

**Questions Submitted by U.S. Senator Russell D. Feingold
to Associate Attorney General, Kevin O'Connor**

1. Please explain the role that you personally played in the litigation in Connecticut involving the challenge to the issuance of a national security letter to Library Connection and the accompanying nondisclosure order. To what extent were you involved in the case and in decision-making related to the case?

As United States Attorney for the District of Connecticut, my office and attorneys from the Civil Division of the Department of Justice in Washington, D.C. represented the defendants in litigation brought in federal court in Connecticut challenging the constitutionality of the non-disclosure order accompanying the National Security Letter issued to the plaintiffs. With respect to my personal involvement, I first learned that the National Security Letter and accompanying non-disclosure order had been issued when I received a copy of the plaintiffs' lawsuit. My role in the litigation from that point forward consisted of general supervision of the Assistant United States Attorneys in my office who were assigned to the matter. I did not draft any pleadings or briefs in the matter. I argued the government's opposition to the plaintiffs' motion for temporary injunction before Judge Hall, but did not argue the subsequent appeal of Judge Hall's ruling before the Second Circuit Court of Appeals. While I did not have daily involvement with the matter, I participated in periodic discussions with lawyers from my office, the Civil Division and the FBI concerning litigation strategy.

As United States Attorney, I also serve as the Department of Justice's spokesman in Connecticut. In that capacity, at various times during the pendency of the litigation and afterward I was asked questions about the matter which I answered in a manner consistent with Department of Justice policy and applicable court rules. I also participated with the plaintiffs and their attorney in at least one panel discussion about the litigation after it was resolved.

2. At a subcommittee hearing that I chaired last year, George Christian, one of the plaintiffs in that lawsuit, testified about the personal and professional difficulties he and others encountered as a result of the national security letter that he had received and the accompanying nondisclosure order. Please review his testimony, which is available at http://judiciary.senate.gov/testimony.cfm?id=2679&wit_id=6284. In light of this testimony, would you have done anything differently with respect to this

case?

During the course of the litigation and afterward, I came to know, respect and admire Mr. Christian. His actions were and are clearly motivated by a legitimate desire to protect the privacy interests of his clients and public library patrons – a sentiment that I have expressed publicly on numerous occasions.

I also keenly understood and sympathized with the situation that Mr. Christian and the other plaintiffs found themselves in when they received the non-disclosure order. I also recognize and regret that this situation became even more difficult for the plaintiffs when, in the course of the parties' efforts to file redacted pleadings, references to the Library Connection were not completely redacted and this, combined with an electronic docketing error, led to its public disclosure as a plaintiff.

As United States Attorney, however, I was ethically and professionally obligated to provide a defense to the government defendants as well as to defend the constitutionality of a statute and non-disclosure provision that had been in existence for almost twenty years. Indeed, the non-disclosure provision being challenged by the plaintiffs was enacted in 1986, long before the Patriot Act was passed in 2001 and the plaintiffs' suit was filed in 2005. In every step of the litigation, I endeavored to balance my obligations to my clients with the legitimate interests and concerns of the plaintiffs.

For example, the issue of whether to abandon enforcement of the non-disclosure order once the plaintiffs' identities were publicly reported was seriously considered. However, the statute being challenged by the plaintiffs did not provide any latitude to the government to allow a recipient to disclose their identity under any circumstance at any time. Had the government acquiesced in such disclosure, it too would arguably be in violation of the strict non-disclosure order that did not provide any means by which exceptions could be granted.

However, once Congress amended the statutory scheme to give the FBI discretion to waive the non-disclosure provision accompanying National Security Letters, the FBI agreed to apply it retroactively (even though its retroactive application was an open question) to the National Security Letter issued to the plaintiffs, allowing them to publicly disclose their identities and the receipt of the National Security Letter at issue.

3. In June 2006, you were quoted in a *New York Times* story regarding the government's decision to release the Library Connection librarians from the NSL gag order provision for the stated reason that the government had completed its investigation. According to the *Times*, you said at the time: "They're celebrating the fact they don't have to comply, and I don't think that's something that should be celebrated. What are you celebrating? You're celebrating the fact that you prevented the government from investigating a potential terrorist threat."

a. Were you suggesting that the plaintiffs in that suit should not have filed their constitutional challenge, which was successful in the district court, and instead should have complied with a statute they believed violated the Constitution?

No.

b. In retrospect, do you think this statement was appropriate?

As I have said on numerous occasions, I respect the motives of the plaintiffs and their right to challenge the constitutionality of the non-disclosure order. I have also repeatedly credited them for the integral role their case played in the statutory amendments made by Congress in 2006 to National Security Letter non-disclosure orders. The statements referenced above reflect my response when asked by a reporter about a press release issued by the plaintiffs' attorneys after the litigation was resolved in which the matter was characterized as a successful refusal by the plaintiffs to comply with the National Security Letter. My statements were intended to clarify that, although the plaintiffs were never required in this matter to comply with the National Security Letter, there was never any dispute or question in the litigation as to whether the FBI acted properly and lawfully in issuing the National Security Letter or that the recipients were obligated under the law to produce information in response to it. The only issue before the court was whether the statutory non-disclosure order accompanying the National Security Letter – which prohibited them from telling anyone they received the National Security Letter – was constitutional. My comments were an effort on my part to convey that the outcome of the litigation was not, as some may have believed, a prohibition on the issuance of National Security Letters to libraries or others or the establishment of a right of recipients to not comply with such letters, but rather the ability for future recipients to challenge the

non-disclosure provisions of such orders and for the government to exercise its new found discretion to not impose the non-disclosure provision in the first place.