

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA,	:	
	:	FILED UNDER SEAL
Plaintiff,	:	PER 02/09/11 ORDER
	:	
v.	:	Misc. No. 1:11dm00003
	:	(TCB)
JACOB APPELBAUM, <i>et al.</i> ,	:	
	:	
Defendants.	:	

**MEMORANDUM IN SUPPORT OF THE MOTION FOR LEAVE
TO FILE AN AMICUS BRIEF IN THIS MATTER**

COMES NOW the INTER-PARLIAMENTARY UNION, by counsel, and for its memorandum in support of its motion for leave to file an *Amicus* brief in this matter it states as follows:

I. Facts

This matter involves the government’s intrusion into and inspection of the Twitter accounts of various people as a part of its investigation of alleged wrongdoing. One of the persons whose Twitter account is the subject of the government’s curiosity is Birgitta Jonsdottir, a member of the parliament of Iceland (the Althingi).

The INTER-PARLIAMENTARY UNION is an international organization with a membership made up of 155 sovereign nation parliaments and 9 regional parliamentary assemblies. The purpose of the INTER-PARLIAMENTARY UNION is, in part, to examine and attempt to resolve human rights violations to or imposed upon members of parliaments world-wide.

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Pursuant to that mandate, the INTER-PARLIAMENTARY UNION was advised of the matters giving rise to this case, and of the actions of the government of the United States of America in seeking the contents of Mrs. Jonsdottir's Twitter account. After considering the matter, the INTER-PARLIAMENTARY UNION, through its Committee on the Human Rights of Parliamentarians, issued a Confidential Decision (copy attached hereto as Exhibit A). Subsequently, the INTER-PARLIAMENTARY UNION directed its Secretary General to prepare and submit a Memorandum to this Court for its use in considering the matter before it. That Memorandum is attached hereto as Exhibit B, and is the proposed *Amicus* brief the INTER-PARLIAMENTARY UNION seeks leave to submit herein.

II. Law

Even though there is no law or rule specifically authorizing this Court to permit the filing of an *Amicus* brief for its assistance in considering a case or controversy, there is precedent (at least from the Middle District of Pennsylvania) for the use of *Amicus* briefs. *See, Waste Mgmt., Inc. v. City of York*, 162 FRD 34, 36 (M.D. Pa. 1995); *see also, Pennsylvania Environmental Defense Foundation v. Bellefonte Borough*, 718 F. Supp. 431, 434-35 (M.D. Pa. 1989). Such authorization also exists for cases before the Supreme Court of the United States (*see*, Rule 37 of the Rules of the Supreme Court) and for cases before United States Courts of Appeal (*see*, Rule 29 of the Federal Rules of Appellate Procedure). In addition, there is no law or rule denying this Court the ability to permit the filing of such a document.

III. Argument

Mrs. Jonsdottir's Twitter account is a matter not only of her individual concern, and therefore of concern to this Court, but is also representative of all of the similar accounts, and sources of information, associated with or owned by members of parliaments world-wide. Therefore, any abuse of Mrs. Jonsdottir's civil rights represents the systemic abuse of the civil rights of all parliamentarians, and an attack on the sovereign governments of nations around the globe. The concepts addressed in Exhibit B compliment the issues raised in Mrs. Jonsdottir's pleadings, and the consideration of Exhibit B should assist this Court in arriving at its rulings in this case, since they provide a different, but eminently valid, perspective on those issues.

After reviewing Exhibits A and B, this Court should grant the motion to permit the filing of the *Amicus* brief, thus expanding the input available to assist the Court in its decision-making process. Any potentially helpful information should be considered in reviewing issues of this import.

In order to fully address the concerns that Mrs. Jonsdottir has raised, in the context of her status as a parliamentarian, this Court should look at the government's actions not just in the partial vacuum of Mrs. Jonsdottir status as an individual, but also in her capacity as a representative member of the government of Iceland. Such consideration must be given, or at least contemplated, by reviewing the exhibits attached hereto, as an *Amicus* brief.

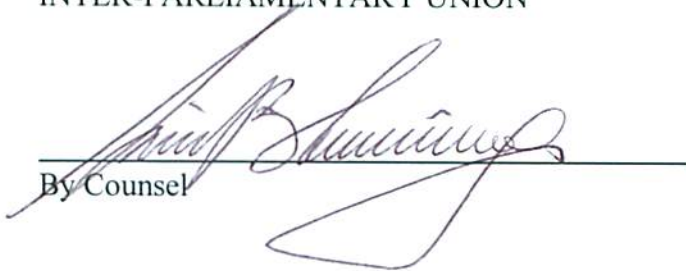
IV. Conclusion

WHEREFORE, pursuant to the inherent powers of the Court, the INTER-

PARLIAMENTARY UNION respectfully requests that this Court grant its motion and enter the proposed order filed herein, which grants it leave to file an *Amicus* brief in this matter.

Respectfully submitted,

INTER-PARLIAMENTARY UNION


By Counsel

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CERTIFICATE OF SERVICE

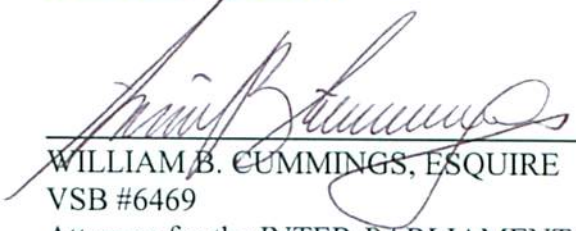
I HEREBY CERTIFY THAT on the 14th day of February, 2011, I hand-filed the foregoing, under seal, with the Clerk of the Court and sent a true copy of the same via e-mail to the following:

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EXHIBIT A



INTER-PARLIAMENTARY UNION

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CONFIDENTIAL

COMMITTEE ON THE HUMAN RIGHTS OF PARLIAMENTARIANS

CASE No. IS/01 - BIRGITTA JÓNSDÓTTIR - ICELAND

*Confidential decision adopted by the Committee at its 132nd session
(Geneva, 17 - 20 January 2011)*

The Committee,

Considering the following information on file:

- Birgitta Jónsdóttir has been a member of the Icelandic Parliament since July 2009. She reportedly provided assistance to Wikileaks earlier that year in connection with the release of a video showing US soldiers shooting civilians in Bagdad from a helicopter;
- On 7 January 2011 she was informed by Twitter that it had received an Order from the United States District Court for the Eastern Division of Virginia to turn over to the United States the records and other information concerning her account contained in an Attachment. Twitter has been given a delay until 26 January to provide the information to the United States Government;
- The information sought by the US Government with respect to Birgitta Jónsdóttir concerned the period starting 1 November 2009 until present and involves subscriber account information including names, user names, screen names or other identities, mailing and other addresses, connection records, or records of session times and duration, length and types of service, telephone or instrument number or other subscriber number or identity, means and sources of payment for such services, including any credit card or bank account number, and billing records, records of user activity for any connections made to or from the account, including the date, time, length, and method of connections, data transfer volume, user name, and source and destination Internet protocol address(es), non-content information associated with the contents of any communication or file stored by or for the account, and correspondence and notes of records related to the accounts;
- Members of the Althingi are protected under Article 49 of the Icelandic Constitution, which states that "No member of Althingi may be subjected to custody on remand during a session of Althingi without the consent of Althingi, nor may a criminal action be brought against him unless he is caught in the act of committing a crime. No member of Althingi may be held accountable outside Althingi for statements made by him in Althingi, except with the consent of Althingi."
- The first court order, which was dated 14 December 2010, was originally kept secret and was only revealed to Birgitta Jónsdóttir after Twitter took steps to ensure that it could notify the individual concerned. Birgitta Jónsdóttir fears that efforts may be under way by US authorities to obtain information about her and her activities also through other US-based companies;

- Birgitta Jónsdóttir believes that the investigation carried out by the US authorities can restrict her ability to carry out her parliamentary work,

Considering moreover that:

- Members of parliament benefit from fundamental freedoms, including the right to privacy as well as of specific measures of protection to allow them to carry out their work unimpeded;
- Parliamentary immunity ensures that members of parliament cannot be held to account for the opinions they express and the votes they cast and countries have generally put special mechanisms in place to ensure that they can carry out their mandate without undue restrictions and with full respect for their freedom of expression;
- In all countries, freedom of expression is essential to enabling democracy to work; citizens cannot exercise their right to vote or take part in public decision-making if they do not have free access to information and ideas and are not able to express their views freely;
- Freedom of expression is even more essential to members of parliament and is recognized as such by courts all over the world; without the ability to express their opinions freely, members of parliament cannot represent the people who have elected them;
- Members of parliament are elected by people to represent them in parliament. In their daily work they legislate and they hold the governments to account. They are unable to perform these duties if they cannot receive and exchange information freely without fear of intimidation;
- Citizens will not communicate sometimes sensitive information to their representative without the assurance that their identity will be protected. Members of parliament, therefore, find themselves in the same situation as journalists, with an absolute need to be able to protect their sources.

Also considering the following information:

- Twitter is a website, owned and operated by Twitter Inc. It offers a social networking and microblogging service that enables its users to send and read messages called *Tweets*, which are text-based posts of up 140 characters displayed on the user's profile page. Tweets are publicly visible by default; however, senders can restrict message delivery to followers;
 - Members of parliament are increasingly availing themselves of modern means of communication with citizens. A vast majority of parliamentarians today communicate by e-mail. Social media - Facebook, Twitter, etc. - are on the rise, in particular among young members of parliament and when MPs communicate with youth. These forms of communication are rapidly complementing and replacing yesterday's telex, telephone calls and faxes;
 - The new social media offer vast opportunities for members of parliament to communicate with the public and to exchange information that is essential to them in their daily work. The use of these media, however, also presents significant risks to parliamentarians that their privacy will be invaded and their parliamentary work impaired;
 - For members of parliament, it is essential that any private communication they receive is accorded the same level of protection regardless of the technology, platform and business model used to create, communicate and store it. This does not appear to be the case today.
1. *Recalls* that freedom of expression goes to the heart of democracy and is essential to members of parliament; without the ability to express their opinions freely, members of parliament cannot represent the people who have elected them; if they cannot receive and exchange information freely without fear of interference they cannot legislate and hold the government to account;

2. *Also recalls that* Article 19 of the Universal Declaration of Human Rights upholds the right of everyone to freedom of opinion and expression; it stipulates that this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers;
3. *Notes that* under standard human rights conventions and their jurisprudence, restrictions on the freedom of expression are subjected to a threefold test: they should be prescribed by law, they must be necessary in a democratic society and they must be proportionate to these necessary purposes;
4. *Fails to see* how the restrictions on freedom of expression that would result from compliance with the court order can be justified on such grounds and *holds that*, to the contrary, such compliance would jeopardise a member of parliament's right to freedom of expression and hence her ability to seek, receive and impart information freely, which is absolutely necessary in a democratic society;
5. *Is concerned* that the national and international legal framework concerning the use of electronic media, including social media, does not appear to provide sufficient guarantees to ensure respect for freedom of expression and parliamentary immunity;
6. *Expresses deep concern*, therefore, over the efforts made to obtain information regarding the communications of a member of parliament and the consequences this is likely to have for all members of parliament on their ability to discharge their popular mandate freely;
7. *Requests* the Secretary General to communicate these concerns to the authorities in Iceland and in the United States and to seek their views; with regard to the United States, *also requests* the Secretary General to explore the possibility of submitting a legal brief to the relevant judicial authorities setting out the IPU's concerns;
8. *Also requests* the Secretary General to conduct an urgent study with a view to formulating guidelines for strengthening the system of parliamentary immunities so that members of parliament can continue to enjoy freedom of expression while using the new social media;
9. *Decides* to continue examining this case at its next session, to be held during the 124th IPU Assembly (April 2011).

EXHIBIT B



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**MEMORANDUM SUBMITTED BY THE INTER-PARLIAMENTARY UNION IN
RE APPLICATION OF THE UNITED STATES OF AMERICA
FOR AN ORDER PURSUANT TO 18 U.S.C PARA. 2703 (D)
AS FAR AS IT CONCERNS MP BIRGITTA JONSDOTTIR**

The Inter-Parliamentary Union (IPU) submits this document through its Secretary General, Mr. Anders B. Johnsson, who is authorized to sign of behalf of the Organisation and to submit this document to the Court.

The case of Mrs. Birgitta Jonsdottir was officially referred to the IPU and its Committee on the Human Rights of Parliamentarians, which has the mandate to examine cases of alleged violations of the fundamental rights of members of parliament. Through its Committee, the IPU has gathered comprehensive experience of parliamentary practice and law in parliaments across the world. Its views on the issues at stake in this case may therefore be of interest to the Court. (Details regarding the IPU and the Committee on the Human Rights of Parliamentarians are set out below).

1. The Inter-Parliamentary Union (IPU) and its communication's procedure regarding human rights violations of members of parliament

1.1. Established in 1889 by a French and British Member of Parliament to promote the idea of arbitration of conflicts, the IPU is today the international organization of national parliaments of sovereign States. The IPU currently has 155 member parliaments and 9 associate members, which are regional parliamentary assemblies. The IPU is the focal point for world-wide parliamentary dialogue, and works for peace and cooperation among peoples and for the firm establishment of representative democracy. The IPU supports the efforts of the United Nations, whose objectives it shares, including the promotion and protection of human rights. The IPU is financed primarily out of public funds. Its headquarters are located in Geneva. It has an office in New York.

1.2. In 1976, as part of its efforts to strengthen the institution of parliament, the IPU set up a special procedure for the examination of communications regarding human rights violations of members of parliament, which is implemented by the Committee on the Human Rights of Parliamentarians. The rationale for this procedure is that members of parliament must be able to exercise their human rights, in particular their freedom of speech, if they are to exercise their representative mandate and to promote and protect the human rights of others. The Committee, which is composed of five titular members representing the major geopolitical regions, is currently examining 74 cases of 403 members of parliament in 38 countries across the world.

2. The submission of the case of MP Birgitta Jonsdottir to the Committee on the Human Rights of Parliamentarians (CHRP)

In January 2011, the Parliament of Iceland (Althingi) and Mrs. Jonsdottir, member of the Althingi since July 2009, informed the IPU secretariat that, as part of an apparent criminal investigation concerning Wikileaks, the United States Department of Justice had sought and obtained an order from the United States District Court for the Eastern District of Virginia, requiring Twitter to turn over to the United States extensive records and information concerning Mrs Birgitta Jonsdottir's Twitter account covering the period from 1 November 2009 to 1 June 2010. The order was initially kept secret from her and was only revealed to her on 7 January 2011, after Twitter had obtained authorization to notify her of the Order. It appears that Mrs. Jonsdottir's was included in the Order as she had provided assistance to Wikileaks in connection with the release of a video showing US soldiers shooting civilians in Bagdad from a helicopter.

The CHRP was requested to take up this matter. At its 132nd session (17-20 January 2011), the CHRP examined the case and adopted a decision, a copy of which is attached. It requested the Secretary General of the IPU to inform the competent authorities of the United States of America of its concerns in this case.

3. Concerns

The major concerns that were raised by the Committee with respect to Mrs. Jonsdottir's situation relate to the following issues:

3.1. Freedom of expression

Freedom of expression, along with freedom of assembly and association, is a cornerstone of a democratic society, which cannot exist without the free flow of ideas and information. It is enshrined in Article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights (ICCPR). As set out in Article 19 of the ICCPR, freedom of expression includes "the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". Freedom of expression has therefore an individual and social dimension: it is a right that belongs to individuals, and also implies the collective right to receive any information whatsoever and to have access to the thoughts expressed by others. All regional and international human rights bodies have underlined the paramount importance of this right for democracy. Freedom of expression is today also enshrined in almost all Constitutions of the world. Iceland guarantees it under Article 73 of its Constitution.

It is not contested that freedom of expression is particularly important for members of parliament who, in accordance with their representative mandate must be able to speak out freely, to seek, receive and impart information of all kinds, through the means of their choice and regardless of frontiers. Without the free exercise of that right, members of parliament would be unable to fulfil their constitutional mandate of legislating and holding the government to account. In the case of *Castells v. Spain* (1992), the European Court of Human Rights captured this in the following way: "while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests..." The Court found therefore that interferences with the freedom of expression of a member of parliament called for the closest scrutiny on its part.

Freedom of expression is not an absolute right and may be restricted. However, in accordance with international human rights law and relevant jurisprudence, restrictions on freedom of expression must meet a threefold test: they must be prescribed by law, they must be necessary in a democratic society and they must be proportionate to these necessary purposes.

Mrs. Jonsdottir, like an ever increasing number of members of parliament, uses Twitter and other social networking and microblogging services to communicate with her constituents and others, to seek and share information and ideas, to impart ideas and information and to receive ideas and information. It is an essential tool for her work as a member of parliament and the exercise of her legislative and oversight functions. During the period in question, she has exchanged thousands of (private) communications to this end.

It is doubtful that, under these circumstances, the disclosure of the extensive information sought by the US government would meet the threefold test which, in accordance with international law, is necessary for any restriction on freedom of expression, even more so of a member of parliament, to be admissible. On the contrary, such disclosure would have a chilling effect on Mrs. Jonsdottir's freedom of speech and greatly hamper the exercise of her parliamentary mandate. The threat of disclosure of private information would discourage her constituents and others to share information and to communicate. Members of parliament, like journalists, absolutely need to be able to protect their sources of information. Therefore, compliance with the Court Disclosure Order, rather than protect a purpose necessary in a democratic society, would jeopardise Mrs. Jonsdottir's ability to seek, receive and impart information freely, jeopardise the free exercise of her parliamentary mandate and hence, negatively impact on the representational function of parliament as such.

Moreover, the IPU Committee is concerned that orders to disclose information such as the one in question would set a dangerous precedent, and potentially affect members of parliament across the world who use Internet communication service providers. It is highly questionable that a government can use the mere presence of a company/service provider within its jurisdiction as an argument to seek speech related and private information about any member of parliament in the world, that happens to be stored by that service provider.

3.2. Parliamentary immunity

In all States over the world, parliamentarians enjoy a certain measure of protection precisely to enable them to exercise their freedom of expression without fear of intimidation from any quarter. There are different systems of parliamentary immunity. Members of the Icelandic Parliament are afforded immunity by virtue of Article 49 of the Constitution which stipulates as follows: "No member of Althingi (Parliament) may be subjected to custody on remand during a session of Althingi without the consent of Althingi, nor may a criminal action be brought against him/her unless he/she is caught in the act of committing a crime."

Mrs. Jonsdottir is apparently part of a criminal investigation in a foreign country, the USA, because of the exercise of her freedom of expression via a social network that has its head office in the United States. She is thus deprived of the protection guaranteed to her under the Constitution of Iceland: the Parliament of Iceland has neither been asked to consent to the investigation targeting her, and even less so given its consent. The action of the US authorities has therefore the effect of rendering her protection under Icelandic law entirely non operational.

Since the use of social networks by members of parliament for communication with their constituents and others is today commonplace in many countries, disclosure orders as the one

in question would undermine and even render void the ability of States to protect their members of parliament from unwarranted interference with their mandate. This would be true also for member of the USA Congress, who could be held accountable for statements they expressed via an Internet service provider by the judicial authorities in another country in which that service provider has its head office.

The effect would be that the laws, even at the highest level, which States have adopted with a view to ensuring the free exercise of the parliamentary mandate would become void by the action of another State, and as a consequence not only impact on the ability of their parliaments to fulfil their constitutional functions but interfere with the sovereign right of States to determine their legal framework.

3.3. Right to privacy

Mrs. Jonsdottir has a right to privacy, which is guaranteed to her under Article 71 of the Constitution of Iceland and Article 17 of the ICCPR to which Iceland, like the United States of America, is a party. It comprises the right to protection of personal data and correspondence in any form, including by electronic means of communication. State interference is permissible only on the basis of a specific decision by a State authority expressly empowered by law to do so for the purpose of securing evidence or preventing crime and must respect the principle of proportionality¹.

Much of Mrs. Jonsdottir's communication exchanged via her Twitter account is of a private nature. The Court Order does not show a pressing need for State inspection of her private communication, and hence appears to interfere with her right to privacy.

3.4 Right to defend oneself

Mrs. Jonsdottir is concerned that the US authorities are seeking disclosure of information from other service providers without her knowledge. Should this be the case, her right to present her arguments and defence would be affected. It is a principle of natural justice that a person implicated in criminal proceedings, which seems to be her case, is entitled to be informed of the action against her so as to enable her to defend herself. The US authorities do not seem to have shown any pressing need, necessary in a democratic society, for shrouding their action against Mrs. Jonsdottir in secrecy.

For all the reasons set out above, the IPU Committee on the Human Rights of Parliamentarians believes that the Disclosure Order concerning Mrs. Jonsdottir's Twitter account should be vacated and that similar orders concerning other service providers be unsealed.

Geneva, 11 February 2011



Anders B. Johnsson
Secretary General

¹ Manfred Nowak, UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, 2005,