

# **Library Records Confidentiality and the PATRIOT Act**

Deborah Caldwell-Stone  
Office for Intellectual Freedom  
American Library Association

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# Agenda

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- The USA PATRIOT Act and Libraries
  - What is the PATRIOT Act?
  - Why the library community is concerned
  - Current status of legislation

# USA PATRIOT Act

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“The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001”

Purpose: “To deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes”

# USA PATRIOT Act

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Amends more than 15 different statutes:

- Foreign Intelligence Surveillance Act (FISA)
- Computer Fraud and Abuse Act (CFAA)
- Electronic Communications Privacy Act of 1986
- Family Education Rights and Privacy Act (FERPA)
- Federal Rules of Criminal Procedure
- Federal wiretap laws
- Immigration laws
- Money laundering laws

# **Library Focus:**

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- Foreign Intelligence Surveillance Act Amendments – Section 215
- Amendment expanding scope of National Security Letter (NSL) statutes – Section 505

## USA PATRIOT Act

# Section 215

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- Amends business records provision to give the FBI authority to obtain any “any tangible thing.”
- Sweeps in any record or any thing: banking records, educational records, medical records, library records, databases – even house keys.

## USA PATRIOT Act

# Section 215

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- Lesser legal standard – record merely must be “sought for” an investigation into espionage or terrorism; no need to show specific facts or probable cause to obtain order.
- Permits FBI to seize records of persons who are not targets of the investigation and not “agents of a foreign power.”

## USA PATRIOT Act

# Section 215

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### Secrecy provisions:

- Order obtained ex-parte in “secret” FISA court without notice to any party
- “Gag order” forbids recipient from informing anyone about the search warrant, the search, or the records turned over to the FBI in perpetuity



## USA PATRIOT Act

# Section 505

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- Authorizes the FBI to use National Security Letters (NSLs) to obtain financial, Internet, credit, and telephone records.
- Permits FBI agent to issue NSL demand for records without judicial review or supervision.

## USA PATRIOT Act

# Section 505

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- Statute provides no means to challenge NSL in court of law
- Imposes “gag order” forbidding library from informing anyone about the NSL or that records were turned over to the FBI in perpetuity

## USA PATRIOT Act

# Section 505

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September 2004: U.S. District Court Judge Marrero enjoins use of the NSL

- Statute's failure to provide an effective opportunity to challenge the NSL in a court of law is an "unconstitutional abuse of power"
- Automatic and perpetual "gag order" violates the First Amendment

Doe v. Ashcroft, 334 F.Supp. 2d 471 (S.D.N.Y. 2004)

*Currently on appeal before the Second Circuit Court of Appeals*

## USA PATRIOT Act

# Section 505

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September 2005: U.S. District Court Judge Hall enjoins enforcement of NSL “gag order”

- Loss of ability to speak about experience as a recipient of an NSL “real and present loss” of First Amendment rights
- Government failed to show any compelling state interest in gagging the NSL recipient

Doe v. Gonzales, No. 3:05cv1256 (D. Conn 2005)

*Currently on appeal before the Second Circuit Court of Appeals*

# Patriot Act Concerns:

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- Appears to trump other laws that usually protect the confidentiality of personal records, including library records.
  - State Library Confidentiality laws
- Eliminates protections put in place after disclosure of FBI abuses in the 1970's
  - FBI Library Awareness Program: Cold War era secret surveillance program monitored library activities without court order

# **PATRIOT Act Concerns**

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- Sweeps aside traditional constitutional protections against unwarranted surveillance and unjustified investigations
- Secret courts and secret procedures provide no means for citizens to challenge erroneous government actions or monitor government activity

# **PATRIOT Act Concerns**

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- Potential surveillance of citizens' reading habits chills the exercise of First Amendment rights and upends the traditional presumption of innocence

# Cause for Concern?

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DOJ Says No:

- No use of Section 215  
("Trust us!")
- No interest in what citizens read



# Cause for Concern?

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## BUT:

- DOJ says libraries “a logical target for federal surveillance”; says it uses libraries to get information on library users
- Whatcom County, Scottsdale, other libraries report FBI attempts to get user records with or without judicial process

# Cause for Concern?

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## Patriot Act in the Library

- National Security Letter served on ALA member in Connecticut; NSL seeks "any and all subscriber information, billing information and access logs."
- Lawsuit filed by ACLU asks court to declare NSL statute unconstitutional

# 2005: Reauthorization or Sunset?

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- Both Section 215 and Section 505 expire (“sunset”) on December 31, 2005.
- President Bush and Attorney General Gonzales asked Congress to reauthorize and expand surveillance authorities granted under the USA PATRIOT Act.

# 2005:

## Reauthorization or Sunset?

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- HOUSE passes H.R. 3199 to reauthorize and expand the USA PATRIOT Act
- SENATE passes S. 1389, the PATRIOT Act Improvement and Reauthorization Act, which reins in some excesses of Section 215.

# 2005: Reauthorization or Sunset?

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Both House and Senate proposals eliminate the sunset dates on the majority of provisions due to sunset on December 31, 2005, making many PATRIOT Act provisions permanent changes to the law.

# H.R. 3199

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## H.R 3199:

- Keeps most of the original PATRIOT Act provisions intact with minor modifications.
- Extends sunset for selected provisions, including Section 215, to December 31, 2015.
- Criticized for lacking protections for civil liberties

# S. 1389

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- Extends sunset for Section 215 and selected provisions to December 31, 2009.
- Adopts modifications that represent some reform of the original PATRIOT Act provisions.

# Section 215 proposals

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The House bill:

- Adopts “relevance” standard currently espoused by DOJ and FBI; no change in predicates for issuance.
- Allows exceptions to gag order for disclosure to legal counsel and those needed to produce records.



# Section 215 proposals

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The House bill:

- Gives recipients of FISA orders the ability to challenge orders in the FISA court with right of review (but Judge may dismiss “frivolous” challenges.)

# Section 215 Proposals

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The Senate bill:

- Imposes higher standard on FISA orders, requiring a limited showing of facts that there is a tie to an actual terrorist case.
- Requires that the order describe the items sought with some particularity and allow a reasonable time period for production.

# Section 215 Proposals

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The Senate bill:

- Gives recipients of FISA orders the ability to challenge orders in the FISA court with right of review.
- Instructs FISA court to establish rules allowing for review procedures.
- Imposes more detailed reporting requirements on DOJ; includes reports on use in libraries and bookstores.

# Section 505 Proposals

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The House bill:

- Provides for judicial enforcement of National Security Letters; violation of order is punishable as contempt of court.
- Imposes jail sentences of one to five years for violation of the gag order.
- Permits disclosure to legal counsel and those needed to produce records.

# Section 505 Proposals

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The House bill:

- Establishes procedures for review of NSLs by federal district courts.
- Allows NSL recipient to petition court to set aside gag order; but a government certification that disclosure endangers national security is treated as conclusive.

# Section 505 Proposals

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The Senate bill:

- Provides for judicial enforcement of NSLs
- Permits recipient to disclose NSL to legal counsel and those needed to comply with order.
- Permits recipient to file motion to quash or modify the NSL in federal district court

# Section 505 Proposals

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The Senate bill:

- Permits court to modify or quash NSL if compliance would violate a Constitutional right or other right or privilege.
- Permits court to modify or eliminate gag order if there is no reason to believe national security is endangered.

# Issues:

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- Federal laws negating state privacy protections
- Proposals for state-level PATRIOT Act provisions to facilitate state and local law enforcement access to records & electronic communications



# Thank you!

For more info:

Office for Intellectual Freedom

[www.ala.org/oif](http://www.ala.org/oif)

800-545-2433 x4223

Washington Office

[www.ala.org/washoff](http://www.ala.org/washoff)

800-941-8478