

Michele M. Reid

The USA PATRIOT Act and academic libraries

An overview

The USA PATRIOT Act of 2001 has continued to raise questions in the academic library community over its provisions impacting confidentiality of library records and privacy rights of users. The 2006 renewal of the PATRIOT Act did not include safeguards librarians had lobbied for, but the slated December 31, 2009, sunset of Section 215, the so-called “library provision,” now affords another opportunity for libraries to press for changes. This issue paper provides an overview of the PATRIOT Act, as well as discusses such related legislation as the Foreign Intelligence Surveillance Act (FISA) and the controversy surrounding National Security Letters. It looks at the current impact of the PATRIOT Act as it applies to academic libraries, highlights key readings and additional sources of related information, and outlines a suggested advocacy plan to address the ongoing surveillance and privacy issues raised by the legislation.

Overview and key aspects

Adopted in October 2001 as an immediate response to the terrorist attacks of September 11, the PATRIOT Act expanded law enforcement surveillance and investigative powers, and significantly amended more than 15 other statutes, including FISA and the Family Education Rights and Privacy Act (FERPA). The Intelligence Authorization Act of 2004 (known as “PATRIOT II”) further broadened the powers of the PATRIOT Act, while, in 2006, Congress reauthorized the original legislation as the USA PATRIOT Improvement and Reauthorization Act of 2005. Sections 216 (allowing monitoring of public access

computers by federal and state law enforcement agencies) and 505 (allowing warrantless wiretapping and confiscation of Internet usage records), were made permanent. Key provisions of Section 215, due to sunset at the end of 2009, include:

- Allowing the FBI to apply for warrants from the Foreign Intelligence Surveillance Act Court (FISC) to retrieve library usage records to assist in terrorism and intelligence investigations.

- The FBI does not have to demonstrate probable cause, only declare it has “reasonable grounds” to suspect that library records may be relevant to an investigation.

- FISC search warrants override state and local privacy laws.

- They contain a “gag order” prohibiting a library from notifying users under suspicion, the press, or anyone else that an investigation is underway.

- As part of the 2006 reauthorization of the Act, a library is now allowed to notify legal counsel, and a warrant may be challenged in court, although there is still no requirement that the user under suspicion will ever be informed.¹

In addition to FISC warrants, Section 505 authorizes the FBI’s use of National Security Letters (NSLs) to demand usage records. Again, the FBI is only required to assert that the information sought is relevant to an investigation, and librarians are prohibited from disclosing that they have received a

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letter. Although NSLs had been used since the 1980s, their use has greatly expanded under the PATRIOT Act.

A 2009 Justice Department report to Congress indicated that of more than 2,000 FBI warrant applications in 2008 alone, only one had been rejected by the FISC court. This suggests to PATRIOT Act critics that the review processes for FISC warrants and NSLs merely “rubber stamp” FBI actions and do not provide adequate judicial oversight.^{2,3}

Impact on academic libraries

The effect of PATRIOT Act provisions on academic and other libraries has been difficult to gauge because of the gag order provisions,⁴ although it is recognized that Section 215 “potentially increases government surveillance on college campuses and challenges longstanding protections for library records.”⁵

PATRIOT Act provisions permitting gathering of academic library usage data should also be considered in the context of privacy concerns relating to university records generally, the monitoring of noncitizen students and visiting scholars, and curbs on intellectual freedom and scholarly communication. The legislation promotes unease throughout much of the academy over its negative effect on free expression and scholarly debate.⁶

The most publicized PATRIOT Act case concerning libraries to date, *Library Connection v. Gonzales*, involved an NSL served on a Connecticut library consortium. A federal district court ruled in 2006 that a gag order on four librarians violated the First Amendment, and the Bush Administration subsequently withdrew its demand for user records.⁷

In *Internet Archive v. Mukasey*, the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF) challenged an NSL served on a California digital library. In 2008, the FBI withdrew the NSL as part of a settlement.⁸

In *Doe v. Holder*, the ACLU again challenged an NSL, this time served on an Internet Service Provider. Lower courts ruled

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that PATRIOT Act NSL provisions violated the First Amendment in limiting challenges to the orders and restricting judicial review.⁹

Recent developments and related legislation

The Department of Justice has rigorously defended Section 215, asserting that libraries are used by terrorists to obtain information vital to carrying out operations against the United States.¹⁰ In January 2009, Attorney General Eric Holder indicated that he supported renewing the Section, as well as a related FISA warrantless wiretapping provision.¹¹

In March 2009, Representative Lamar Smith (R-Texas) introduced the Safe and Secure America Act of 2009 (H.R. 1467) that would extend Section 215 for another ten years. The bill claims that the PATRIOT Act contains “protections against abuses of Section 215 authority, including Congressional oversight, procedural protections, application requirements, and judicial review.”

Also in March 2009, Representatives Jerrald Nadler (D-New York) and Jeff Flake (R-Arizona) introduced the NSL Reform Act of 2009 (H.R. 1800), designed to raise the standard needed for the FBI to obtain NSLs, and stipulating that they cannot be used to investigate U.S. residents’ activities protected by the First Amendment.

In April 2009, Representatives Barbara Lee (D-California), Robert Wexler (D-Florida), and John Conyers (D-Michigan) introduced the Select Committee on National Security and Civil Liberties Act of 2009 (H.R. 383) to establish a House select committee to

review national security laws and policies as a prelude to Congressional consideration of the expiring provisions of the PATRIOT Act.

In May 2009, the Obama administration announced that it would not ask the Supreme Court to review a lower court decision in the case of *Doe v. Holder* that struck down as unconstitutional PATRIOT Act NSL gag order provisions. The FBI will now be required to develop new procedures to justify requests for gag orders. The decision was welcomed by the ACLU as beginning a process that may lead to a “constitutionally appropriate balance between free expression and national security.”¹²

Key readings and sources of additional information

There is a vast literature treating the PATRIOT Act from a range of political perspectives. The text of the Act and associated legislation and commentaries can be found at THOMAS (thomas.loc.gov). James Neal¹³ and Becky Albitz¹⁴ summarize the impact of the initial legislation on academic libraries and serve as good starting points for reviewing the implications for academic freedom and privacy, while Brian Yeh and Charles Doyle¹⁵ provide a detailed commentary on the reauthorized legislation. Anita Ramasastry presents arguments both for and against Section 215, especially in the context of First and Fourth Amendment rights.¹⁶

The American Association of University Professors (AAUP) includes library concerns in a discussion of the threat of PATRIOT Act legislation to the academic community.¹⁷ In contrast, the Department of Justice has rigorously defended the federal government’s position, arguing the PATRIOT Act’s usefulness in fighting terrorism and “dispelling the myth” that it threatens civil liberties.¹⁸

From the civil libertarian perspective, both the ACLU and EFF have recently launched Web sites (www.reformthepatriotact.org and w2.eff.org/patriot/sunset) in preparation for the anticipated congressional debate on sunseting Section 215.

ALA has often worked with ACLU in questioning the legality of PATRIOT Act provisions, and its Web site (www.ala.org/ala/aboutala/offices/oif/ifissues/usapatriotactlibrary.cfm) also provides up-to-date news, a news archive, and position statements. ACRL’s recent legislative agenda is available online (ala.org/ala/mgrps/divs/acrl/issues/washingtonwatch/washingtonwatch.cfm#agenda), while the Association of Research Libraries (www.arl.org/pp/pscl/patriot), and the Colorado Association of Libraries (cal-webs.org/if_patriot.html), maintain portals and detailed bibliographies linking to scholarly resources exploring aspects of the PATRIOT Act. Colorado’s site also includes useful advocacy materials and FAQs.

Advocacy opportunities: Let the sun go down on Section 215

Many of the sites mentioned above outline grassroots advocacy strategies for academic libraries and their stakeholders interested in sunseting Section 215, and in pushing for other changes to the PATRIOT Act, including the proposed reforms of NSLs. Below are components of a generic plan that can be customized by libraries to garner the support of their elected representatives, as well as modified and scaled to become an effective part of broader initiatives.

Define advocacy goals and objectives:

- **Goals**

- Sunset Section 215, and seek other changes to PATRIOT, FISA, and NSL laws needed to protect civil liberties while keeping America safe from terrorism.

- **Objectives**

- Support H.R. 383 to encourage Congress to conduct a thorough review of national security laws and policies.

- Support the National Security Letters Reform Act (H.R. 1800) to raise the standard to be met for the FBI to obtain NSLs.

- Reject the Safe and Secure America Act of 2009 (H.R. 1467).

— Support any other emerging legislation protecting civil liberties and reader privacy.

• **Assess landscape**

— Stakeholders/supporters can include anyone on or off campus with an interest in education or libraries who is concerned with preserving security without compromising civil liberties.

— Consider advantages such as:

- The changing political climate and increased public awareness of the need to balance civil liberties and security.

- Recent court rulings finding some PATRIOT Act measures unconstitutional.

- The academy's tradition of free inquiry and privacy.

— Anticipate barriers such as:

- Apathy, or conflicting time commitments.
- Possible lack of support from university administrations.

- The necessity of organizing disparate supporters, and a lack of lobbying expertise.

- The remaining perception among some constituents that PATRIOT Act provisions promote security without threatening civil liberties and academic freedom.

• **Identify critical tasks, for example**

— Educate your campus community and state/region regarding issues.

— Organize campus constituencies to develop activities supporting regional/national efforts.

• **Develop a communication plan**

— Customize a key message that will resonate with your constituencies (such as “USA PATRIOT Act: Sunset Section 215 for a freer and safer America”).

— Consider a campaign promoting the key message featuring campus figures, celebrities, etc.

— Work with state and regional library associations, and coordinate with ALA lobbying efforts.

— Create links on your institutional Web site to relevant ALA, ACRL, and state and regional library association Web sites.

• **Develop a work plan**

— Closely track legislation.

— Lobby elected representatives, including organizing constituents for personal visits.

— Publicize the cause with benefit events and sponsored speakers.

— Be indefatigable and add assignments and tasks as needed. Continue outreach to potential friends and allies using strategies appropriate to each group.

• **Budget.** Will depend on the nature of activities and available resources.

• **Evaluate results.** A successful campaign will result in sunseting Section 215 and the passage of reforms to PATRIOT Act, FISA, and NSL legislation. Failing sunseting, significant progress would still be made by amending Section 215 to assure civil liberties and privacy protections.

Notes

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16. A. Ramasastry (2006), "Why are librarians mad about the USA PATRIOT Act?" *Insights on Law & Society*, 6(2), 11–25, retrieved June 20, 2009, from Academic Search Complete database.

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