

The PATRIOT Act and Libraries: A Sensitive Relationship

By George H. Pike*

The sensitive relationship between libraries and the USA PATRIOT Act is back at the top of the headlines. In August, a “member of the American Library Association”, known only as “John Doe”, filed a federal lawsuit after receiving a National Security Letter (NSL) from the FBI. The NSL requested information from John Doe pursuant to an “authorized investigation to protect against international terrorism or clandestine intelligence activities.” John Doe is prohibited from discussing the letter or even that they had received the letter

John Doe’s lawsuit argues that the provisions of the PATRIOT Act governing NSLs violate the Constitution’s free speech provisions and protections against unreasonable searches. In particular, John Doe argues that the secrecy provision prevents him or her from relating their experiences with the PATRIOT Act as part of the public debate of the Act’s renewal.

Section 215

Most of the concern and debate on the PATRIOT Act’s impact on libraries has focused on Section 215 of the Act. This controversial provision allows government officials to obtain “any tangible things” during an intelligence or terrorism investigation, including library and bookstore records. The Act also requires the recipient of a request to keep it secret. Section 215 is due to expire in December, 2005. However, there are several proposals to extend and modify this section currently being debated in Congress.

Section 215 is not unlimited. The law provides that searches which target U.S. citizens cannot be based only on activities protected by the first amendment, such as reading or speech. The law also requires that a subpoena be obtained from a designated federal court judge, who reviews the subpoena request to ensure that it complies with the law. Although this process has been criticized for its secrecy and overwhelming history of approving subpoena requests, there is at least some judicial review.

National Security Letters

The National Security Letter received by John Doe does not require any judicial review. Any FBI official at the rank of Special Agent in Charge of a field office may initiate the NSL and again, no one is permitted to talk about the NSL or even acknowledge receiving one.

NSLs cannot be used to obtain the same broadly defined records that Section 215 allows. The NSL that John Doe received was issued to an “electronic communication service provider” to obtain, “subscriber information, billing information and access logs” about library patrons.

Is a library an electronic communication service provider? This question came up a few years ago when the Digital Millennium Copyright Act provided safe harbors to Internet service providers for the infringing acts of their customers. Most commentators believed that libraries, with their ubiquitous Internet and database access were considered service providers. This reasoning could readily extend to the PATRIOT Act. In an early court ruling on John Doe's lawsuit, the court did not question whether John Doe was an electronic communication service provider under the Act.

The NSL procedure pre-dates the PATRIOT Act, although it was expanded by the Act. However, the John Doe lawsuit drove home to libraries that the government has even broader power to seek out library records than the more widely known Section 215. The difficult question is whether either provision of the Act is being abused or misapplied to libraries.

ALA and the Department of Justice

The American Library Association released a report showing that at least 200 libraries had received inquiries from law enforcement officials since the enactment of the PATRIOT Act. Emily Sheketoff, Director of the ALA's Washington office indicated that because of secrecy requirements, the report could not identify whether the inquiries were under Section 215 or through the NSL process. In May, 2005 the Department of Justice reported to Congress that no 215 subpoenas were issued to libraries or bookstores. Ms. Sheketoff, however, noted that the report failed to mention National Security Letters, and may have created an impression that the PATRIOT Act was being used against libraries less than it actually was.

Due to security requirements, the U.S. Department of Justice cannot address specific uses of Section 215 or National Security Letters. The Department's Office of the Inspector General issues an annual report to Congress on the Implementation of the PATRIOT Act, including reports of abuses. The reports have indicated no complaints "alleging misconduct" of a provision of the PATRIOT Act were reported between June 2003 and June 2005. The Department's Office of Public Affairs said in defense of the Act that "both houses of Congress recognized the critical tools that the Patriot Act provides."

The ALA's Sheketoff reiterated that libraries should not be safe havens for terrorists. If law enforcement has reason to believe a threat exists, then librarians are "anxious to help." But librarians have a long dedication to constitutional rights of privacy, free speech and free access to information by their patrons. Ms. Sheketoff asserts that the government must provide equal assurance that all constitutional rights of patrons are protected before libraries should allow the government access to any patron records. She questions whether the PATRIOT Act meets that standard.

History and the future

Those that support the government's position on the PATRIOT Act say that it provides important and necessary tools to fight terrorism. I can't disagree with that position.

However, there is no question that the PATRIOT Act gives the government much broader powers of investigation, and we are asked to trust the government that they won't abuse those powers. Former Attorney General John Ashcroft once said that the Justice Department was not inclined to broadly investigate Americans' reading habits, "No offense to the American Library Association, but we just don't care."

But history shows that when government is given more power over its citizens, some abuse almost inevitably flows. Heightened national security concerns have often result in civil liberties reductions, as seen in the Alien and Sedition Acts of WWI, the Japanese internments in WWII, the Red Scare and the Vietnam War. Most of those actions are now recognized as abuses--offensive to the Constitution and an offensive part of our history. It may be that only future will decide the effectiveness or offensiveness of the PATRIOT Act's library provisions. While the John Doe case remains before the courts Congress will return to the renewal of the PATRIOT Act. One hopes that those that are charged with enacting, reviewing, and enforcing the Act will heed history's lessons.

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