. BEESON: Yes. The statutes that are cited in the government's brief -- this is from my recollection.

THE COURT: There's one subpoenas of financial institutions. Records about consumers.

MS. BEESON: These are all -- most of them are gags that were expanded recently by the Patriot Act. There's been another one challenged but the gag order was identical to the one in the NSL statute in connection with 215 of the Patriot Act. That's may be pending in Detroit and not been decided.

THE COURT: Pending where?

MS. BEESON: In Detroit. What I would argue here is that the closest analogy we have and some parts of the argument the government concedes this, is the grand jury context. If they had used a grand jury subpoena here, our client could speak. There would be no question. The default rule under the Federal Rules of Evidence is that a grand jury witness can clearly disclose the mere fact he's been called by the grand jury.

THE COURT: It's not a default rule. The rule prohibits a large category of people not to speak and

the witness is not included.

MS. BEESON: Absolutely. Yes, your Honor. We believe that the government has not justified, you know, the party from that rule in this case. There's no particular reason why they need a gag here. If I could turn to that.

THE COURT: I was going to say I think their answer is going to be you're right. That's a criminal investigation under the grand jury procedures but Congress gave us this authority, and they did it because of national security. And so isn't there a distinction to be drawn, may be sufficient justification. We're not talking about -- I will call it normal. It is not normal to anyone -- criminal investigation versus a

counter-terrorism investigation that would justify the secrecy?

MS. BEESON: We have no idea what kind of investigation we're talking about. The government hasn't given the court and the plaintiff any reason. With think that's why we're entitled to a preliminary injunction. That's the first argument. They haven't said. For all we know it is a routine criminal investigation, and they decided they wanted to use this new power instead of the grand jury subpoena. If they had asserted this was a counter intelligence or counter-terrorism or national security investigation, the fact is the government has routinely been able to investigate and prosecute those

kind of cases without using a blanket gag. Without gagging third parties who they request information from disclosing the mere fact that they have been asked for information.

THE COURT: Do you think I should give the government fill in the blank deference in the area of national security: Some, none, a lot, a little. Aren't they entitled to some deference?

MS. BEESON: Your Honor, the cases make clear that there cannot be just blind deference, of course, from the judiciary to the mere invocation of national security as an excuse to limit First Amendment

rights. We would say no. We think the same is true with the deference they argue is owed to Congress and we cite those cases in our brief but Landmark Communications is a clear one where the Supreme Court held there was no particular deference.

THE COURT: But how about some deference? Is your answer I should give it no deference?

MS. BEESON: We believe that the analysis, you know, is that the presumption of any gag like this, any prior restraint, the presumption is it is unconstitutional. By definition, the prior restraint is government action. Always I'm saying so again I think our argument would be, you know, no. What does deference mean? Deference. We have to apply the test that the Supreme Court has laid out for us which is it is the government's burden to justify any gag they impose and

they haven't done so here. It is not enough to come in and say national security or counter-terrorism and assume that's enough to justify a gag as broad as this.

THE COURT: Let's assume they give me a whole lot more information. I'm a little district court judge sitting here in Bridgeport, Connecticut. I'm not sophisticated about international terrorism and means of operation. Isn't there some point at which I need to defer to their judgments as to the need to keep things

secret. For example, in the context of a Title III application, a wire tap, I would get affidavits from the FBI. In there they are going to tell me based on their experience, this is how people operate. This is why we need to tap phones. Otherwise they will evade us, et cetera, et cetera. I'm not sure that would be called deference. I'm certainly relying upon their under oath assertions about how things work in a world that I don't operate in every day.

MS. BEESON: Your Honor, courts have developed when necessary a great deal of expertise in dealing with sensitive national security cases. There are many cases that I'm sure this court and other courts have considered which involve equally perhaps more sensitive information and courts have not actually had to advocate their duty to determine whether the government's arguments are sufficient. Here again, the most important point I would make is we're not in a situation where the

government has given you evidence and argued there's some specific reason for the gag that they seek here. They haven't provided any evidence.

THE COURT: I suspect they would point you to paragraph 29 of the affidavit. I don't know if you have it in front of you. I don't want to read it out. If you can look at it. I'm assuming you are going to tell me

that's not specific enough. If that isn't, tell me by way of example what would be a specific showing that if credited by the court would be sufficient.

MS. BEESON: What's clear from the case law is the case by case analysis is required. It is very difficult to sort of say in the abstract what combination of facts might be good enough. I pause for a second. We're getting into difficult territory in terms of the open courtroom.

THE COURT: You are speaking hypothetically because obviously you are not referring to what the defendant filed. That should be clear in the courtroom. I'm asking you to spin me a set of facts you would be hard pressed to say is insufficient.

MS. BEESON: The point that I would make is that even assuming that in some cases the government might be able to establish facts that would show that the disclosure of a mere identity of the person who received an NSL, would threaten an investigation, they haven't done so here. Clearly we're talking about an organization. We aren't talking about revealing the actual target if there

is one of any underlying investigation.

THE COURT: They suggest that revealing upon whom it was served will be sufficient to alert that one or two or some small number of terrorists who happen

to be the answer to the information sought I suppose in some way.

MS. BEESON: Here I can talk about hypotheticals. That's all we have from the Government. Their, hypotheticals as you suggest, your Honor, have to deal with sometimes it might be true that the disclosure of an identity of the third party would alert a target. Might tip off the target to flee.

THE COURT: They say that's the case here.

MS. BEESON: I wanted to refresh my recollection. They don't say that's the case here. They assert a hypothetical. We don't know whether there's an active investigation, what kind of investigation, whether the records they seek pertain to the particular target or pertain to a third party. Under the NSL power, it is perfectly possible for the government to get records like they are seeking here, that are about an innocent person that aren't relevant to an investigation. We don't know any of those facts. Maybe if we knew all of those facts and all of them and maybe if the government could affirmatively establish that, you know, that disclosure again, mere identity of the third party would actually threaten some investigation, there might be some limited

need for a gag. Let me be clear. We're not saying that the government could never get a gag under some -- we

don't want to say under the statute. We believe the whole statute is unconstitutional. We understand that the government is sometimes entitled to a limited gag in certain kind of investigations. That's not what's at issue here. What's at issue here is whether or not they are entitled to this gag and the presumption is that they aren't. The presumption under the first is openness. To overcome that high burden they have to come in with very specific evidence to argue that the gag is needed because otherwise it would, you know, disrupt the investigation in some way.

THE COURT: You said something that's going to cause me to ask a question that I was trying to refrain because you are going to think it is a stupid question because the answer is so obvious to me but obviously under the standard you have to show, you agree with me or the defendant it is a clear likelihood of success under Tom Doherty and the Second Circuit, the cases you have cited?

MS. BEESON: Yes, your Honor.

THE COURT: I'm going with Judge Winters. Let's assume hypothetically I conclude that you have borrowing from Judge Marrero shown clearly that the statute is unconstitutional because it has no end date and that there's no government interest in an endless secrecy so therefore it is unconstitutional. So you are under my

hypothetical, going to win the case and judgment enter. However, you are here asking for a preliminary injunction, not to disclose it whether the needs of the investigation are over five months, five years, 500 years from now. You are here saying you want to go out on the front steps of the courthouse and say who John Doe is, okay, so it is in the next minute. Let's assume on the other hand, the government has made a showing that they do have an investigation that would reveal something if it were known who received it and it is active and they have a current need to keep it secret. How do I approach that? You are entitled to win. You are entitled to have the statute thrown out because I can't sever. The gag section is the gag section. How do I grant you a preliminary injunction, though, when I find that you really aren't entitled to the relief you want because the government's interest are compeling?

MS. BEESON: First to clarify, the preliminary injunction that we're seeking is not to enjoin all uses of the statute. All uses of the gag. We're only asking to disclose a very narrow piece of information. Not all of the details about the NSL. We're happy to continue to keep confidential, even though they made no specific showing for the need.

THE COURT: Let's say they did show a need.

Let's say they have shown that need and you are asking me to overcome a clear showing hypothetically by the government, they have laid it out chapter and verse this is the target we're focusing on, this is why this particular information is necessary to prove what he's doing or who he's talking to, where he's going, who his friends are, whatever and their target is to set off a dirty bomb in Times Square. They lay that out in front of me which is a hypothetical. I want to make that clear to people in the back. This is hypothetical. Let's say that's what they came before me.

On the other hand, they have no argument on your unconstitutionality argument.

MS. BEESON: Even on its face?

THE COURT: However, whatever, it is unconstitutional. Let's say that the conclusion I reach, what am I supposed to do as a judge when asked to grant a preliminary injunction based on your showing it is unconstitutional? When I have hypothetically a clearly demonstrated compeling government interest in the secrecy?

MS. BEESON: Maybe I'm not getting at what you are asking.

THE COURT: I told you it wasn't a good question.

MS. BEESON: Those two issues are quite

separate. If we were here arguing about the ultimate question in the case, the constitutionality of the gag,

and the court, you know, concluded that the gag was unconstitutional on its face, there would certainly be a way to preserve on appeal that decision. This is exactly what happened in Judge Marrero's case. Any information that the Court found after careful review of both sides still needed to be confidential. Here we have a very separate question. Regardless of the facial validity point, the question is whether right now plaintiffs have shown a likelihood of success right now on the simple question of the gag on disclosure of the identity of the client's name. So I think it would be -- I think that it is quite possible for the court to just address that narrow issue and not have to reach any of the other questions and just be clear, the relief we're seeking would not prevent the government from using the statute tomorrow. They probably will in gagging someone else. The holding wouldn't necessarily mean that the next gag is also unconstitutional. It would mean that this narrow part of the gag is unconstitutional.

THE COURT: You have touched on something which I meant to ask you at the beginning in connection with the preliminary injunction. Your claim on likelihood of success on the merits is limited to the argument of

facially invalidity; is that correct? As applied. Not facially.

MS. BEESON: We aren't asking you to issue a preliminary injunction. We understand that would be a

very hard question. That's why we kept our request --

THE COURT: It is just your NSL.

MS. BEESON: It is just this NSL.

THE COURT: Let's assume that Attorney O'Connor has made the most complete and compeling case, one that would persuade a jury beyond a reasonable doubt that this, that the identity of the recipient of the NSL will harm substantially a serious, important counter-terrorism effort by the government of the United States, at least if it is revealed tomorrow or in the next six months. So I have that record in front of me plus the legal conclusion that as applied to this gag thing is unconstitutional. What do you do with that on a preliminary injunction?

MS. BEESON: I think we would lose the preliminary injunction. Clearly at that point, you would have decided based on actual evidence from the government, they met the compeling interest task. I don't think I need to reiterate, although, I'm happy to. We feel quite strongly they have not done so here. They haven't put forward any evidence whatsoever. They put forward

hypotheticals about what might be a legitimate need for secrecy in other cases, but not in this case.

THE COURT: So it in effect survives strict scrutiny in the hypothetical I painted?

MS. BEESON: Yes. The only thing I was hesitating earlier about this is to just say even in the absence of specific evidence from the government, we think

that it is clear from the nature of our client's organization, that it would, in fact -- that it could not really pose a risk to any underlying investigation to disclose their identity. Unless you have a question, I won't say more about that.

THE COURT: I do understand. Those are a couple questions I had wanted to explore also with the government that I knew I can't explore in a public forum. We'll have to wait to the end. I know what you are referring to. That's really what causes me to have questions for the government that they maybe can't answer in public. I really need to talk to the government about this. The government said it isn't prior restraint. So then I go and look. I know prior restraint. I learned that my first year of constitutional law. Then I read Professor Chemerinsky and he says it is an elusive doctrine and sure enough it is. Most prior restraints are licensing schemes or court order like the Pentagon papers.

We all know those, too. This statute isn't either of those.

MS. BEESON: Your Honor, I have to say this is one of my favorite subjects. I don't actually think we need to spend any time on that because of Kamasinski --

THE COURT: You go to content based and that does it.

MS. BEESON: Exactly. Kamasinski makes clear that even if you consider a content basis

restriction on someone is subject to strict scrutiny.

THE COURT: What do I do with Rhinehart?

MS. BEESON: Rhinehart we believe that's distinguished in a way I said earlier. It is a different kind of information. A different kind of gag. In cases like this where the government is suppressing speech before it occurs by preventing our client from speaking, clearly strict scrutiny applies.

THE COURT: You have to wrap up. I do have quite a few questions for the government. I have two quick areas that I need your help on.

First, is ex-parte submissions. Of course, there's been none. You cite me to a lot of cases that are very good law. In the Second Circuit, there's a case that sets out a standard about whether the courts should consider I guess it is U.S. v. Abuhamra just decided last

fall, sets out the test. When do you do it. Due process and fairness issues all surrounding it. However, when I look not at your cases which are general principles ex-parte but I go to national security, it seems clear to me most every court said we can take ex-parte submission. It is not a problem. There's a statute that Congress has enacted CIPA, or something like that, Classified Information Procedures Action, at which the government can make a request to submit something ex-parte upon a showing that satisfies the statute I suppose and principles of fairness. I would grant that and they could submit it.

MS. BEESON: This issue did come in case it

wasn't clear in the other case as well and Judge Marrero because the government did, in fact, come and submit ex-parte affidavits in support and we opposed and fully briefed it and would be happy to do so easily because we briefed it before. What Judge Marrero decided was that our opposition to the submission was moot. He basically didn't consider those affidavits at all. He didn't need to. The only thing I would say we think the law is very clear that when deciding the merit of dispute, as opposed to a privilege issue, for example, right, it is never proper for the government to submit ex-parte affidavits. In fact, even in cases involving classified information, we have nothing showing classified.

THE COURT: The government suggests it is in the footnote.

MS. BEESON: The CIPA statute only applies to the criminal cases. There's a very complicated set of procedures that governor that. Some courts have, you know, required the government to disclose at least to the counsel, you know, the defendant's counsel in a criminal context, the classified information. There's a different issue, of course, about whether it can be released to the public. We aren't arguing that any secret affidavit should be disclosed to the public. We're saying certainly we would have a right to review them because they go to the very question the Court is being asked to decide which is whether or not the government established a compeling

interest.

THE COURT: Before we finish, ask me if I would like you to brief it. Last night I started thinking about this issue. I found a little bit. I would like case law that suggests in the national security classified information sense, it would be shared with counsel. I know in a recent case where none of the lawyers are qualified. There's nobody to give the information to. I don't know if you have a classification.

MS. BEESON: We don't, your Honor. The only thing I would say --

THE COURT: I don't either so don't feel bad.

MS. BEESON: To provide the cases but the courts have made a very clear distinction between the submission of ex-parte affidavits to support a claim of privilege, like, for example, whatever it is, executive privilege, states secret privilege, et cetera, and the use of those affidavits on the merits, in fact, now Justice Scalia, then Judge Scalia made this distinction very clear in a particular case which I should have on the tip of my tongue. Molerio decision in the D.C. circuit made a distinction about the use to target Americans' use to support privilege.

THE COURT: Thank you. I have exhausted my questions. Attorney O'Connor.

MR. O'CONNOR: Good morning. I think in lieu of going through my entire recitation, you made it

clear you have a bunch of questions so I will be very brief. I think you had indicated before you asked a question that you characterize as potentially a dumb question or stupid question. I think you touched on the heart of this matter. We have to keep in mind regardless of the ultimate merits and the constitutionality of the provision, we're at a mandatory injunction and the remedies they seek are both extreme and irreversible to

the government if your Honor grants this mandatory injunction. Obviously the legal standards that both parties agree on are correct, although, that I would add at a mandatory injunction, the likelihood of success on the merits, is insufficient. It must be a clear unlike a preliminary injunction.

THE COURT: My first question to make sure we have the same standard.

MR. O'CONNOR: The only difference we would have is it must be a clear likelihood of success.

THE COURT: I think counsel agrees with you and certainly Judge Winters said it is a clear likelihood.

MR. O'CONNOR: Because we're at the mandatory injunction stage, we obviously have a likelihood of success on the merits that will require a discussion of constitutionality. The government understands that. Underlying the whole thing is the reality you can't put the genie back in the bottle. If you grant this injunction, you will effectively have vitiated this

statute. To an extent we concede they are not looking for an entire waiver of the NSL and all of the information but practically speaking what they are looking for is the entire NSL save for one particular sentence, a key sentence but one particular sentence.

THE COURT: There's a lot of genies that

the government didn't want out of the bottle. The Pentagon papers being the biggest one but still got out of the bottle. You think the standard is intermediate scrutiny, right?

MR. O'CONNOR: We do. We understand the Second Circuit did follow that in Kamasinski. The Second Circuit also doesn't provide a compeling reason why they were not following Rhinehart scrutiny. As we see it, Rhinehart intermediate scrutiny is still good law. Granted the Second Circuit has not followed it. Judge Marrero discussed it but in our view didn't provide a very clear explanation as to why he was going with Kamasinski's strict scrutiny and not Rhinehart's intermediate scrutiny. As your Honor indicated in questioning to the plaintiff, I don't think we need to get too tied up whether it is intermediate or strict scrutiny at this point.

THE COURT: I think we might have to.

MR. O'CONNOR: Under either standard, the government would contend this statute passes constitutional muster. Under that, the reality we think that the better argument of the two is irreparable harm. I think your Honor's questions is clear on that. Their

argument has been vitiated by what's happened here since the indictment. Excuse me, the complaint. Take off my criminal hat for a second. Since the complaint was

redacted and unsealed. What happened at that point was a press release was issued. The impact of that press release cannot be minimized.

THE COURT: It might make the ACLU or the ACLUF happy because they would be able to speak about NSLs on library records but what's happened to Doe's right to speak?

MR. O'CONNOR: The gravamen in their claim was they could not speak. The public would never know an NSL had been served on an organization with library records.

THE COURT: It is pretty clear now that their request is very narrow. The harm they claim is the recipient is unable to speak as the recipient.

MR. O'CONNOR: That's right. The government would say that's absolutely right and I think Judge Marrero recognized this and your Honor recognizes this. That the recipient can say certain things and not others. The recipient certainly cannot, absent a ruling from this court, disclose the fact it received an NSL.

THE COURT: You are not going to threaten the Doe plaintiff or go against the Doe plaintiff if tomorrow you saw the Doe plaintiff in the paper talking about the evil of NSLs against library records, about the

fact that librarians like itself, myself, himself, herself

whatever it is, have to speak out on this subject, we need to go to Congress and ask to speak in front of Congress. We need to make Congress call the government into hearings and testify about why or what they have done here. None of that in the government's view would violate the law?

MR. O'CONNOR: No. I think we have conceded that in our brief by citing to Judge Marrero. I think he said anything beyond the scope of the recipient, I think he used the term is fair game.

THE COURT: All we're talking about is who the recipient is being disclosed.

MR. O'CONNOR: I think you have to include the dates upon which it was perhaps received.

THE COURT: I don't think they are asking for that.

MR. O'CONNOR: They are not. I wouldn't want to presume that's all we're concerned with.

THE COURT: You are concerned with that information but all they want to be able to say is John Doe is fill in the blank. They want to say that blank. They can't say that now under the law which they claim is unconstitutional. Why isn't that statement I, whoever it is that is saying it, am John Doe. That's speech. Why isn't that irreparable harm when he can't say it?

MR. O'CONNOR: For two reasons, you have to

weigh the harm to the government. You have to look at the context. We started here with a claim that they wouldn't say anything. Now you have the articles in New Zealand Herald saying that Patriot gag order challenged by Connecticut library. The public domain will be influenced by the lawsuit. We're only looking at whether this particular individual can play a role in this broader public policy debate.

THE COURT: You would agree with me that the ability of Doe to say that's who I am is speech?

MR. O'CONNOR: Yes.

THE COURT: I received the NSL?

MR. O'CONNOR: Yes.

THE COURT: That is speech, right?

MR. O'CONNOR: Yes.

THE COURT: I would suggest a case that's not cited in your brief ought to be looked at by the government. You cite me to Charette about lesser First Amendment rights are not entitled to as much respect on the irreparable harm scale as others. If you go to a case decided in 2003 by the Second Circuit called Bronx Household of Faith versus Board of Education. The court says and basically brushes -- not brushes because it is their colleague's opinion but says we're not going to pay much attention to it in these facts "Where a plaintiff

alleges injury in a rule or regulation that directly limits speech, the irreparable nature of the harm may be presumed.".

MR. O'CONNOR: There's a general presumption the First Amendment claims of irreparable harm but is not something that can't be overcome. It is not an automatic presumption. I think we overcome it and I can tell you why we overcome it. First of all, this information and I think there's a clear line of authority cited in our brief was only obtained because of the --

THE COURT: I want to stay with -- isn't the issue of irreparable harm for Doe particularly heightened, we start with a presumption and it gets even stronger when the subject matter that Doe wants to talk about is something that the government has consistently denied it was doing. In other words, the need for speech here is even more compeling because high officials in the United States Government, not the current defendant I believe but his predecessor, on several occasions, I have to use the right word here, spoke in a -- he used various words to describe the concern expressed by people like Doe, who are Doe like people in the past that this power would be used against him. Isn't it even more compeling in that situation with the public debate now ongoing what will this act look like in December of 2005, that this

person Doe be able to say exactly what he's asking to say?

MR. O'CONNOR: Yes and no. Yes, if your factual assumption is correct, one, but it is not. We're

confusing things here. I probably spent more time than anyone in the State of Connecticut dealing with libraries on the Patriot Act. At no time has the government ever said an NSL has never been used in a public library. They have said and declassified for the particular purposes of this debate that Section 215 that's not at issue here, resulting in confusion that somehow the Attorney General also said NSLs were never used. Prior to this case, were they or were they not? Frankly, as I stand here I don't know. I can tell you this NSLs have been in existence for twenty years. The gag order that counsel alluded to as a new provision of the Patriot Act or I should say a provision that's enhanced by the Patriot Act, has remained unchanged for twenty years. The only provision of the Patriot Act changed of the NSLs was the standard under which you could seek one.

THE COURT: I don't want to go somewhere I can't go. I have something I want to say but I can't say it. What I want to say times have changed so the fact that 215 only looked to librarians as the only section that might apply to them may be why they focused on 215 but the fact that 205 now can apply to them doesn't make

it any less important. It is in the same nature of obtaining library records so let's chalk it up to the lack of sophistication on the part of librarians that they didn't realize, wow, you can use that in 205 against me.

MR. O'CONNOR: 505.

THE COURT: 505. All the time I'm complaining about 215. I should have been over here complaining about this. Maybe that's all the more reason this is heightened First Amendment right. The need to get out the fact that it is being applied to library records.

MR. O'CONNOR: To the extent they want to use it as part of political speech, their argument that it is heightened at some point is logical but the court still must consider the government's rationale and the public policy behind the non-disclosure provision.

THE COURT: You are swinging me over to the test and scrutiny or whatever you want to argue it is supposed to.

MR. O'CONNOR: I'm talking about irreparable harm. From the government's perspective, the irreparable harm here the only claim that they have now that they have done this press release which by the way, the claim initially was libraries were unaware. The ALA home page has this thing front and center. The ACLU home

page has this thing front and center. That this is clearly outweighed by the government's need for secrecy and the policy behind the statute for secrecy here and in the affidavit by the Assistant Director Szady a case is made. I think what's also getting lost in this debate is some sort of expectation that the government must see the future. The whole purpose of this statute is not because we can sit up here and say if you disclose the name of

this individual, X, Y and Z will happen but what we can say and what we do say in the affidavit is that if you do this, there's a very high risk based on our experience and knowledge of how these things work that not this plaintiff, not the public but that the target of this investigation will learn that the government is looking into an organization of which he or she or it utilized in the course of an investigation. That's the harm. If that information gets out and the disclosure of the recipient of the NSL is made public, it's a very logical assumption and a very logical assumption based on experience and history that the individual who is under investigation here will learn he's under investigation. When you draw from that, you say what is that individual likely to do based on past experience? That individual is likely to either stop doing what he's doing --

THE COURT: Can I stop you because you are

about four pages down in my questions. I would like to stick with irreparable harm. Not what outweighs it. I just want to get with irreparable harm. Do you agree with me this is a First Amendment speech question for Doe and there's a presumption of irreparable harm? Do you agree?

MR. O'CONNOR: Yes.

THE COURT: You then say -- you argue in your brief this is not a prior restraint and part of your argument seems to be because categorical statutory prohibition on disclosure is enforceable only by a penalty

action after the fact is not a prior restraint. I'm quoting from your brief. I hope I'm not saying anything I'm not supposed to. What's the penalty action here? What can you do to this plaintiff if he or she or it spoke?

MR. O'CONNOR: That is a very good question. The statute is silent as to that.

THE COURT: There's no penalty so it doesn't get disqualified as prior restraint. Do you agree it is prior restraint?

MR. O'CONNOR: No.

THE COURT: Why not?

MR. O'CONNOR: Because it is not a licensing scheme and it is not a court order as your Honor noted in your own question. While it is an elusive

doctrine, we recognize that. I think at the end of the day whether it is or isn't prior restraint when you look at irreparable harm, the mere fact that this plaintiff is somewhat restricted but yet as your Honor notes, can still go out and talk generally, can still go out and issue notices to customers that the FBI has NSL authority and they should be aware of that. All the other things that they can do. I don't think they have demonstrated irreparable harm.

THE COURT: But the Supreme Court in Ward v. Rock Against Racism said the relevant question is whether the challenged regulation re: law authorizes suppression of speech in advance of its expression. Isn't

that what this section does? The man hasn't spoke yet. It is not like he spoke then you are going to punish him for it, that would not be prior restraint. If a lawyer who is in front of a grand jury -- an AUSA in front of the grand jury goes out and tells the press about the grand jury investigation, he's going to get prosecuted or sanctioned that wouldn't be prior restraint. 6E might be prior restraint but it is constitutional. Here we have a law that says before you open your mouth, Doe, shut it. That's prior restraint. I don't know what else I can call it if it isn't prior restraint.

MR. O'CONNOR: I think courts have

recognized that it is just a categorization, a broad categorization of that that doesn't fall within the prior restraint doctrine.

THE COURT: It might be a characterization but Nebraska press said prior restraints are disfavored because they have immediate and irreversible sanction. You talk about the harm when the genie is out of the bottle, what about the harm from Doe when the stopper is in the bottle, he's going to die of oxygen of his First Amendment right if he doesn't get.

MR. O'CONNOR: He doesn't get to speak now, your Honor.

THE COURT: When will he?

MR. O'CONNOR: When your Honor issues a decision in this case. He's either going to be able to

speak or if you agree with the government, what are we going to do then? He's already spoken. Sorry, government but I had to make a call on the mandatory injunction. I allowed him to speak but in hindsight I analyzed the constitutionality. I find Section 2709 is constitutional. What are our remedies at that point? We have no remedies. At this point, that's why I said in the beginning, we have to focus on this particular procedural aspect of the case. Their harm is temporary in nature. They are and we concede at this time prohibited from saying that they

received an NSL. They are not prohibited from saying other things relevant nor are their lawyers, nor are the ACLU, or the ALA. They are particularly prohibited from this.

THE COURT: But the posture of this case is such that while I probably could benefit from more time for reflection and maybe additional briefing, et cetera, I have a legal issue in front of me. Let's assume hypothetically that I conclude that it is awful clear to me there's something with this gag order section of the statute. Let's assume I agree with Judge Marrero that the fact it has no drop dead provision, no way to ever allow the man to open his mouth or the organization to open its mouth, that that really is offensive of the First Amendment so let's say I today or tomorrow, next week decide that the plaintiff is going to win this case. Obviously I'm not entering judgment. I could change my mind. It could be a new Supreme Court case, whatever.

I'm as sure I can be about any judgments I make which people would be surprised to think how judges aren't always so sure. Let's assume I'm as sure as I can be that they have made a really good question on constitutionality. That's really the question I was talking about the stupid question I asked. What do I do if you were to carry the heavy lifting, if you haven't

carried the heavy burden of showing that you have a compeling reason for this in this case, case by case analysis. I think the same holds on your side that it holds for them on a case by case analysis. Wouldn't you agree? That you can't just come in here and say to me it is national security. Here is an affidavit. This is how we operate. We have to keep things secret because things may happen if we don't keep them secret. Let's assume I don't think that's sufficient to meet their burden. Would you agree I should enter the preliminary injunction?

MR. O'CONNOR: That's a very long question.

THE COURT: If I was a lawyer, you could sustain the objection.

MR. O'CONNOR: To begin you reference Judge Marrero's decision, which granted on the merits is not a good decision for the government particularly because he found that Section 2709, the specific provision that we're talking about here today, as well as other provisions of it was unconstitutional. But what you do note there is what Judge Marrero was finding a compeling government

interest without reviewing information other than a very similar affidavit to the one we have here because it is unnecessary. Now the Government has made it very clear that we will provide you that information but are we really looking at the underlying merits of this

investigation here in terms of or are we looking at the prospective impact of disclosure of the plaintiffs' identity on an ongoing investigation.

THE COURT: The plaintiffs' argument is she's saying I'm only going with as applied on my motion for preliminary injunction but I don't know based on what the government has given me that there is an investigation. I guess you would say no to that.

MR. O'CONNOR: She has an NSL, your Honor, and it has a specific --

THE COURT: I understand that. You keep wanting to take me to those so you are going to get there. If you could look at your paragraph 8. I don't know whether you can answer this question. You suggest that revealing the recipient will permit the target or targets to learn of the investigation and take action to avoid it. What record do I have in front me that would allow me to conclude how the target would learn that from the mere identity of the recipient in this case as applied?

MR. O'CONNOR: That's right. The record you have is the judgment of the very experienced counter-terrorism official. We can't look you in the eye and predict with certainty the future because the

plaintiffs' name has not been disclosed. If it is disclosed, we certainly can anticipate reasonably,

rationally some severe risks of what can happen. That's the reason they have this in the act so the identity of targets are not disclosed. Therefore, the targets learn they are under investigation and take measures to avoid detection because the purpose here is not to prosecute this person at this point. It is to identify this person to prevent what we may or may not believe to be a potential terrorist or other national security threat. The basis here to look at is not the underlying merits. Nowhere in their brief do they say anything other than there's no national security considerations here and the government hasn't provided specifics. We offered in camera to your Honor to do that. They objected saying we can't legally do that. We're happy to brief that issue. We received a reply brief yesterday. I don't think we're prepared to go into extensive detail on string cites in the footnote.

THE COURT: This is going to be another awful question. I won't characterize it. Some thing that you haven't told me about. I'm not saying that you have to tell me but something caused you based on the statutory requirement of the statement that must be made in connection with the NSL, caused you to issue this NSL, right?

MR. O'CONNOR: Correct.

THE COURT: I don't know. Was it one thing or was it more than one thing that has happened since? If I'm going somewhere I shouldn't, stop me.

MR. O'CONNOR: No. You don't know the underlying basis. But neither did Judge Marrero, that's our point and he ruled on the merits.

THE COURT: But I'm not Judge Marrero.

MR. O'CONNOR: You indicated before what if you conclude he was right. He also found notwithstanding there was compeling government interest and stayed his ruling for ninety days because of it. That's judgment on the merits.

THE COURT: That was on the face. That was a facial attack. What they are raising the preliminary injunction as applied in this instance. I think under those circumstances -- which I wasn't clear. That's one of the things I asked Attorney Beeson. It was unclear to me. Now it is clear. She wants to raise her preliminary injunction motion to rest only an as applied basis. If it is an as applied basis, don't I need to know more than just the law enforcement agent telling me that target is a terrorist activity, will take snippets and pieces of information, lots of things together and run and hide?

MR. O'CONNOR: I don't believe you do. We're willing to give you that information. They object

to that information in camera. It is a catch 22. They are saying we need to provide you more information. We're offering to do it. They are saying we can't do it unless they turn it to over them.

THE COURT: Why didn't you provide it?

MR. O'CONNOR: We have been responding to the legal arguments, number one. Number two, in Judge Marrero's case, we used that somewhat controlling procedures. As your Honor knows, we used that in helping to draft the sealing orders and the like. Our presumption was that at this point that would not be necessary to do absent a request from you. We offered in our pleadings that we're more than willing to provide it to you.

THE COURT: Can you go to page 31 of your brief?

MR. O'CONNOR: Yes.

THE COURT: If you go down, I don't know if this is made public. If you go down to the 6th line from the bottom. That's the sentence that begins with Doe's name. May well have. And that sentence. Okay. Particularly after the dash, the but only. How do I know that? Isn't that critical to your argument that of what the affidavit says to me. If you reveal Doe's name then people will figure this out. Doesn't the ability to figure out turn on certain assumptions size, numbers? I

don't know what else it turns on.

MR. O'CONNOR: Assumption is based on experience. The reality is here that we're issuing an NSL with a very specific request. We're not asking for an overly broad request.

THE COURT: This is really going to be -- how do I know there's only a very few terrorists in the body of individuals served by Doe? Isn't that a critical assumption to the argument that revealing the identity of Doe will permit an intelligent terrorist by deduction to be alerted, wow, it must be me they are picking up with the NSL. I am going to scram and go somewhere else.

MR. O'CONNOR: The point is simple. This is in response to the attack that the claim was made that if you disclose the plaintiffs' name, come on, who is going to figure that out. Our point is and I believe a reference was made, but I have to be careful here, to the number of and our point is sure, there may be that number of whatever.

THE COURT: The universe is a certain size. And you are suggesting the people you are interested, that universe is another size.

MR. O'CONNOR: Right. Our point they can say this is not a realistic corner because there are so many. Our point is that's not really the case. The real

issue here is how many of those people are people that would reasonably believe they are being looked at. I think it is fair to draw the inference.

THE COURT: I'm a district court judge that

knows nothing about national security. Governments have often argued the courts shouldn't be involved in this topic because we don't have any expertise so how do I know that what 31 -- the argument in 31 rests on, how do I know it is true? If I were to say it out loud, I would get quite a laugh here. How do I know that's true? Sure. Do I think it's true? I would like to hope it is true.

MR. O'CONNOR: You don't know that's true and we don't know that's true right now. What we're trying to say when you look at their argument and you look at the perspective impact of this, to claim simply that there is no -- this will not, disclosing the plaintiff will not compromise the investigation, that is no more supported.

THE COURT: But the burden is on you.

MR. O'CONNOR: That's right. In responding to their claim there will be no compromise because of this number, I think it is very fair to respond yes but which is what we have done. Granted we can't predict with accuracy the percentage of number of patrons that may or may not be engaged in this type of activity but I do think

that's a very fair inference to draw. I think this court can do so.

THE COURT: 27 if you look at that. That's one of those something may happen. Shouldn't I know. Paragraph 27 of your affidavit. Shouldn't you tell me if in fact that is present here. I don't know if it is

present or not. If I knew it, you would be building a record that I would conclude you have a compeling interest. It's nice that's a risk but I don't know if it happens in everyone of these cases. I doubt it does the way it is written so wouldn't I want to know it is. And 25 is the same thing. You talk about the mosaic type of argument. Other pieces of information. Maybe this is the first step in your investigation of this target or whoever person this information is going to help you get a target. There's no other information out there. Wouldn't I want to know that. Maybe there's 27 other pieces of little things out there and this is the straw that's going to break the back of your secrecy and allow the person to piece it together. I don't know what it is. These are hypotheticals.

MR. O'CONNOR: I think with respect to what you need to know, we'll give you the comfort level assuming we get over the legal issues and the ex-parte issues. We'll give you whatever facts we have in our

possession to help you make this decision but I don't want to get off the point that we're still in the prediction business here. What we're simply pointing out in the affidavit are the potential impacts of disclosure. None of those can be predicted with any certainty because, your Honor, a lot is going to depend on the nature of the individual that's being looked at and what we may or may not know about this individual at this time.

THE COURT: This is a case by case

analysis. You want me to rest my decision on general principles of counter terrorist investigation but I'm supposed to be deciding in this instance have you got a compeling interest I think. It isn't just if the government says we're engaged in the counter-terrorism. I know that and we're doing the best we can to stop terrorism and one way to do that is to not let them know we're looking at them because if they know, they will run and hide. I understand that. If we're here on a case by case analysis, as your brief from the Second Circuit says in Judge Marrero's appeal, I think you can see that I'm supposed to look at this case by case. Why should I accept a general statement? Some might say, for example, that the way I drive I'm going to get in an accident this afternoon when I go home. It is quite predictable that the chances are I will get into an accident. That isn't a

way to carry a burden in a particular moment. Am I going to get into an accident?

MR. O'CONNOR: It doesn't involve national security. As much as I'm concerned about your health, safety and well-being. I think that's different at this point. I realize the point of your hypothetical. We are in a different arena. It is not an arena where the government thinks the judiciary has no role. Look where we are.

THE COURT: You accepted the invitation to join the party.

MR. O'CONNOR: The bottom line is in this particular case, absent an in camera proceeding what you have in the affidavit, is the most that we can provide absent declassification and sharing with your Honor. That's an issue we're going to have to grapple with at some point in this case because presumably whatever you do at this stage and we hope you will not grant the mandatory injunction for the reasons we stated. Whatever you do, there's going to be discovery phase presumably unless we can get you to dismiss it outright and suspend discovery. There will discovery and I presume during the course of the discovery depositions and documents will be requested that we're going to claim secrecy and your Honor is probably going to have to review those in camera.

Principle review of documents in camera is not as radical as one might assume.

THE COURT: I'm not as troubled by that as the plaintiff but I haven't seen the plaintiffs' brief or argument so I need to do that. I guess let's talk about that. I guess I would ask that. I don't know how to put this. I'm concerned about delay. And but I'm concerned also about the ability to hear from the plaintiff on the appropriateness of my seeing them alone as opposed to myself and counsel. I'm assuming that government's position is that counsel -- leading counsel. One attorney for the plaintiff would not be permitted to see what I see if you submit ex-parte material that you offer.

MR. O'CONNOR: I think at that stage but we

have to look at CIPA. Other than your Honor which I think Congress does authorize, there has to be security clearances. We do this in litigation. We issue clearances for defendants. Whether or not we can do that at this stage, I think is highly doubtful. I would have to go back and look at CIPA to see exactly how this would play out.

THE COURT: I think I'm inclined -- we can talk about this at the very end. I think I'm inclined to ask for briefing on the question of ex-parte submission but at the same time not to delay this any farther also

ask the government to prepare the materials that they wish to submit ex-parte and submit them ex-parte. I won't look at them until I resolve the question -- obviously Judge Marrero's route, if I can get there, is a fine route. If I don't need to look at them, I don't need to look at them and I won't and will return them unopened. If I determine that I do, then I'm going to have to address the question of whether about the fact that there's ex-parte and I need to look at the cases that plaintiff wishes to offer me and any you want to offer me on this would be helpful too. I would look at those cases and exhaust that issue before I look at anything. Obviously I would not look at them unless I decided I should. I wouldn't look at them until I decided that, yes, I needed them and yes, I should look at them and yes, it is appropriate to look at them ex-parte so I would ask that.

I guess it strikes me that it might be possible for me to conclude based on your affidavit that national security is a compeling interest of the government but that doesn't get you all the way home, does it? Don't you still need to show to me that you have narrowly tailored this statute to serve the compeling interest?

MR. O'CONNOR: When we're looking at likelihood of success on the merits. That is an issue

that the court has to grapple with. We're very cognizant of the Doe cases or I should say the Ashcroft cases. On the other hand for the reasons we articulated to the Second Circuit, we don't agree with Judge Marrero finding on that particular prong that no government administrative subpoena can have an indefinite or permanent, we refer to the term as non-disclosure, not gag orders, no NSL can have a permanent non-disclosure. In fact, as your Honor recognized, numerous other provisions do have these same -- this is the only NSL provision at issue in the litigation.

THE COURT: This statute has no drop dead provision gag order.

MR. O'CONNOR: That's right. And obviously that troubled Judge Marrero, no doubt. I sense it troubles you a bit. It may trouble other people. I think what we have to look at here this is a different environment. This is not a criminal investigation. This is a national security investigation. There's no drop

dead end date on these investigations. And Congress recognizes that in the legislative history between 2709 and putting this non-disclosure provision in there. Why we may disagree, we being the general public, certainly not the government with that. That's a policy decision made by Congress. I think the Butterworth decision is

controlling here.

THE COURT: What about cases like Globe Newspaper where they said it is absolutely a compeling interest to protect minor sexual assault victims from being publicly displayed during their testimony in court but at the end, they said let's do this on a case by case basis. We may have a 19-year-old victim who got victimized at 17 and maybe we don't need to close the courtroom for that or maybe we have another circumstance where we can put the person behind a screen and that would be enough to hide their identity. There's other ways to do things. Don't you fail because the statute is such a broad brush or a hammer? There's no way out of it. It is absolute.

MR. O'CONNOR: The simple answer is that no in the sense that those cases don't apply because this doesn't have an end date and Congress has decided that in these particular cases, NSLs so long, not a line agent, line agents can't certify. It has to be a high ranking FBI official certifies all that is relevant to clandestine intelligence or counter-terrorism investigation and I note

of interest nowhere in the complaint, nowhere in their papers in support of an injunction do they quote the fact that the provision goes on to say that they must also certify that it is not being done in violation of First

Amendment rights. I find that curious that that's nowhere in the papers. In fact, instead of using ellipsis around it, we use periods.

THE COURT: Let's stick with the question of narrow tailoring. Wouldn't you concede that this statute can never be claimed to have been narrowly tailored?

MR. O'CONNOR: I would concede that this statute is certainly not as narrowly tailored as others. That doesn't make it unconstitutional.

THE COURT: It is not that narrowly tailored to achieve your interest. It is unconstitutional.

MR. O'CONNOR: As a term of art if someone says it is not as narrowly tailored as a statute that has a provision allowing a court challenge or an end date, certainly one can claim but that doesn't mean that it is not narrowly tailored enough to pass constitutional muster and the question here is when you look at Butterworth, the court there struck down part of the grand jury secrecy statute. It was a Florida statute I believe but not a part of the statute that said with respect to grand jury testimony that a witness learns other than his or her own, they may never disclose that. There was no temporal

nature to that. That's still good law. Granted

Kamasinski and other cases including Hoffman-Pugh there were specific provisions in those statutes that allow the court challenge. They can be distinguished rightfully so but Butterworth is still good law. In that case, the court specifically upheld that part of the statute so I don't think you can say on its face because it is a permanent non-disclosure provision that makes it not narrowly tailored.

THE COURT: Let me give you another one of my crazy hypotheticals. Let's assume it is 2075 Al Qaeda is off the face of the earth. We are at a peace in the Middle East. Everybody loves everybody. There's no terrorism left. There's something else that's a threat to the world. There's a global warming has melted the ice cap and we're all flooded but whatever it is, we have other things to worry about but not terrorism. Don't you think that the public has an interest in knowing the circumstances under which the government sought information and why in order to learn from these situations in order to design and to discuss and criticize and debate what we should do when the next problem arises in our society. I'm mindful -- I may be wrong about this. I do believe there were secret memos written in connection with the Japanese Internment, Army memos that were classified and that have since been unclassified and

allowed people to now debate. I think the common view is what a terrible mistake that was and why it was and maybe it was a bad mistake in part because information was poorly collected or of hidden. Maybe it is not tomorrow but you have no compeling interest in 2075 that I just painted to keep this information quiet, do you?

MR. O'CONNOR: Your Honor, your scenario if we live in the perfect world, unfortunately you or I won't be alive then. The reality is that would be up for Congress to decide. Congress is getting under 2709 periodic reviews of the statute. If Congress were to decide in 2075 to declassify this information or to repeal the statute saying there's no more terrorism, we don't need NSLs based on this criteria, that would be Congress' decision.

THE COURT: I'm not so sure and absolutely no disrespect meant to Congress but I think given the First Amendment, people have a right to ask the court to decide is that good enough. Is it good enough to say that 50, 60 years from now Congress will decide what needs to be classified. Isn't it that you must narrowly draw your statute to serve the interest you have and when that interest ends, then the gag on the First Amendment must end. Therefore, you would have to have a statute and I'm not the legislature. I'm not going to draw the statute

but there's amendments in front of Congress now on the Patriot Act to provide express judicial review. You can have an amendment about periodic review of the continuing need. It seems to me that to say that assuming the recipient was still in existence in 2075. They couldn't continue. They couldn't continue to be gagged when there's no government interest left, I don't see how that's narrowly tailored.

MR. O'CONNOR: If you get rid of the compeling government interest, the whole dynamic changes but that's not where we are. We're here today and terrorism is alive and well and will be in the foreseeable future. Hypothetically speaking the dynamics not only for Congress but for your Honor, if you are sitting here in 2075 and this issue comes before your Honor and you are able to say I don't buy this. I don't buy your national security concern. I don't buy this thing, then we might be looking at a different situation. We're not unfortunately there yet.

THE COURT: Let me take you to an entirely different place and talk about Kamasinski. As you were listening, I believe that case talks about three categories of information; the first of which the information the person already knew is not subject to being gagged or can't be gagged. It would violate the

First Amendment. But isn't it possible that the speech the plaintiff wants to engage in here, implicates more

than one category? In other words, the second category of Kamasinski that the fact of the inquiry that supports here, in order to say that that really goes to the public's ability to disclose complaints about the conduct of government action which pulls it into the first category. I'm sorry if I'm not being clear. It strikes me that the second category which is gagged appropriately under Kamasinski says can be gagged without violating the First Amendment, is the fact there's something that the government is doing. But in Kamasinski the speaker it doesn't want to criticize what the government is doing. It wants to say this is what the government is doing which, of course, undercuts the secrecy of the investigation. Here the speaker wants to say look what the government did to me which is wrong and the wrong part of what he wants to say is much more akin to the first category of Kamasinski like this judge is a terrible judge, complaining publicly about the bad conduct of the government.

MR. O'CONNOR: Kamasinski, as we see it, certainly is an issue that the court and we have had to grapple with in our briefs. I think the key factor there is you are dealing with a state statute protecting the

confidentiality of complaints against judiciary -- the judiciary review counsel or whatever its name was back in 1994. At that point they recognize. I think somewhat consistently. If you step back and look at 2709. All 2709 lets us get on its face is identification

information. We don't get the content of any communications. We don't get the subject line of any communications. We merely get identification information.

THE COURT: That's because you already know the other stuff, don't you?

MR. O'CONNOR: You can't presume that and frankly I can't answer that. It is not always that easy. Oftentimes the government doesn't. Sometimes it does. I would not be able to say whether we do or not here in public. In Kamasinski obviously the key difference was there was an end life because the court found reasonable even though it applied strict scrutiny. The court upheld the statute even under strict scrutiny because of limited information that it disclosed at the time and the fact that the proceedings. There was a public policy supporting not disclosing that information at that time. Obviously when it became a matter of public record, the statute provided I think they found probable cause. If the Government never, as I understand that case, found that the judge acted properly, it does not see the light

of day. It's only if there becomes a hearing so that baseless claims to the judicial review counsel never get out. You can make an argument those are worthy of public interest. I think the court recognized that there were compeling government interest in not disclosing this information.

THE COURT: All of these cases we're

talking about involve proceedings or grand juries even that aren't like our federal one. This system of justice operates in a setting in which the person who received the subpoena can call a press conference. I have been subpoenaed. This is what they want from me. After they testified, this is what they asked me. There's no limitation. The person can say much more than the plaintiff here is asking them to say. How do you rationalize the federal approach to a subpoena in an investigation that could be highly confidential, private, et cetera, with this statute?

MR. O'CONNOR: I think two things, first of all, obviously the federal policy is more liberal than the state of Colorado or the state of Florida. That's because Congress and others and the courts decided that's the way it should be. I do think there's a policy distinction between the grand jury phase of the proceeding and the NSL phase and the NSL phase you are not investigating past

conduct that may constitute a crime. You are investigating future conduct that may lead to a national security threat or breach against the United States. It's different environment than the grand jury.

THE COURT: It does take a Title III application that's talking about future investigation.

MR. O'CONNOR: You have probable cause to believe a crime has been committed.

THE COURT: Why don't you narrowly tailor a statute that says like Title III, have a judicial officer

review it?

MR. O'CONNOR: I think Judge Marrero does a fairly adequate job of sort of summarizing all the different investigative techniques on the federal level and wonders whether there's rhyme or reason as to why there's different standards. I don't know anymore than you do, your Honor, what the ultimate thinking was and why different things were. What I do know is NSLs are limited to national security and terrorism.

THE COURT: You will agree that saying the words national security while it will get my attention certainly, doesn't carry your burden, does it, of whatever scrutiny?

MR. O'CONNOR: I don't think we say national security. We go through all of the potential

impacts that we would expect from disclosure.

THE COURT: There's a lot of it may, it could, it might.

MR. O'CONNOR: How else can I do that?

THE COURT: The way any lawyer does in a case where they are trying to persuade the finder of fact. They take little pieces of facts, not theories, build them up until finally the brain of the fact finder goes click. The tumbles roll into line. The plaintiff came up all sevens. I believe it.

MR. O'CONNOR: Understood. Under the context of that this is a unique circumstance, I think we

all acknowledge that, we can do no more for two witnesses.

THE COURT: In public you can't.

MR. O'CONNOR: Absolutely. As I said, we never said we wouldn't give it to you in camera. Here we are in an open courtroom. I do think as Judge Marrero recognized, your Honor can decide without that ex-parte but we will give it to you.

THE COURT: I would make that decision. I think because of the time issues and the plaintiffs' concerns. The fact that I'm not the last stop on this train schedule that I think I need to ask you to prepare and submit those to me fairly quickly so that as soon as I

resolve for myself the issue of the ex-parte and do I need it, really need it. I have to work myself in effect the whole decision and get to either a wall, yeah, I do need it or no, I don't. I don't know when that's going to be. I would like to have the stuff there. If I get to that wall, say I have to look at it and it is right to look at.

MR. O'CONNOR: I don't want to repeat myself. This is a prospective impact that we're talking about because it hasn't happened yet. It is hard for me to read the future. I can only tell you possible implications. I think the 2709 NSL letters we are asking a senior member to certify. We're not having a supervisory agent or an agent in the field just willy nilly going in. There's a review process internally that I do believe this government can pay some presumption of

legitimacy to. That these aren't being served willy nilly based on false or baseless beliefs that there may be national security. Even if your Honor doesn't know all the particular facts behind it, I do think there can be some presumption of legitimacy to it. You talked about the role of courts. I'm not saying you should rubber stamp this. On the other hand, I think that there's some presumption of legitimacy and a deference shown to law enforcement by the courts, by Congress and others. I understand it is a line drawing exercise for your Honor.

I think in the particular case, the line can be drawn comfortably in favor of the government.

THE COURT: Can I take it to one more point before I get to the issue of stay. That's again a hypothetical question. On the issue of deference, you cite me Sims v. C.I.A. for the proposition that I ought to defer to your evaluation of what information ought to be not disclosed to the public in the interest of national security but that case didn't involve First Amendment rights, did it? That involved a FOIA request which is a right of Congress gives to us to request information of the government and certainly Congress can limit the extent of those rights or see to it that the agency the power or discretion to make judgments about where the interest should be balanced. That's quite different, isn't it, than when someone asserts I have information I want to come out of my mouth. I have it right now and you won't

let me speak. That's an entirely different context. I don't know why Sims is helpful to me on how much, if any, what is this deference concept in this context.

MR. O'CONNOR: I think we cite a string of cases that show generally speaking there is a deference shown to the judgment of more experience, more sophisticated government agents than the courts would presume to be. I think we cite that case for the

principle. It is in recognition of the general principle. Your Honor's point is a valid one. I would suggest that to the extent that NSLs are a problem, it is for Congress. As your Honor indicated, there's obviously an issue that Congress is looking at as we sit here today. Although they may be in recess. When they come back.

THE COURT: I think the Fourth Circuit case is it In Re: Washington Post that talks about how -- again I don't want to be disrespectful to Congress but I think when we get into a constitutional area, that the fact they decided to make this statute the way it is without any expiration, just a blanket gag order on all information surrounding the NSL, as we said the plaintiffs aren't asking to reveal everything. They want to reveal one more piece of information. That I think is the Fourth Circuit which is generally quite deferential to Congress, saying it is the Washington Post saying that isn't our job to say oh, Congress decided this is how it is going to be we'll defer to that. Yes, that's true in many areas that the courts have to come up against in terms of what they say

in a statute, what they do mean. I think when a First Amendment right is implicated, I'm not sure that the fact Congress passed this law, there's a lot of cases on the books for 200 years of laws that have been struck down and passed by legislature that are unconstitutional.

MR. O'CONNOR: I don't think we're suggesting for a second that your Honor shouldn't be determining the constitutionality or the breadth or whether this is an overbroad provision. We're arguing that this provision is not overbroad based on the particular circumstances under which it exists as well as some pending case law including Butterworth's Supreme Court case. It is not a question of this court not having jurisdiction. We understand the role.

THE COURT: I appreciate that. I didn't think you were arguing that. I want to be sure you weren't trying to take me all the way to the end of that road.

MR. O'CONNOR: I would like to but I'm not trying.

THE COURT: One question you may not be able to answer it. What's the significance of the facts that you mentioned a moment ago that the government doesn't request in the NSL the content or the re line, for example, you said at one point. I don't get the point of that. If it sort of by the way or an aside, if it is kind of to say why the Doe shouldn't be so offended by the

request, I wasn't sure what the gist was.

MR. O'CONNOR: I think it is very important for both your Honor to know that this provision which as

you correctly noted has no expiration date on the non-disclosure provision is in itself narrowly tailored. When we talk about narrowly tailored, the information at which it seeks is not as broad as a subpoena or many of the other things we talked about. It is very targeted information. You can distinguish and compare pen registers and traps and trace. But in terms of the information that can come in, 2709 said we're limited to the following information. The policy behind that, I know there's an argument when you say transactional records, can you get into content. The bottom line is it is clear where that statute allows us to go. I think looking at narrowly tailored that's a factor that the court has to consider as well.

THE COURT: The last question I have which I have for both of you is and again I have no idea what my decision is as I sit here. If I were to grant the plaintiffs' preliminary injunction, both of you have raised. You certainly raised it Attorney O'Connor in the issue of the stay. I need to be educated by counsel because I'm not familiar with how the Second Circuit will handle this appeal. Let's say, for example, I granted you a stay, is it proper for me to limit the time in which you must take the appeal for the stay to be effective? I know, for example, the government gets 60 days to appeal.

I don't think it is the right if I enter an injunction to let you take 60 days to decide. We all know you're going to appeal. I don't think that's fair to buy 60 days. My reaction is and you tell me if it is not done or not approved by the Second Circuit to say a stay is in place so long as the defendant files a notice of appeal within fill in the blank: Two, three, or whatever days. Then I want to know what happens to the plaintiff. I presume the plaintiff will go and seek by way of motion at the circuit of lifting of the stay and how quickly that gets handled, if either of you have experience with that.

MR. O'CONNOR: We have talked about this not that we're defeatist or anything.

THE COURT: Every defendant gets upset at the end of a bench trial when I say how about damages. They all go oh, my God. It's just because when I got back to my office and you are not here. I have to ways to go. If I go one way, fine. I have information I don't need. If I go the other way and I don't have the answer and need it, it is very frustrating.

MR. O'CONNOR: I believe we briefed it.

THE COURT: I would like your reaction to the specifics in terms do you think it is unfair for me to put a limit on your appeal time?

MR. O'CONNOR: It always depends. I don't

know if legally there's a prohibition on that. I don't know as I stand here.

MR. GREEN: I think that there's an expectation that, if need be, we could try and appeal this on a sooner basis. Specific date something we have to talk to the court right now. That's where I understand you to be going. In terms of whether we can have some period imposed that's shorter than the normal government appeal, I think as a model what I would recommend to the Court the way Judge Marrero handled it.

THE COURT: Remind me what he did.

MR. GREEN: As I understand it, he stayed enforcement of his decision and give the Government a certain number of days by which they had to do something either file an appeal or let it go. I don't recall what the specific period was. I do believe it was at variance with the normal period that the government has to appeal.

THE COURT: I will double check that.

MR. O'CONNOR: I believe it was 90 days, your Honor.

THE COURT: All it is going to do is drive the plaintiff to go appeal my stay order.

MR. O'CONNOR: We're not negotiating against ourselves. I think 90 days would be the outside range.

THE COURT: It is 90 days. That was a

judgment.

MR. O'CONNOR: It was a summary judgment.

THE COURT: If I can hear from Attorney Beeson on that and I forget just the issue on the stay, how would you suggest I approach it?

MS. BEESON: I have one very brief initial comment.

THE COURT: Do the stay first because I will forget.

MS. BEESON: On the stay issue, we would technically object to the stay if we did not have an agreement for a very expedited appeal schedule. I would be hopeful that we can work something out.

THE COURT: Maybe what I will do is I will wait until I get to a point where I can see if I can address the issue and hopefully that I can get counsel on the phone in short order and work the issue out.

MS. BEESON: I have two points. One is just that we do object to giving the government another chance to put evidence that it should have put already before this court. Our preliminary injunction was very clear. We argued there was a justification. They came forward with the only justification they had given the court's deadline. We don't think it is appropriate

especially given the First Amendment rights. Every day gives them another chance to come back and put more evidence in the record.

THE COURT: You haven't heard when I'm asking for it.

MS. BEESON: No. I want to make it clear we do object it.

THE COURT: I will ask it in a time period less than I expect to decide. I realize you would like me to decide today. I just got the government's brief Monday afternoon. I just got your reply. These are very difficult, interesting and challenging issues. I'm not going to render an opinion in the next day or two. I'm hopeful after the long weekend you may see an opinion so my intention was to ask you both for any memorandum about ex-parte submissions as well as any further affidavit that would come to me ex-parte by I will start with tomorrow afternoon at 3:00. If it is an affidavit, it can be a fax copy or even an e-mail transmitted unsigned as long as you are representing the person had actually signed it and the original will be forthcoming.

MR. GREEN: If I may speak for a moment. This is something that I have some experience with. In a recent case in the District Court in Washington, D.C., where we were required to provide classified records for

the court in camera, there were more than one agency involved. They each had to provide use authority for their materials. It took two weeks and that was a tight time schedule. The lawyers were at the mercy of the clients.

THE COURT: But the clients are the ones

who want their interest protected. I would also say that the government has been aware that the plaintiff here had a lawyer from late July. You have been aware since August what of the lawsuit?

MS. BEESON: August 9th.

THE COURT: I foolishly gave you too much time to do your brief, thinking that you needed that time. What I didn't focus on a lot of this has been briefed whether it is you or somebody else at justice in Judge Marrero's case. I gave you that time. I'm sympathetic to Attorney Beeson's argument that you should have come forward. You should be ready with this material now.

MR. GREEN: I would mention a few things. The first things is that just to point of whether the Government has been acting unresponsive on this at all. We have not been foul on this issue. I have talked to the FBI.

THE COURT: Does that mean you are in the process of?

MR. GREEN: I told them that it may well be the case that the court could decide that you want them to provide this stuff. My understanding they have begun that process. Having said that, I can't say how long it will take. The other thing I want to mention to the court on the substantive legal issue is that our understanding from the original opening brief from the ACLU, the court can look and decide for itself, was that in the initial

opening brief, they were not challenging the underlining validity of this investigation. What they were saying to the court was assuming this is a valid investigation, we see no possible harm from disclosing this particular entity got an NSL. As I understand it, that did not require the court to get into the underlying validity. That's what Judge Marrero found in the Doe case. So what we said to the court was, your Honor, we don't see the plaintiffs' brief as touching on the underlying validity investigation but if they are, if they are now telling us, if they are going to come back in reply and say we are, then we want to present this material ex-parte and in camera. That's why we did not provide it the initial matter. Obviously the tight time frame played a part. The fact of the matter is also that we knew plaintiffs would oppose it. They would fight it and the court would have to make a decision before it could be presented.

That was another part. All of these things go into play. Of course, on reply, that's what we're hearing from the plaintiffs. Now they are coming back and saying now we don't know if this investigation is valid or not. They are raising the exact issue that we didn't see raised in their initial pleading. So I would say, your Honor, we would like the opportunity to get the FBI to herd the cats and bring this information before the court but it may take some time. We had legitimate reasons to make sure this was implicated given Judge Marrero's treatment of it in Doe.

MS. BEESON: Our opening brief makes it clear what we're asking the court to do is to lift a particular gag. Our argument is that government has not justified this gag. The gag was put in place by the government. It was put in place by the government with respect to a particular investigation which we know nothing about. They knew from the day we filed that brief that was the issue. They should have known at that moment that they were required to give to the court evidence to the support to specific gag in the case. I would say again we don't know there's still an active investigation. For all we know, it could be over already. The target could already flee, if there was one, et cetera, et cetera. We would vigorously object to any extended

deadline and obviously the deadline the court offered of late afternoon tomorrow is fine and we're happy to give the court the brief on the ex-parte evidence by then.

I want to make one final point that goes back to the issue to the harm of our client John Doe from being unable to speak this mere fact that the client has been served with an NSL and make three very quick additional points. The first reason it is so important that our client be able to say for himself I have received one of these and I object to it is because it lends credibility in a very firsthand way to this argument that other librarians and other organizations have been making that these powers go too broadly. Second of all, the

client has a desire to explain and to talk to their other colleagues about what happened and help them prepare for the possibility that the FBI could serve one of these NSLs on them. In fact, I want to quote and I'm quoting from the redacted version of the affidavit which I think is fine. This is from a representative of our client who is a librarian. I can say that now in open court and he said that he had no knowledge of the NSL provision of the Patriot Act until he received this.

THE COURT: But he does now.

MR. O'CONNOR: When you say he received this, what are you referring to?

MS. BEESON: The NSL.

MR. O'CONNOR: He had no knowledge until he received the NSL?

MS. BEESON: I'm reading from the public version of the affidavit.

THE COURT: Are you concerned on secrecy purposes or her argument?

MR. O'CONNOR: Secrecy purposes.

THE COURT: Let me cut you both off. What I want to say to is if he read your press release whoever he is, whoever any librarian is now knows under this section an NSL can go to library records.

MS. BEESON: He personally knowing what happened wants to work with other libraries, library service providers and library associations to figure out how to respond to these in the future. Our argument is

under the First Amendment that he has the right to do so. He or she. I'm not trying to make a comment on gender.

THE COURT: I'm going to ask two things from both parties. I would request by 3:00 any briefing on the question of the legal issues for the considerations of whether the court should look at any ex-parte materials and whether I guess it needs to, if the government wants to make that argument that I don't need to. I'm inclined to think I had a lot of submissions. I'm

beginning to think I need to so I guess the main concern is the offer made by the plaintiff and joined by the defendant of addressing case law in the area of national security and the treatment of these records and whether, in fact, it's provided to the other side or not, is it required classification, if nobody who has classification. The case as I mentioned the defendant with no lawyer who the government would classify. That's a criminal investigation. That's a little different. Whatever cases you can find, if you get me those by 3:00 tomorrow then just hold one moment.

(Off the record discussion with law clerk.)

THE COURT: I will give the government, maybe you didn't want until this date because it is a holiday. Given it is Labor Day, I tend to labor on it. I will be in my chambers 10:00 Monday morning for receipt from the government of I assume they will sealed classified materials that you will be submitting. Maybe

there's a special procedure. I'm a obviously a neophyte to this. However, it is gets to me that's when I will be available and expecting to receive them.

MR. GREEN: May I be heard? One, there are number of procedures involved. We have made some citation to the federal register. The Code of Federal Regulations that deals with the procedures to handle the materials.

One of the things involved that your Honor and I don't know if your Honor has a clearance for classified information or not. In the past, that's how it has been handled. I think with the argument must be handled here, your Honor, if one of your law clerk was involved in reviewing the material as well.

THE COURT: I'm not intending to do that. I'm intending just to look at it myself.

MR. GREEN: Even in that case, your Honor, the normal procedure is that the judge would have to be cleared. I think that's done quickly. I know, for example, in the previous case I mentioned it was done within a two-week period. I don't know how much of that period was taken up with getting that done.

THE COURT: I guess if that's a requirement, if you don't reveal things to judges unless -- I was a justice department attorney but I didn't have the highest level. I have been classified before but not at the highest level.

MR. GREEN: In front of the court, I can only say I know it to be the requirement from past cases.

I can't say with certainty.

THE COURT: On Monday either I can receive this material and you have it and you deliver it to me or someone does. I assume it is hand delivery. You don't

want to send it over the Internet. Now the building is going to be closed. Attorney O'Connor has a lot of lawyers who have a key to the building. If you come to chambers, I will be there. If you are unable to reveal that because I don't hold the right clearance, I would appreciate a letter copied to counsel by Monday at 10:00 telling me that I'm not going to get anything. It likely will be blank. If it is two weeks, two weeks, whatever it is. Then I will need to make a judgment of whether I just need to make a decision and it may be that whichever way I decide, the Circuit says no you should have waited for that material or no, you made the wrong decision, whatever it is their reasoning is, rather than sitting on my decision and not allowing it to get up to circuit so that whatever stay is entered, isn't in any longer than it needs to. That's going to be a judgment call. I have no way to know where I will be on Monday morning in my mind, not physically. If you would give me a report on that if you are not able to give me the material.

MR. GREEN: We appreciate the difficult position the court is in. It will be no problem we will provide material or provide a letter along the lines, whatever deadlines, if there procedures that can be taken,

we'll make sure they are both realistic and aggressive deadlines.

THE COURT: Is there anything I need to do or you put my name in and they tell you?

MR. GREEN: I must confess in the previous case, I was fortunate enough to be part of a two-person team so I got the use authority from all the agencies. The other person dealt with clearing the court.

THE COURT: If there's anything you need from me, let me know that this afternoon. As I will assert to the plaintiff, if I get something to look at, I'm not going to look at it until I worked my way to the point that I concluded that I do need it and it is a appropriate for me to look at.

Thank you all very much. It's been very helpful. I'm hopeful I can get an opinion out next week. We'll stand in recess.

(Whereupon, the above proceeding adjourned at 12:06 p.m.)

COURT REPORTER'S TRANSCRIPT CERTIFICATE

I hereby certify that the within and foregoing is a true and correct transcript taken from the proceedings in the above-entitled matter.

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Official Court Reporter