Testimony of

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April 11, 2007

Testimony for the Record To the Senate Judiciary Subcommittee on the Constitution Hearing April 11, 2007 Responding to The Inspector General's Findings of Improper Use of National Security Letters by the FBI Submitted by George Christian Executive Director Library Connection, Inc. On Behalf of the American Library Association

Thank you for this opportunity to share with you my experiences as a recipient of a national security letter. My name is George Christian, and I, along with three of my colleagues, are the only recipients of an NSL who can legally talk about the experience.

We won the right to do so in Federal District Court and have now become known as the "Connecticut John Doe's" or the "Connecticut Four." Ours is a story that we hope will provoke serious thought. Though our gag order was lifted, several hundred thousand other recipients of national security letters must carry the secret of their experiences to their graves.

My colleagues and I would, at first, not seem to be likely recipients of an NSL. I am the Executive Director of Library Connection, Inc., a consortium of 27 libraries in the Hartford, Connecticut area. At the time, along with myself, our Executive Committee included Barbara Bailey, Board president and Director of the Welles-Turner Memorial Library in Glastonbury, Peter Chase, vice-president of the Board and Director of the Plainville Public Library (who is now the current Board president), and Janet Nocek, secretary of the Board and Director of the Portland Public Library. Our primary function is to provide a common computer system that controls the catalog information, patron records, and circulation information of our libraries. Having this information in a common system greatly facilitates sharing our resources. Most patrons treat our member libraries as if they were branches of a common library. At the time we were served with a national security letter, in July 2005, we were also providing telecommunications services to half our member libraries.

Before I tell our full story, I'd like to emphasize a few lessons learned from our experience. Our saga should raise a big patriotic American flag of caution about how our civil liberties are being sorely tested by law enforcement abuses of national security letters. The questions raised vindicate the concerns that the library community and others have had for over five years about the broad powers expanded under the USA PATRIOT Act. Our story should cause everyone to pause - to consider how we can prevent such abuses from continuing. We believe changes can be made that conform to the rule of law, do not sacrifice law enforcement's abilities to pursue terrorists yet maintain civil liberties guaranteed by the U.S. Constitution.

The path we chose in Connecticut is based on a longstanding principle of librarianship - our deep rooted commitment to patron confidentiality that assures that libraries are places of free inquiry, where citizens go to inform themselves on ideas and issues, without fear that their inquiries

would be known to anyone else. The freedom to read is part and parcel of our First Amendment rights. To function, the public must trust that libraries are committed to such confidentiality. When the USA PATRIOT Act was signed into law, our Connecticut library community, like the American Library Association, many other librarians as well as booksellers, authors and others, were concerned about the lack of judicial oversight as well as the secrecy associated with a number of the Act's provisions and the NSLs in particular.

Libraries are, of course, subject to law enforcement. Librarians respect the law and most certainly want to do the right thing when it comes to pursuing terrorists and protecting our country. We recognize and accept that, with appropriate judicial review, law enforcement can obtain certain patron information with subpoenas and appropriate court orders. We are not talking about absolute patron privacy. What has disturbed the library community in recent years has been the idea that the government could use the USA PATRIOT Act, FISA and other laws to learn what our innocent patrons were researching in our libraries with no prior judicial oversight or any after-the-fact review.

Because of the NSL gag orders, librarians receiving these letters are not able to inform patrons about specific or broad inquiries. Nor can we report the use of NSLs to local or Congressional officials as part of your oversight responsibilities to insure that abuses are not taking place, and assess the best uses of these legal tools. That is why I am here today with great appreciation for what you are doing to demand accountability on these important issues. If our gag order had not been lifted, we would not be able to share our story with you and the world.

Sometime after the passage of the USA PATRIOT Act, and before our own experiences in Connecticut, some observers dropped their concerns about investigative abuses when Attorney General Ashcroft declared that librarians were "hysterical" with their concerns and that the USA PATRIOT Act had not been used in libraries. You can imagine we were therefore quite shocked to be served with a national security letter! We were disappointed that Attorney General John Ashcroft's assurances, echoed by his successor Alberto Gonzales, were inaccurate at a time when Congress was preparing to debate the renewal of the PATRIOT Act. But, because of the gag order, there was no way we could respond or tell our story at the time.

The "Connecticut Four" continue to feel strongly that libraries were and should remain pillars of democracy, institutions where citizens could come to explore their concerns, confident that they could find information on all sides of controversial issues and confident that their explorations would remain personal and private. For example, a woman looking for information on divorce or breast cancer does not want those concerns known to anyone else; a student who wants to study about the Qw'an shouldn't have to wonder if the government is second-guessing why he is interested in this topic; a business owner curious about markets for his products or services in the Middle East should not have to worry that by researching these markets at the public library he will arouse FBI suspicions. As one of my fellow John Doe's put it: "spying on people in the library is like spying on them in the voting booth." Further, Connecticut is one of 48 states with laws protecting the privacy of library patrons and charging librarians with the responsibility of ensuring that privacy. We felt we would be violating this legal responsibility if we turned over patron information in response to a request made in a process not grounded on basic constitutional procedures.

It is widely believed that some civil liberties were restored in the revised PATRIOT Act, but they were not. Language in the revised law appears to protect the privacy of library records, but a loophole inserted into the wording allows the FBI to use a national security letter to obtain library records anyway. The revision states that a library functioning in a "traditional role" is not subject to an NSL UNLESS it is providing "electronic communication services," which the law defines as "any service that provides to users thereof the ability to send or receive wire or electronic communications." Thus, any library providing Internet service can still be served with an NSL - that is essentially every library in the United States today. Robert Mueller, FBI Director, in a written response to a Senate Judiciary Committee inquiry, even stated that new language "did not actually change the law."

While the re-authorized USA PATRIOT Act appears to provide a way to challenge the lifetime gag order imposed on anyone who is required to turn over records to the FBI via an NSL, a loophole in the wording makes it virtually impossible for anyone to successfully challenge the gag order. According to the revised PATRIOT Act, if the government declares that lifting the gag order would "harm national security"; the court must accept that assertion as "conclusive" and dismiss the challenge. Hence, there is no prior judicial review to approve an NSL and, with rare exception, no legal way to challenge an NSL after the fact.

Like so many others, the library community believes that secrecy is a threat to open government and a free society. It is the secrecy surrounding the issuance of NSLs that permits their misuse. Because of the fact that all recipients of NSLs are perpetually gagged, no one knew the FBI was issuing so many. No one knew there was no public examination of the practice. No one could ask if over 143,000 National Security Letters in two years are necessary. No one could ask if the FBI could follow up on so many or whether it was the best use of their resources. These questions cannot be asked if gag orders and other forms of secrecy prevent even Congress from knowing what the FBI is doing with its powers. Secrecy that prevents oversight and public debate is a danger to a free and open society.

We urge Congress to re-consider the PATRIOT Act. Restore basic civil liberties. Restore constitutional checks and balances by requiring judicial reviews of NSL requests for information, especially 'in libraries and bookstores where a higher standard of review should be considered. National security letters are very powerful investigative tools that can be used to obtain very sensitive records. The FBI should not be allowed to issue them willy-nilly. It shouldn't be allowed to issue NSLs unless a court has approved it and found that the records it seeks are really about a suspected terrorist. We believe that terrorists win when fear of them induces us to destroy the rights that make our country free.

The details of our story support my request to you. On July 8,2005, an FBI agent phoned Ken Sutton, our systems and telecommunications manager, and informed him that Library Connection would be served with a national security letter, and asked to whom it should be addressed. Ken said it should be addressed to myself as the Executive Director.

While I had been aware of the cautions raised by the ALA, ACLU, and others, until Ken related this phone conversation to me, I had not really thought about the term "national security letter." Nor are all attorneys familiar with the term. This is not surprising, since every recipient of a

NSL is prohibited by a perpetual gag order from mentioning receipt of the letter or anything associated with it.

In considering how we should respond, I had learned that the District Court in New York had found the entire NSL statue unconstitutional because of prima facie violations of the lst, 4th and 5" amendments. So, by the time the letter arrived, on July 13, 2005, I had made up my mind to oppose this effort. One of the two FBI agents served the letter on me, and pointed out that the letter requested information we had about the use of a specific IP address that was registered to Library Connection, Inc. He also pointed out the letter's gag order prohibited Library Connection from disclosing to anyone that the FBI was attempting to obtain information from ow library business records

We could not fathom any "exigent" nature for the FBI request. I was struck that: 1) the letter was dated May 19, almost two months before the FBI served the letter on July 13th and 2) it was addressed to Ken Sutton, the person they had called to get the correct addressee. The requested information was for use of an IP address five months earlier, on February 15.

At the same time, I did not want to impede the investigation of a perilous situation that endangered my country or my fellow citizens. Because the letter was dated two months before it was delivered to me, it seemed reasonable to conclude that the FBI was not in a rush to get the information they wanted. I told the Agent that I had reason to believe that the use of NSLs was unconstitutional, and that I wanted to consult my attorney before complying with the request. The agent wrote a phone number on the back of his business card and said my attorney could call that number.

After the FBI agents left, I called Library Connection's attorney and asked what to do. The attorney informed me that the only way I could contest compliance with a national security letter was to go to court against the Attorney General of the United States.

I did not feel that I could take a step like that on my own. The by-laws of our corporation grant the Executive Director the authority to enter into contracts on behalf of the corporation. However, I did not feel it would be morally right to engage the consortium in a legal battle with the Attorney General on my own. Library Connection receives no Federal, state, county, or grant funding. Our annual budget is around one million dollars, and our entire financial support comes from our member libraries, which must take the expense of belonging to Library Connection out of their own operating budgets. For all I knew, suing the Attorney General might lead to a dispute that went all the way to the Supreme Court. Any costs associated with this effort would have to be borne by our member libraries, and I did not feel I had the authority to commit the libraries or their funds on my own.

I therefore decided to ask the Executive Committee of the Board of Directors to make the decision on behalf of Library Connection. I reasoned that the by-laws allow the Executive Committee to act on behalf of the board of directors in circumstances when the entire board could not be consulted, and that these circumstances certainly met those criteria. So I called an emergency meeting of the Executive Committee, which consisted of Barbara Bailey, board president and Director of the Welles-Turner Memorial Library in Glastonbury, Peter Chase, vice-

president of the board and Director of the Plainville Public Library, and Janet Nocek, secretary of the board and Director of the Portland Public Library.

The next day, the Executive Committee met with our attorney. I informed them about the National Security Letter, and our attorney informed us that we were now all bound by its associated gag order. After learning that the NSL statute had been ruled unconstitutional in district court, the committee decided to resist complying with the request. The Executive Committee and I met with attorneys from the ACLU in late July of 2005. After discussing a variety of options, the Executive Committee decided to engage the National Office of the ACLU to seek an injunction relieving Library Connection from complying with the NSL and to seek a broader ruling that the use of NSLs is unconstitutional. The Committee also decided to seek relief from the gag rules associated with NSLs in order to 1) allow the Executive Committee's actions to be presented to the full Board, and 2) to allow the fact that an NSL was served on a library organization to become part of the national debate over renewal of the PATRIOT Act.

At this point I would like to make it clear that the four of us who comprised the Library Connection Executive Committee --- Janet Nocek, Barbara Bailey, Peter Chase, and myself --- were equally impacted as recipients of the NSL. and equally committed in our opposition to it and its associated gag order. The story of this NSL and the Library Connection became very personal to us on the Executive Committee and impacted our lives in different and personal ways.

We also felt we were defending our democracy by insisting that the checks and balances established in the Constitution be observed. We had no court order, and there was no evidence that an independent judge had examined the FBI's evidence and found there to be probable cause justifying their request for information.

The national security letter asked for all of the "subscriber information" of "any person or entity related to" a specific IP address for a 45-minute period on February 15, 2005. We knew that the address was the address of a router at one of our libraries. Routers use address translation schemes to shield the true addresses of the computers behind them in order to make hacking into those computers more difficult. They do this by randomly assigning a different address to the computers behind them every time those computers are turned on. Since there was no way of tracing the path from the router to a specific personal computer, the FBI would have to find out who was using every computer in the library on that day. And since there was no way of determining who was using the computers in the library five months after the fact, we felt that "subscriber information of any entity related" to the IP address meant a request for the information we had on all the patrons of that library. That seemed like a rather sweeping request. Some would call it a fishing expedition.

Let me reemphasize: we did not want to aid terrorists or criminals. One of us, Janet Nocek, had actually lost a friend on one of the planes that crashed into the World Trade Center. All four of us were deeply affected by the September 11 attacks, and none of us wanted any further harm to come to our country or its citizens. But we did not feel we would be helping the country or making anyone safer by throwing out the Constitution either. All we wanted was some kind of judicial review of the FBI request.

I am not a lawyer; I manage a library organization. I understand from the attorneys that it is technically legal for the FBI to deploy NSLs without judicial review. However, as a law-abiding citizen and as a person committed to the principles of librarianship, it did not nor does not make sense to me that such intrusions into the privacy of our library patrons is reasonable, especially a wholesale request for information about many patrons, not necessarily a library patron that is the legally deemed to be specific target of an investigation. Avoiding such fishing expeditions should not be allowed in libraries, bookstores or other places of inquiry. As I understand it, there are other types of investigative letters without judicial review, but they do not have gag orders attached. In the 10 months that we contested our national security letter, the Justice Department never produced nor seemed to seek any judicial review.

In August, the ACLU filed suit in Federal District Court in Bridgeport, Connecticut. Peter Chase and I prepared affidavits to be filed with the suit. Imagine our surprise to learn we would not be allowed to attend the hearing in person because of the risk that we would be identified as the plaintiffs. Instead we had to watch the proceedings via closed circuit TB from a locked room in the Hartford Federal Court Building.

In the hearing, Judge Hall asked to review the government's evidence for keeping us gagged. The government insisted on submitting secret evidence, which they would not provide to our attorneys or us. Like the judge in New York who had ruled on the issue, Judge Hall ruled that a perpetual gag amounted to prior restraint, and was therefore unconstitutional. She also ruled that her review of the evidence found no compelling national security reasons for keeping us gagged. Her ruling was immediately appealed by the Justice Department. While the case was under appeal, we remained gagged.

The gag order caused us troubling dilemmas personally as well as professionally. We had no desire to talk about the specifics of the national security letter we received but we wanted to tell our fellow librarians that NSLs posed a threat to patron privacy as well as what it was like to be under a federal gag order. We wanted to tell our patrons that we were trying to protect their confidentiality. We also wanted to tell Members of Congress, at a time when you all were debating the renewal and sunset provisions of the USA PATRIOT Act, that the national security letter provision was being used against libraries, and that librarians felt this was a huge threat to the privacy that they and their patrons trusted to exist at libraries.

Being gagged was also frustrating on other professional and personal levels. I felt compromised since I could not reveal the problem to the full board nor to our member libraries or my own staff that had seen the FBI arrive, announce themselves and hand me a letter. No one could bring up the topic at Library Connection Board meetings, nor at meetings of the full membership. I knew that all the board members and all the member library directors knew of the case, and I suspected the Executive Committee and I had their approval. However, I had no idea whether the approval was unanimous, or whether there was a significant dissenting opinion. I felt terrible I could not let anyone know that the struggle was not depleting our capital reserves and putting the corporation at risk. I could not even tell our auditors that the corporation was engaged in a major lawsuit-a direct violation of my fiduciary responsibilities. I pride myself on my integrity and openness. I worried if, knowing I was participating in this court case behind their backs, the

members of the board and other library directors were starting to wonder what else I might be concealing.

Another one of the "John Doe's" was compromised in his work as chair of the Intellectual Freedom Committee of the Connecticut Library Association. For example, he was often invited to debate the PATRIOT Act with Kevin O'Conner, a local Federal Prosecutor, who, ironically, became the attorney defending the government in our case. Mr. O'Connor felt free to continue to accept invitations to talk about the PATRIOT Act while my colleague, Mr. Chase, felt the gag order required him to decline such invitations.

At various times we had to go to extreme measures to keep from talking with the press or answering questions from colleagues and family. One of the John Doe's even had his son ask "Dad, is the FBI after you?" All he could say was that he was involved in a court case and it was extremely confidential.

It is difficult to convey the very detrimental impact that the gag order had on our lives and on our families and colleagues, as well. Everyone in the library community knew Library Connection had received an NSL and that we were involved in litigation to contest it. They also knew we were gagged, and that to talk about it carried severe risks.

Practical information we could have shared with them, about the risks they faced from NSLs, could not be shared. And, of course, there were always our ongoing concerns about losing the trust of our library patrons who continued to expect appropriate confidentiality about their library records.

After our court hearing, all of this became even more difficult, as the national and local papers were full of stories about a library consortium in Connecticut that had taken the Attorney General to court over receipt of an NSL and its associated gag order. The consortium was described as "John Doe," as our case was officially known as Doe v. Gonzales. There are only four library consortia in Connecticut, so speculation about the identity of John Doe was swarming all around us.

Things soon got worse because the government had been careless in redacting identifying information from the papers associated with the court case. At the hearing itself on August 31, 2005, our attorneys discovered that the government had failed to redact Peter Chase's name in an affidavit. As officers of the court, they notified the court and the government, who then redacted it.

Within a few weeks, the New York Times discovered that Library Connection's identity as the plaintiff had been inadvertently disclosed on the court's web site. The Times published a story revealing Library Connection's name on September 21. This led to a further examination of the documents available to the public and to further redactions. However, the press soon discovered my name among the documents and a reference to one of the other plaintiffs as "chairman of the Intellectual Freedom Committee of the Connecticut Library Association." Only one person could fit that description, Peter Chase. Papers around the country picked up articles identifying Peter and me from the New York Times and AP wire services.

On November 6, the lead story on the front page of the Sunday Washington Post started with my name. This was the first article to give us some inkling of how pervasive the national security letter issue had become. The article reported that since the revision of the NSL statute in the USA PATRIOT Act, NSLs had been issued at the rate of 30,000 per year.

The whole world now knew us as the John Doe plaintiffs in a suit over being gagged for receiving a national security letter, yet we remained prohibited from speaking to Congress or our fellow librarians and library patrons or our own families about what had happened to us. We were soon deluged with phone calls from the press at work and at home. Initially this was a very delicate situation. Our attorneys had cautioned us that even a "no comment" was tantamount to admitting we were John Doe. Our attorneys felt it was therefore better just not to discuss the issue. Everyone who read the New York Times, the Washington Post, and many other papers throughout the country knew about the Library Connection, Inc. I even received letters and clippings from around the country. Yet still we could not share our experience with Congress while Congress was debating the renewal of the PATRIOT Act.

The 2nd Circuit Court of Appeals in New York heard our case in November 2005. At least this time we were allowed to be present at our own court case. However, we had to conceal our identities by entering and leaving the court building and the courtroom separately, not sitting together, and not establishing eye contact with each other or our attorneys.

In court the government argued that merely revealing ourselves as recipients of a national security letter would violate national security. Our attorneys filed more legal papers to try to lift the gag, and attached copies of the New York Times articles. The government claimed that all the press coverage revealing our names did not matter because 1) no one in Connecticut reads the New York Times, and 2) surveys prove that 58% of the public disbelieves what they read in newspapers. To add to the absurdity, the government insisted that the copies of the news stories our attorneys had submitted remain under seal in court papers.

Even though our names were not thoroughly redacted from the court documents, the government did redact from ow affidavits our claim that 48 states had laws protecting the privacy of patron library records. We could not understand the threat to national security this information posed, but we did note that Attorney General Gonzales claimed to Congress that there was no statutory justification for claims of privacy.

It appeared that Congress would vote on the renewal of the PATRIOT Act before the Appellate Court would rule on our gag order. Our attorneys took the case all the way up to the Supreme Court in an emergency attempt to lift the gag. Though clearly troubled by the case, the Court refused to lift the gag at that point.

On March 9,2006, President Bush signed into law the revised USA PATRIOT Act. A few weeks later the government decided that our silence was no longer needed to preserve national security. They told the Second Circuit that the FBI would lift the gag order, and then they tried to get Judge Hall's decision vacated as moot. The Second Circuit refused to erase Judge Hall's decision Erom the books, and expressed concern about the breadth of the NSL gag provision. Judge Cardamone of the Second Circuit wrote, "A ban on speech and a shroud of secrecy in perpetuity are antithetical to democratic concepts and do not fit comfortably with the fundamental rights

guaranteed American citizens. Unending secrecy of actions taken by government officials may also serve as a cover for possible official misconduct and/or incompetence." The court referred the rest of our case back to district court. Justice Hall's original opinion that our perpetual gag order was unconstitutional now became part of case law.

A few weeks after that, the FBI said they no longer needed the information they had sought from us and thus abandoned the case completely. In doing so, they removed the PATRIOT Act from the danger of court review.

We held our first press conference on May 3 1,2006 at the offices of the ACLU in New York City. Since then, we have tried to accept every invitation to library groups, colleges and civic organizations. We want people to know that the FBI is spying on thousands of completely innocent Americans. We feel an obligation to the tens of thousands of others who received National Security Letters and now will live under a gag order for the rest of their lives.

We want you to take special note of the uses and abuses of NSLs, in libraries and bookstores and other places where higher First Amendment standards should be considered. Ours is a story we hope will encourage the U.S. Congress to reconsider parts of the USA PATRIOT Act and in particular, the NSL powers that can needlessly subject innocent people to fishing expeditions of their personal information with no judicial review. Because of the gag order, you, our Senators and elected representatives and the American public, are denied access to the stories and information about these abuses. This is information you need to conduct oversight, work for appropriate changes to current law and seek to protect our constitutional rights.

Thank you for this opportunity to testify. I hope that the story of our experience will help you in your ongoing efforts to rebalance our civil liberties with the need for protecting our national security.