

American Library Association - Orlando - 6/27/04

(Prepared by Mike Pheneger, Colonel, USA (R), ACLU National Board Member from Florida. Note: This is based on my personal research. Since it was developed for oral presentation, it is possible that it contains text that is inadvertently quoted without proper attribution.)

Opening Statement

In April, 2004, I began to feel that, like Alice, I had stumbled through the looking glass into a different world.

The ACLU filed a **constitutional challenge** to Section 505 of the USA Patriot Act dealing with **National Security Letters**. Most suits of this kind pose no special problems, but this suit was **filed under seal** in a Federal District Court **to avoid potential criminal prosecution for violating gag provisions contained in the act.**

We were forced to negotiate with the Justice Department for three weeks just to obtain permission to make a public announcement that a suit had been filed. We are still barred from revealing the identity of our client or specifics of the suit. Without approval, the JD could bring criminal charges against the ACLU and members of the staff for violating gag provisions of the act.

This **illustrates** just how much has **changed** since 9/11.

I in no way discount the danger of the treats confronting our country.

Attacks on 9/11 were horrible and appalling

Threat of Terrorism is very real. There will be other attacks.

I assure you that I **strongly** favor **appropriate** measures to defend the country from future terrorist attacks. I spent 30 years on active duty in the US military and have **hands-on experience** in counterterrorism as Director of Intelligence of the US Special Operations Command (which includes the military's counterterrorist forces) and Deputy Director of Intelligence for US Central Command (which commands all US military operations in the Middle Eastern.)

However, I have an **absolute** commitment to the **preservation of Civil Liberties and maintaining Constitutional Government**. I am a long-time ACLU member and currently serve as Treasurer of the ACLU of Florida and represent Florida on the ACLU's National Board of Directors.

Today, the **issues** we confront today are:

Should we sacrifice Civil Liberties to achieve security?

Would doing so **actually protect** us?

Can we combat terrorism without fundamentally changing the character of our society and sacrificing the liberties that make us unique among nations?

Interestingly, **circumstances have placed librarians on the leading edge of these issues**. New laws and dangerous threats conflict with their traditional values.

Should librarians **cooperate** in providing information about the **reading habits** and **Internet preferences** of their patrons?

Should records be **maintained or destroyed**?

Should librarians **monitor** patrons?

Should they **inform authorities** of behavior deemed **"suspicious.?"**

USA Patriot - Uniting and Strengthening America – Providing Appropriate Tools Required to Intercept and Obstruct Terrorism

Passed **hastily** and practically **without hearings** in a climate of **fear and anger** after 9/11.

Most Congressmen and Senators **hadn't read it**, much less understood it. Several staffers contacted Laura Murphy in our Washington office and asked what they had just passed.

Extremely complex (Over 300 pages, 10 separate titles, 150 sections that amend numerous other Federal statutes.) The law cannot simply be read and comprehended. Seemingly minor changes can only be appreciated after detailed study.

Sold as providing law enforcement **appropriate** and essential tools to preempt future terrorist attacks.

The DOJ characterizes Patriot as a series of “**modest**” and “**incremental**” changes to existing practice. **That is simply not true.** Though many sections are not controversial, **fifteen sections** combine to create **a very significant change** to the law that existed prior to 9/11 and **fundamentally change the character of the rights and liberties guaranteed by the Constitution and Bill of Rights.**

The government made no showing that the tools sought would have had any effect in preempting the 9/11 attacks.

USA Patriot is a bad law but it can be fixed!

The idea that we can trade liberty for security is false.

Our **real challenge** is to **counter a very real terrorist threat** while **preserving the liberties that make us unique as a nation.**

We must stop giving in to fear and have faith in the system that got us this far.

I would like to present **a bill of indictment on Patriot** and follow with brief discussion of specific provisions of special interest to librarian professionals:

(The AG argues that terrorists “do not deserve the protection of the American Constitution.” He misses the point. The Constitution establishes the legal framework we use to determine who is a terrorist and who is not.)

Many of Patriot’s new **tools** are **neither appropriate nor necessary.**

Patriot **greatly expands** the government’s ability to **invade** our privacy.

(The AG combines an almost obsessive concern with maintaining DOJ's ability to operate in secret with a fairly callous disregard for the privacy of our citizens and the right of citizens and Congress to know.)

It **lowers the standards** for using **the most intrusive** investigative techniques **far** below the 4th Amendment standard of "probable cause" and in some cases, redefines the term.

It **reduces** and, in some cases, **eliminates** the ability of the judiciary to act as an **effective check** to prevent **misuse** of these powers.

Patriot **creates new crimes** that threaten to **chill** the **legitimate** exercise of 1st Amendment freedoms of speech and association.

Some investigative techniques, here-to-for available under the most **unusual and extreme** circumstances, are **now routinely available**.

The Patriot Act and Justice Department regulations **have greatly expanded the number of cases considered to be "terrorism investigations."** (See Syracuse University study)

Extraordinary powers, justified on **national security** grounds, are being increasingly **used in routine criminal investigations**.

USA Patriot is largely **applied in secret**. The Attorney General has **resisted** providing **both Congress and the public** with meaningful information on its use. Without approval, the JD could have brought criminal charges against the ACLU and members of the staff for violating gag provisions of the act. We are still barred from revealing if we have a client (other than the ACLU).

Finally, in public statements, Justice Department public spokespersons (specifically Mark Carallo) and recently both the President and Vice President have made **disingenuous and misleading** statements about Patriot that are designed to allay growing public concerns about the act.

Carallo has falsely claimed that the act does not apply to US citizens. It does.

Ashcroft has claimed that the 4th Amendment “probable cause” standard applies to warrants issued under the Patriot Act. It does not, in the traditional meaning of the term.

The President (in Orlando) argued that Patriot tore down the “wall” between intelligence and Criminal Investigation prevented the FBI and the CIA from talking and sharing information. This badly misrepresents the for bureaucratic failures to share information.

Now lets look as **several specific provisions** of USA Patriot of special interest to Librarians to illustrate what “**tools**” the law provides:

Section 215, Business Records, has been referred to as the librarian’s nemesis. In reality, section 215 does not mention libraries, but language includes them. In fact, **library records are just the tip of the iceberg.**

It allows the FBI to obtain library, Amazon.com, employment, personnel, financial, medical, education and virtually any other record.

It also allows them to obtain “any tangible thing.” The FBI’s internal memos on 215 use the example of **a key** to a building or office.

It can be used to obtain **entire databases** and **organizational membership lists.**

The **target** need **not** be the **subject of the investigation** or **suspected of any crime.**

Section 215 warrants are issued by the secret **Foreign Intelligence and Surveillance Act (FISA) Court.**

The FBI must only assert that the Information sought is “**relevant** to an ongoing national security investigation.” Judges **must** enter the order. There is **no subsequent judicial oversight.**

(In normal proceedings, agents would have to execute an affidavit that the subject was suspected of committing a crime and provide probable cause. They would also have to specify the premises to be searched, the specific items sought, and justify why they thought they were there.)

Those served are **gagged** from revealing the order to **anyone not required to produce the information requested. (I believe this may, in the AG's mind, bar consulting an attorney.)**

The "good news" is that Patriot precludes obtaining information "**solely**" on the basis of an individual's First Amendment activities, but **does not preclude such activities from being considered.**

Section 215 is bad. National Security Letters are worse. (Section 505)

Administrative Warrants that can be issued by any FBI field office to obtain information deemed "relevant to an ongoing investigation."

There is **No judicial participation** or oversight

NSLs can be used to obtain entire data bases, phone company, ISP, financial and credit records and have probably been used to obtain library records as well. (Probably electronic Internet Communications) I base this on the fact that proposed legislation to fix Patriot would bar their use for that purpose.) The administration, on the other hand, has just proposed an amendment to the Intelligence Appropriations Act to provide for criminal sanctions for failure to comply and up to five years in prison for failure to comply with non-disclosure provisions).

Again, the **target(S)** need not be **suspected or accused** of any crime.

The previous **Intelligence Authorization Act** (Dec. 03) expanded the scope of financial information that may be obtained using NSLs to include insurance companies, travel agencies, stockbrokers, the post office, jewelry stores, casinos and car dealerships.

Those who receive the orders face **criminal charge** if they reveal the order.

Sections 507 and 508 give the government unprecedented power to "engage in exploratory searches of highly personal" **educational** records with **no reasonable suspicion of wrongdoing.**

Sections 215, 507, 508, and National Security Letters give the government unprecedented power to invade the privacy of Americans.

Patriot's definition of "**domestic terrorism**" is so broad that it could result in charging demonstration participants who are attempting to change or influence the policy of government **as domestic terrorists for acts (in violation of Federal or State law) of civil disobedience deemed (subsequently) as dangerous to human life**. This places a wide variety of groups that vigorously exercise their 1st Amendment rights in danger of being branded domestic terrorists is something goes wrong.

People who break laws while demonstrating should be charged, but there is **little virtue in designating them domestic terrorists**.

This could affect Green Peace, anti-NAFTA demonstrators, PETA, and Operations Rescue and others who demonstrate vigorously. (Interestingly, this is why Eagle Forum and a number of Christian right organizations oppose the Patriot Act.

Some fear the use of these provisions against Operation Rescue by a future (i.e. – Non-Republican) administration.

The Government's ability to conduct physical searches and electronic surveillance have been greatly expanded by the Patriot Act.

Sneak and Peek Searches (Section 213) –

Expands an authority previously available for use against foreign agents and foreign powers.

Allows **secret searches** of your home and property **without prior notice**.

Provides for **delayed notification** (previously only in certain cases involving electronic surveillance); notification can be **delayed indefinitely** if the AG certifies that notification could have an **"adverse result"**

Very **low standard** of justification: Government must only assert that notification will **jeopardize the investigation**.

Can be used in **any criminal case** (not just terrorism or intelligence)

Use thru May, 2003, gave 47 sneak and peek warrants; delays of 1 to 90 days and some of unspecified duration. Have authorized **248 extensions**.

Because it is so much easier, the FBI will seek to have the exception swallow the Title III rule.

Otter (R-Id) Amendment – sought to defund sneak and peek searches. Passed the House 309-118. (July 2003) with broad bi-partisan support. (All Tampa Bay area congress persons voted to defund.) Unfortunately, the Senate did not take up the amendment.

Electronic Surveillance

Two levels

Externals of Communications (to/from)

Content

Patriot Expands both levels significantly.

Expands FISA authority to seek Pen Registers (who you call) and Trap and Trace Devices (who calls you) in important ways.

Can be used to obtain information on **individuals not suspected or accused of a crime**

Standard is “**relevancy to an ongoing criminal investigation**”

Judges **cannot disapprove** the application; **cannot inquire into truthfulness of the government’s application** prior to granting

Section 214 authorizes their use in **criminal** as well as **intelligence and terrorist investigations**

Section 216 expands pen register/trap and trace warrants to the externals of **Internet communications** which is **much more**

intrusive. Law enforcement can get to/from/subject/all websites visited and all documents downloaded. This is significantly **more revealing.** (**Intercept of Internet “content” is prohibited, but content is not defined**)

Also authorizes **nationwide service.** Departs from 4th Amendment requirement to specify places to be searched.

Makes it difficult for a local or regional ISP to challenge a warrant (would have to go to location of the issuing court.)

This could affect Libraries as well, but I do not know if they are being used for that purpose.

Patriot also expands the government’s ability to conduct electronic surveillance (wiretaps) without many of the safeguards that prevent abuse of criminal wiretaps.

Section 218 – amends FISA to change the standard for an electronic surveillance warrant

Previously, FISA authority could be used if collection of foreign intelligence was **the purpose** of the warrant.

Patriot allows use of FISA warrants if intelligence is a **“significant purpose”** of the investigation, i.e. – the investigation must only be **related to national security** in some way. **This greatly expands the universe of cases where FISA authority can be used.**

(Increasing numbers of drug related cases are included. DOJ has created a new category of anti-terrorism cases that significantly expand the cases where FISA can be applied).

There needs to be **no finding that the subject is suspected or accused of a crime.**

Allows the government to **conduct roving wiretaps** of any phone, mobile communications device or Internet connection the subject may reasonably be expected to use. (No USSC decision on roving wiretaps yet)

(In Title III roving warrants, the government is required to determine that the target is actually using the line. This is not so in FISA cases.) (206)

Section 206 also authorizes “John Doe” roving surveillance that does not identify the target by name.

Allows for **nation-wide service** in the US (a similar provision for regular law enforcement purposed requires that the applicant show that the instrument(s) to be monitored were used by the subject.)

Provisions tend to **marginalize the role of judges** and to **insulate the government from court challenges to warrants.** (someone served in Colorado must go to DC to challenge a warrant.)

Expands the **probability** that the **innocent communications** of others will be intercepted.

FISA Court is very **compliant**. May have denied as many as 5 of 15,000 applications prior to 9/11. There is **no adversary proceeding**, no **second guessing** of the government’s application by FISA judges, **no subsequent judicial oversight over the surveillance and its fruits.**

In 2003, the FISA Court issued an opinion that **a number of DOJ applications were based on false allegations** and one FBI agent was barred from further applications to the court.

Section 207 lengthens the duration of FISA Warrants to 120 days.

In the first year after Patriot, the **number of FISA warrants was up 20%**. When asked, DOJ told Congress that it **did not keep statistics on how many of the post Patriot warrants met the “significant purpose” standard but failed to meet the earlier “the purpose” standard.**

DOJ argues that the **real effect** of section 218 lies in the way it **facilitates sharing information** between law enforcement and intelligence arms of the government.

It breached the metaphorical “wall” between intelligence and criminal investigation. DOJ argues that **this “barrier” prevented effective efforts to identify and disrupt acts of terrorism and prevented criminal and intelligence investigations from coordinating their parallel efforts.**

Problem with this assertion is that the barriers to intelligence sharing prior to 9/11 were higher than existing law required. (See Janet Reno’s Testimony to the 9/11 Commission).

Failures had much more to do with differences in organizational culture, bureaucratic rivalries, errors, misjudgment, and other factors than they did with a legal wall of separation.

For example, **information from a properly authorized FISA warrant could be used for criminal prosecution prior to 9/11, but DOJ rarely did so.** (Practice upheld by several US District Courts of appeals.)

(US V. Pelton- 1987 – “Information gathered pursuant to FISA authorization may be used in a criminal prosecution with the authorization of the Attorney General.” “ It is clear that ‘otherwise valid FISA surveillance is not tainted simply because the government can anticipate that the fruits of surveillance may later be used, as allowed by S1806(b) as evidence in a criminal trial.” (also see US v Cavanaugh and US v Duggan)

Section 203 allows the disclosure of grand jury information to virtually any federal law enforcement or intelligence agent.

No judicial approval or oversight. The court must be notified after the fact.

Danger of misusing extraordinary Grand Jury authority to spy on American citizens.

An innocent accused could find his/her records disseminated widely or placed in a database where they will subsequently come back to haunt him.

Patriot adversely affects the rights of immigrants and non-citizens.

Allows the AC to authorized the arrest of any immigrant on security grounds.

Hold they up to seven days without filing charges.

If the AG finds the alien's release threatens national security, they can be held for additional six months periods until the AG elects to deport, prosecute or release the individual.

Under Patriot, they face jail or deportation if they speak on behalf of an organization designated as terrorist, provide advice and assistance or material support, raise funds or solicit membership in such organizations. (These restrictions could raise serious 1st amendment issues.

Post 9/11 arrests. The DOJ website proudly boasts that "over 515 individuals linked to the 9/11 investigation have been deported."

NOTE: The assertion is that they were "linked to an investigation" not that they were linked to terrorism or any crime other than (often minor) immigration violations.

Most were deported in **secret Immigration court proceedings**. Many were without counsel. Many were deprived of access to families and friends. Many were held in harsh conditions that made it difficult or impossible to contribute to their own defense. (See DOJ IG Report)

THE DOJ still refuses to make a full accounting.

Doonsbury characterized these as "comfort arrests."

The DOJ's IG report thoroughly documented the rather shameful treatment of these individuals.

Many Americans of all political views are coming to believe that Patriot needs to be revised now.

"I strongly believe Congress must act now to rein in the Patriot Act, limit its use to national security concerns and prevent it from

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developing ‘**mission creep**’ into areas outside national security.” (quotes Newt Gingrich, SF Chronicle, Nov. 11, 2003)

I agree. We **can** combat terrorism **and** preserve our civil liberties.

Americans can be both **safe** and **free**.

END Opening

See Additional Issue Response Outlines Below:

We do not need the controversial provisions of the Patriot Act to preempt terrorism.

No post 9/11 Investigation has yet suggested that 9/11 occurred because Federal agencies did not have sufficient authority to investigate.

Investigations have identified major problems with

Bureaucratic inefficiency

Turf Wars

Poor or nonexistent coordination

Intelligence Compartmentation

Poor Analysis – A failure to connect the dots

Failure to aggressively follow-up potential leads

The **Gilmore Commission** (headed by a former Republican Governor of Virginia and Chairman of the Republican Party) did sound a cautionary note that we should not sacrifice civil liberties in the battle against terrorism.

Gilmore suggested the President appoint a panel to review the civil liberties implications of anti-terrorist legislation.

How can Patriot be fixed?

Legislation introduced in the Senate and House

SAFE Act - Senator Craig (R-ID) and Senator Durbin (D-IL)
(Safety and Freedom Ensured)

Protecting the Rights of Individual Act – Senator Lisa Murkowski
(R-AK) and Senator Wyden (D-OR)

This legislation would

Limit certain Patriot authorizations like “sneak and peek warrants” to terrorism cases

Restore effective judicial oversight

Prevent access to library records without judicial approval

Require the government to make some evidence to **show that the target of records requests is an agent of a foreign power or terrorist organization**

Restore the probable cause standard for the most sensitive records (involving library, medical, internet materials, etc.).

Limits the use of “john doe” roving wiretaps.

Redefine domestic terrorism to protect 1st Amendment Rights

Require the Attorney General to provide Congress more detailed information about the use of electronic surveillance

These Acts would not totally “fix” Patriot, but would make an excellent start.

The Patriot Act is not needed to effectively fight terrorism.

Government has made significant progress in the fight against al-Qaeda

Both inside and outside the US

Successes came from:

Leads from documentary records recovered in Afghanistan and interrogation of captures al-Qaeda overseas.

Leads from cooperating Intelligence and Police agencies all over the world.

Information from cooperating individuals in the United States (Frequently members of local Islamic Communities)

Collection by various elements of the Intelligence Community

Improvements in the sharing and analysis of raw intelligence data

To date, I have seen nothing accomplished inside the United States involving controversial portions of the Patriot Act that could not have been accomplished under the law as it existed prior to 9/11.

Anti-Terrorism successes post 9/11

Detroit Cell (Possibly coming apart because of Justice failure to make full disclosure of info to the defense)

Buffalo Cell (cooperation of local community)

Arrest of Jose Padilla (based on overseas information)

Cell in Pacific Northwest

Columbus Cab Driver who was to target Brooklyn Bridge

The Virginia group that trained for Jihad through paintball exercises in the Virginia hills.

Community Resolutions

Over **320 cities and counties** and **four state legislatures** have passed resolutions urging their Congressional delegations to revisit and fix the Patriot Act. (Hawaii, Alaska, Maine, and Vermont)

Resolutions have been passed in Tampa, St. Petersburg, New York City, Broward County, Sarasota, Dallas, Chicago, Los Angeles and Tampa.

These resolutions simply ask our congressional delegations to join the growing number of Republicans and Democrats in Congress who are sponsoring legislation to correct the most egregious problems with the Patriot Act.

We would like your help. Urge organizations to endorse the Tampa resolution.