

**The Role of Librarians in Challenges to  
the USA PATRIOT Act**

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Librarians and library associations have been outspoken critics of the expanded surveillance powers granted law enforcement with passage of the USA PATRIOT Act in 2001.<sup>2</sup> Librarians' organized protests have given impetus to community and legislative efforts to curtail the expanded power, and librarians have also had a small role in lawsuits challenging the Act. The focus of librarians' concern has been nondisclosure requirements in section 215 and the general relaxing of standards and shrinking of judicial review of applications for searches and seizures.<sup>3</sup> Librarians have yet to identify publicly any particular uses of the Act against libraries, though they have reported some law enforcement requests for library records since September 11.<sup>4</sup>

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<sup>2</sup> The USA PATRIOT Act is an acronym for Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 47 U.S.C., and 50 U.S.C.).

<sup>3</sup> Section 215 eliminated restrictions on types of businesses or individuals that could be the target of search warrants issued by the secret Foreign Intelligence Surveillance Act ("FISA") Court, opening the way for searches of "any tangible thing" held by any entity, including libraries. Section 218 relaxed the required assertion that foreign intelligence was the primary purpose of the search, directing that FISA warrants issue when foreign intelligence is stated to be a significant purpose. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 215, codified at 50 U.S.C.A. §§ 1804(a)(7)(B), 1823(a)(B) (2003). The USA PATRIOT Act provided that sections 215 and 218, along with some other extensions of surveillance powers, sunset at the end of 2005. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, § 224 (codified as amended in scattered sections of 18 U.S.C., 22 U.S.C., 31 U.S.C., 47 U.S.C., and 50 U.S.C.).

<sup>4</sup> The Library Research Center at the University of Illinois conducted an anonymous survey of over 1,000 large public libraries in 2002, and found eleven

Librarians continue to assert that the threat of government surveillance creates a chilling effect on library use. Attorney General John Ashcroft has responded by declassifying information on how many times libraries were searched under section 215 and by announcing that the section has been used zero times in libraries.<sup>5</sup> American Library Association President Carla Hayden expressed surprise at the number and pushed Congress to amend the Act to eliminate unnecessary intrusions on civil liberties.<sup>6</sup>

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percent had been visited by law enforcement during the year after September 11. Results are posted at <http://www.lis.uiuc.edu/gslis/research/national.pdf> (on file with the North Carolina Journal of Law & Technology). See Leigh S. Estabrook, *The Response of Public Libraries to the Events of September 11, 2001*, 84 *Illinois Libraries* Winter 2002, at 1, available at [http://www.cyberdriveillinois.com/publications/pdf\\_publications/illibrary\\_v84n1.pdf](http://www.cyberdriveillinois.com/publications/pdf_publications/illibrary_v84n1.pdf) (last visited Apr. 13, 2004) (on file with the North Carolina Journal of Law & Technology). Viet Dinh, Assistant Attorney General, reported that FBI "agents have contacted about 50 libraries nationwide in the course of terrorism investigations." Eric Lichtblau, *Aftereffects: Intelligence Operations; Justice Dept. Lists Use of New Power to Fight Terror*, N.Y. TIMES, May 21, 2003, at A1. But see Statement of Barbara Comstock, Director of Public Affairs, Dept. of Justice, at [http://www.usdoj.gov/opa/pr/2003/June/03\\_opa\\_323.htm](http://www.usdoj.gov/opa/pr/2003/June/03_opa_323.htm) (last visited Apr. 13, 2004) (asserting the inaccuracy of the report of Assistant Attorney General Viet Dinh's comments about visits to libraries) (on file with the North Carolina Journal of Law & Technology). News reports of law enforcement in libraries have not always included information about the authorizing law or even details of what was requested. See *News Briefs: FBI Targets Library Computers in Terrorism Investigation*, AM. LIBRARIES, Sept. 24, 2001, at <http://archive.ala.org/online/news/2001/010924.html> (describing pre-PATRIOT Act investigations in Florida, Pennsylvania, Texas, and the Washington, D.C. area) (on file with the North Carolina Journal of Law & Technology); Eric Fleischaer, *FBI targets Internet records at Wheeler library*, THE DECATUR DAILY, June 15, 2002 (this article no longer appears with other articles from the same day on the DECATUR DAILY website archives); Christine Pelisek, *Check This Out: Libraries quietly sound alarm against PATRIOT Act*, L.A. WEEKLY, July 4, 2003 (reporting that Santa Monica city librarians were approached for information about the library records of a particular person).

<sup>5</sup> Prepared Remarks of Attorney General John Ashcroft, *The Proven Tactics in the Fight against Crime* (Sept. 15, 2003), at <http://www.usdoj.gov/ag/speeches/2003/091503nationalrestaurant.htm> (on file with the North Carolina Journal of Law & Technology).

<sup>6</sup> Press Release, Am. Library Ass'n (Sept. 18, 2003), at <http://www.ala.org/ala/ourassociation/governanceb/executiveboard/eboardactions/confcallnotes/september18.html> (on file with the North Carolina Journal of Law & Technology).

Others have taken note that section 215 is only one of the USA PATRIOT Act provisions that lower standards of access to library records.<sup>7</sup>

Almost a dozen amendments to reduce the effects of the USA PATRIOT Act were introduced in Congress by the end of 2003, and the progression of bills reveals an early and consistent focus on libraries and section 215, the section identified most often in protests by library associations.<sup>8</sup> By early 2004, community resolutions against the Act totaled over 250, and many of the resolutions specifically mentioned libraries or library use.<sup>9</sup> In mid-

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<sup>7</sup> See Letter from Daniel J. Bryan, Assistant Attorney General, to the Honorable John Conyers, Jr., U.S. House of Representatives (July 26, 2002) (responding to the Senate Judiciary Committee request for the number of times section 215 was used in libraries), at [http://www.house.gov/judiciary\\_democrats/dojpatriotresponse/tr72602.pdf](http://www.house.gov/judiciary_democrats/dojpatriotresponse/tr72602.pdf) (on file with the North Carolina Journal of Law & Technology). The response to Question 12 was that the answer is classified, and that National Security Letters would be another, preferred means of obtaining electronic records. National Security Letters, administrative subpoenas issued by the FBI, were addressed in section 805 of the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>8</sup> Security and Freedom Ensured Act, H.R. 3352, 108th Cong. (1st Sess. 2003); Protecting the Rights of Individuals Act, S. 1552, 108th Cong. (1st Sess. 2003); Security and Freedom Ensured Act, S. 1709, 108th Cong. (1st Sess. 2003); PATRIOT Oversight Restoration Act, S. 1695, 108th Cong. (1st Sess. 2003); Reasonable Notice and Search Act, S. 1701, 108th Cong. (1st Sess. 2003); Library, Bookseller and Personal Records Privacy Act, S. 1507, 108th Cong. (1st Sess. 2003); Library and Bookseller Protection Act, S. 1158, 108th Cong. (1st Sess. 2003); Domestic Surveillance Oversight Act, S. 436, 108th Cong. (1st Sess. 2003); Freedom to Read Protection Act, H.R. 1157, 108th Cong. (1st Sess. 2003); Surveillance Oversight and Disclosure Act, H.R. 2429, 108th Cong. (1st Sess. 2003); Benjamin Franklin True Patriot Act, H.R. 3171, 108th Cong. (1st Sess. 2003).

<sup>9</sup> For example,

Resolved, That the Council of the City of New York urges each of the City's public libraries to inform library patrons that Section 215 of the USA PATRIOT Act gives the government new authority to monitor book-borrowing and Internet activities without patrons' knowledge or consent and that this law prohibits library staff from informing patrons if federal agents have requested patrons' library records . . . .

Council of the City of New York, *Draft: Local Resolution to Protect Civil Liberties Resolution 0600-2004*, at <http://www.council.nyc.ny.us/legislation> (Feb. 4, 2004) (on file with the North Carolina Journal of Law & Technology).

2003, in the wake of this growing discontent, Attorney General John Ashcroft began a tour of the country, delivering speeches defending the Act and finally, in September of 2003, attacking librarians as spreading “breathless reports and baseless hysteria.”<sup>10</sup> Political cartoons featured FBI agents hovering over a small girl reading nursery rhymes and the Attorney General as a man on a mission to tour the country until every last librarian was eliminated.

Why would potential searches of library records get so much attention? The answer is likely to be found in librarians’ professional commitment to protecting anonymous reading and their organizational effectiveness in expressing discontent. Librarians have long adhered to ethical standards that require protection of the confidentiality of library users’ reading and research habits, and several sections of the Act lower the barriers to review of library records.<sup>11</sup> Library associations, including the American Library Association and numerous state associations, have passed resolutions condemning section 215 and other sections that expanded access to records of library users’ activities.<sup>12</sup> Well-

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Community resolutions have been tracked by the American Civil Liberties Union. ACLU, *List of Communities that have Passed Resolutions*, at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (last visited Apr. 13, 2004) (on file with the North Carolina Journal of Law & Technology); see also Bill of Rights Defense Committee, *Civil Liberties Safe Zones*, at <http://www.bordc.org> (last updated Mar. 20, 2004) (on file with the North Carolina Journal of Law & Technology).

<sup>10</sup> See Prepared Remarks of Attorney General John Ashcroft, *supra* note 5.

<sup>11</sup> “We protect each library user’s right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired, or transmitted.” American Library Association Code of Ethics, art. III, at <http://www.ala.org/ala/oif/statementspols/codeofethics/coehistory/codeofethics.pdf> (last visited Apr. 13, 2004) (adopted 1995) (on file with the North Carolina Journal of Law & Technology). Confidentiality of information gained about library patrons was part of the Code of Ethics since 1939. Historical Codes of Ethics outlined by the American Library Association are at <http://www.ala.org/ala/oif/statementspols/codeofethics/coehistory/Default2092.htm> (last visited Apr. 13, 2004) (on file with the North Carolina Journal of Law & Technology).

<sup>12</sup> American Library Association Council, *Resolution on the USA PATRIOT Act and Related Measures that Infringe on the Rights of Library Users*, at <http://www.ala.org> (Jan. 29, 2003) (on file with the North Carolina Journal of

linked through professional organizations and email mailing lists, librarians also hosted panel discussions, posted privacy policies and sometimes warning signs (some humorous, some serious), and reviewed automated system settings to make sure they would destroy circulation records upon timely return of materials. The media took note of librarians' activities, and coverage of librarians' objections to the USA PATRIOT Act has been extensive.

Professional commitment to privacy and organizational strengths has not, however, placed librarians or library associations at the forefront of legal challenges to the Act through the courts. Although the American Library Association was a plaintiff in a Freedom of Information Act suit in 2002,<sup>13</sup> other cases have had minimal involvement from the library community. As of early 2004, three cases challenged sections of the Act that could affect libraries. One case, *Muslim Community Association of Ann Arbor v. John Ashcroft*, challenged section 215 on First, Fourth and Fifth Amendment grounds.<sup>14</sup> Librarians joined a number of other organizations identifying themselves as First Amendment organizations in filing an amicus brief in support of the plaintiffs' opposition to the defendants' motion to dismiss.<sup>15</sup> Another case, *Humanitarian Law Project v. Ashcroft*, challenged section 805, and the federal district judge ruled that the provision was unconstitutionally vague.<sup>16</sup> Librarians were not involved in this case, though librarians giving research advice could be protected by the invalidation of the provision making it a crime to provide

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Law & Technology). The North Carolina Library Association, like many other state and regional library associations, passed *A Resolution on Libraries and the USA PATRIOT Act*, at <http://www.nclaonline.org/intellect/USPatriotAct.html> (Apr. 25, 2003) (on file with the North Carolina Journal of Law & Technology).

<sup>13</sup> The complaint is available at <http://www.aclu.org/Files/OpenFile.cfm?id=11039> (last visited Apr. 13, 2004) (on file with the North Carolina Journal of Law & Technology).

<sup>14</sup> *Muslim Cmty. Assoc. of Ann Arbor v. John Ashcroft*, No. 03-72913 (E.D. Mich.).

<sup>15</sup> American Booksellers Foundation for Free Expression, *Brief of Amici Curiae First Amendment Organizations in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss*, at [http://www.abffe.com/pdfs/amicus\\_brief.pdf](http://www.abffe.com/pdfs/amicus_brief.pdf) (Oct. 31, 2003) (on file with the North Carolina Journal of Law & Technology).

<sup>16</sup> *Humanitarian Law Project v. Ashcroft*, No. CIV.A.03-6107 ABC, 2004 WL 112760, at \*1 (C.D. Cal. Jan. 22, 2004).

expert advice and assistance to groups the Secretary of State labeled terrorists.<sup>17</sup> The third case was a decision of the secret Foreign Intelligence Surveillance Act (FISA) Court that limited use of the court for regular domestic criminal investigations. The FISA Court decision resulted in the first convening of the FISA Court of Appeals and the first release of a public version of an opinion from either court.<sup>18</sup> To avoid an entirely one-sided appeal, the Court of Review allowed amicus arguments in support of the lower court decision, but library groups were not part of this appeal.

In recent decades, librarians looked to state laws to protect libraries from fishing expeditions into records of library use. In the 1970s and 1980s, librarians and library associations worked at the state level to see the passage of laws protecting the confidentiality of library records and library use. This effort did not reflect a new commitment from librarians but was in response to an FBI surveillance effort to track Soviet use of technology information available in American public libraries. This effort, called the “Library Awareness Program,” included the recruitment of library staff as FBI agents and requests for records of library use.<sup>19</sup> By 2004, forty-eight states and the District of Columbia had statutes restricting access to records of what library users read and even do in libraries, and Attorney General opinions offered similar protection in the remaining two states, Hawaii and Kentucky.<sup>20</sup>

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<sup>17</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, § 805, codified at 18 U.S.C. § 2339A (2003).

<sup>18</sup> *In re Sealed Case Nos. 02-001, 02-002*, 310 F.3d 717, 719 (2002).

<sup>19</sup> HERBERT N. FOERSTEL, *SURVEILLANCE IN THE STACKS: THE FBI'S LIBRARY AWARENESS PROGRAM* (1991).

<sup>20</sup> ALA. CODE § 41-8-10 (2003); ALASKA STAT. § 40.25.140 (Michie 2003); ARIZ. REV. STAT. § 41-1354 (West 2003); ARK. CODE ANN. § 13-2-701 (Michie 2003); CAL. GOV'T CODE § 6267 (West 2003); COLO. REV. STAT. § 24-90-119, § 24-72-204 (2003); CONN. GEN. STAT. § 11-25 (2002); DEL. CODE ANN. tit. 29 § 10002 (2003); 2003 D.C. STAT. § 39-108; FLA. STAT. ch. 261 (2003); GA. CODE ANN. § 24-9-46 (2002); IDAHO CODE § 9-340E (Michie 2003); 75 ILL. COMP. STAT. ANN. 70/1, 140/7 (2003); IND. CODE ANN. § 5-14-3-4 (Michie 2004); IOWA CODE § 22.7 (2003); KAN. STAT. ANN. § 45-221 (2002); LA. REV. STAT. ANN. § 44:13 (West 2003); ME. REV. STAT. ANN. tit. 27 § 121 (West 2003); MD. CODE ANN., State Gov't § 10-616 (2003); MASS. GEN. LAWS ch.

Subpoenas and warrants issued under the USA PATRIOT Act or under other laws negate the effect of these state laws, so librarians have found this protective shield to be to be increasingly vulnerable.

Librarians and library associations may argue that library records are protected by Constitutional guarantees of free speech and against unreasonable search and seizure, but the case law is not overwhelmingly supportive. In *Tattered Cover, Inc. v. City of Colorado*, the state supreme court avoided basing its decision on federal law and instead based protection of bookstore records on Colorado law.<sup>21</sup> The court noted that the U.S. Supreme Court in *Zurcher v. Stanford Daily* may have extended heightened protection of expressive materials only so far as to require scrupulous exactitude in compliance with particularity requirements of the Fourth Amendment.<sup>22</sup> Given that particularity requirements are relaxed by several sections of the USA PATRIOT Act, the *Zurcher* opinion may offer some support for librarians and bookstore owners trying to gain special protection for readers'

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78, § 7 (2003); MICH. COMP. LAWS § 397.601-603 (2003); MINN. STAT. § 13.40 (2003); MISS. CODE ANN. § 39-3-305 (2004); MO. ANN. STAT. § 182.817 (West 2003); MONT. CODE ANN. § 22-1-1101 (2003); NEB. REV. STAT. § 84-712.05 (2003); NEV. REV. STAT. ANN. 239.013 (Michie 2003); N.H. REV. STAT. ANN. § 91-A:5, § 201-D:11 (2003); N.J. STAT. ANN. § 18A:73-43.1, § 18A:73-43.2 (West 2003); N.M. STAT. ANN. § 18-9 (Michie 2003); N.Y. LAW § 4509 (McKinney 2003); N.C. GEN. STAT. § 125-19 (MB 2003); N.D. CENT. CODE § 40-38-12 (2003); OHIO REV. CODE ANN. § 149.432 (West 2003); OKLA. STAT. tit. 65, § 1-105 (West 2003); OR. REV. STAT. § 192.502 (2001); PA. STAT. ANN. tit. 24, § 4428 (West 2003); R.I. GEN. LAWS § 11-18-32, §38-2-2 (2003); S.C. CODE ANN. § 60-4-10, § 60-4-20, § 60-4-30, § 30-4-10 (Law. Co-op 2003); S.D. CODIFIED LAWS § 1-27-3, § 14-2-51 (Michie 2003); TENN. CODE ANN. § 10-8-101 (2003); TEX. GOV'T CODE ANN. § 552.124 (2004); UTAH CODE ANN. §§ 63-2-202, 63-2-302 (2003); VT. STAT. ANN. tit. 1 § 317 (2003); VA. CODE ANN. § 2.2-3705 (Michie 2003); WASH. REV. CODE ANN. § 42.17.310 (West 2003); W. VA. CODE § 10-1-22 (2003); WIS. STAT. § 43.30 (2003); WYO. STAT. ANN. § 16-4-203 (Michie 2003). Hawaii and Kentucky have Attorney Gen. Opinions finding that privacy rights protect library patron records. 90 Op. Attorney Gen. 30 (Hi. 1990); 81 Op. Attorney Gen. 159 (Ky. 2002).

<sup>21</sup> *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044, 1047 (Colo. 2002). The Freedom to Read Foundation of the American Library Association served as amicus curiae in support of the plaintiff bookstore.

<sup>22</sup> *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978).

records. Still, as the *Tattered Cover* court pointed out, there are few federal cases outside of the context of obscenity where conflicts between the First and Fourth Amendments have been resolved.

Librarians may play a larger role in legal challenges to surveillance sections of the USA PATRIOT Act if the FBI or another law enforcement agency seeks library records and a librarian decides to violate a nondisclosure requirement.<sup>23</sup> If a librarian were to violate nondisclosure as an act of civil disobedience, prosecution of that action could provide a way to overcome the problem of standing that normally prevents challenges to searches that are required to be kept secret. The librarian's disclosure could also provide a way to identify potential plaintiffs in the persons whose records were sought. Even if the Constitutional challenges were unsuccessful, the media coverage of such a conflict likely would feed support for pending amendments that would limit the USA PATRIOT Act.

Because the USA PATRIOT Act is a complex piece of legislation, and because it was passed quickly without the normal benefits of hearings or full committee review, consideration of the increases in surveillance powers could have remained confusing and highly technical for most Americans. When librarians posted warning signs and drew attention to the legality of the FBI keeping track of the reading habits of ordinary Americans, this one example of overreaching captured the imagination of many and has been a component of community resolutions, proposed amendments, and the defensive speeches of Attorney General Ashcroft. Whether or not librarians become a larger force in court challenges to the Act, the idea of privacy in using a library is now a touchstone for debate about how to achieve a balance between security and privacy in the post-September 11 world.

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<sup>23</sup> Penalties for nondisclosure are not provided in the USA PATRIOT Act or the law it amended and could be pursued as contempt of court for FISA court or other court orders or obstruction of justice in the case of court orders or administrative subpoenas.