

USA PATRIOT Act: A Summary of ALA Activities

Library issues related to the USA PATRIOT Act and other anti-terrorism activities fall generally into two main categories:

1. Legal and legislative concerns related to civil liberties, especially privacy and the confidentiality of patron records, and
2. Access to government information issues, which include "takedown" of Web-based government information, removal of items from the FDLP, changes to FOIA policies, etc. These are not part of the PATRIOT Act itself and are not reported elsewhere in this brief.

ANTI-TERRORISM LEGISLATION

The USA PATRIOT Act, passed at the end of October, is a unique, lengthy and complicated law. Passed under most unusual circumstances, it raises numerous questions for the library community. By the end of the legislative process the two key issues that ALA focused on related to 1) access to business records, including library, student, and healthcare records and 2) computer trespassing including the definition of "authorized user."

Because there were no hearings and hence, essentially no legislative record, analysis and interpretation of the law has been difficult. The complexities of the new law and its intersection with other federal and state laws make it difficult to obtain quickly a comprehensive analysis of the Act. Although stories are starting to come in about FBI requests for "business records," there has, of course, been little time and only anecdotal information from which to gain further insight.

Soon after the September 11th attacks, Attorney General John Ashcroft asked Congress for additional powers he said would assist the government in fighting domestic terrorism. There was immediate agreement in the Congress that the Administration should be given such assistance quickly. In barely 6 weeks of activity Congress finalized passage of legislation only modestly changed from that originally proposed by Ashcroft immediately following the terrorists' attacks. The USA PATRIOT Act officially became law when President Bush signed this anti-terrorism bill on Friday, October 26th. ALA's activities regarding the legislation focused on the impact of the legislation on the library community and our library users.

As soon as the "unofficial" draft was available, the ALA Office of Information Technology Policy (OITP) convened a group of library and university technology experts to begin analyzing the proposed legislation and identifying key issues that would be problematic for libraries. The discussion identified three fundamental areas of concerns: 1) the broad definition of terrorist to include any cybercrime; 2) access to library records; and 3) use of library systems for active surveillance and wiretapping. Included in the meeting were colleagues from the American Association of Law Libraries (AALL) and the Association of Research Libraries (ARL), chairs of the ALA Committee on

Legislation and the OITP Advisory Committee as well as several librarians, technology specialists and our legal advisors.

From this conference call, and keeping the leadership of the ALA Executive Board and the Committee on Legislation informed, ALA developed several main concerns that were the focus of subsequent activities and the issues reflected in ALA's letters and statements. These concerns, mainly around the issues of privacy and the confidentiality of library and other records, included:

- the expansion of pen register and trap and trace devices to the Internet;
- the expansion of access to business records;
- the expansion of access to educational institution records;
- the expansion of the definition of terrorism; and
- new mandates for technology.

The Senate and the House entered into separate and parallel negotiations with the Justice Department which had the lead for the Bush Administration, although others in the Bush Administration were involved. This meant that rumored changes made during the parallel negotiations had to be closely tracked through confidential sources. Often changes appeared contradictory and unclear. Each new change meant ALA had to do a new legal analysis and discuss the section in question, sometimes several times a day.

Because of the "unofficial" nature of the proceedings, ALA and others working on the anti-terrorism legislation were in close contact with potentially supportive congressional offices. Rarely were we provided specific language in writing; more often sympathetic staffers provided ALA with verbal descriptions of the changes as negotiations proceeded. During this entire period ALA and our sister library associations worked closely with the Center for Democracy and Technology (CDT) and the broad coalition of organizations brought together under the title of "In Defense of Freedom" Coalition (IDOF) by the American Civil Liberties Union (ACLU). IDOF includes ACLU as well as Free Congress Foundation, Friends Committee on National Legislation, Gun Owners of America, The Eagle Forum, the American Muslim Council, Americans for Tax Reform and many other diverse groups.

Additionally, Morton Halperin, a long time advocate for civil liberties, met with ALA, AALL and ARL when the legislation was first circulating to help us further understand the issues and implications of the proposed legislation for libraries.

On October 2, ARL, AALL and ALA released a joint public statement, signed by our respective government relations staffs, on each of our Web sites. Subsequently all of our associations signed onto the IDOF statement. (Later the Medical Library Association also signed onto the library statement. For the library community statement see ALA Web pages at: <http://www.ala.org/washoff/terrorism.pdf>)

ALA's main efforts in the House focused on the House Judiciary Committee which appeared to be developing a more "enlightened" bill, insisting on a sunset provision and generally being more responsive to some of the civil liberties concerns. Late on October

3rd the House Judiciary Committee passed H.R. 2975 unanimously. There were numerous amendments made during the markup. Many of the changes the library community and others would have liked did not become official amendments. For example, changes sought by Reps. Maxine Waters (D-CA) and Sheila Jackson-Lee (D-TX) were withdrawn following a public negotiation with Ranking Member John Conyers (D-MI) to give him leeway to include pieces of their proposals in the final negotiated version that would be the Chairman's bill.

The Senate passed their version of the bill late on October 11th. The following morning the House substituted the Senate language for the original House language during a procedural move in the House Rules Committee. There was no time or opportunity to work for amendments or to get the House to reconsider. Some representatives complained on the floor that they had not even had time to read the bill. The House passed the "new" H.R. 2975 with the Senate language with only some differences, in a vote of 337 to 79 late in the afternoon of Friday, October 12th.

There was considerable uproar from some members of the House because of the unusual process and the failure to have commitments honored. Two changes in the final language include a sunset on the electronic surveillance provisions and a provision for judicial oversight of the use of the FBI's Carnivore system, a government electronic surveillance system. Some observers are now speculating whether the lack of hearings or any other kind of public record will subject the law to legal challenges because of lack of a legislative history.

The library associations and our coalition colleagues also focused on trying to make changes to the Senate bill, S. 1510. As the Senate proceeded in its behind-the-scenes discussions, it became apparent that Senator Russ Feingold (D-WI) would be willing to work on certain amendments to the Senate version during floor debate. Working closely as a group with his staff, the "library community" representatives shared our concerns specifically with his office and offered language, talking points, etc. to assist Feingold and other senators. Again, with our other library association colleagues, ALA made many calls to grassroots supporters to have them call their respective Senators about supporting Feingold at the time of floor debate.

At this point in the process ALA focused on two key Feingold amendments:

- 1) Business Records (to avoid preemption of existing privacy laws for medical, library, etc. records, and possibly to limit the scope to "agents of a foreign power" as the FISA (Foreign Intelligence Surveillance Act) statute had previously done and
- 2) Computer Trespassing (to make it clear that an unauthorized user does not include people with an existing "user" relationship, and limiting the communications intercepted to those related to trespassing).

The other two Feingold amendments addressed roving wiretaps and secret searches.

While some public interest groups were working on other parts of the legislation such as the immigration section, it appeared that the main lobbying organizations working on

these two provisions were CDT and the library associations. These amendments were all defeated in a procedural move to table them.

During debate on the two amendments ALA addressed, key senators referenced the library issues in particular. One senator even specifically mentioned calls from her state librarian and others. Although Feingold did not prevail, we believe that the library community efforts helped get other Senate support for Feingold's proposals. For example, in a procedural vote on the business records amendment, 10 senators voted with Feingold including Senator Arlen Specter (R-PA.) The Senate passed S. 1510 by a 96 to 1 vote late on Thursday, October 11th.

During conference deliberations there was no opportunity to wiggle in some other definition or report language to meet library concerns. This was further complicated by the closure of congressional office buildings because of the anthrax problems. This made it extremely difficult to contact congressional staffers. President Bush signed the bill on October 26th (P.L. 107-56).