
This paper examines the impact of the PATRIOT Act on libraries, from the circumstances surrounding the original passage of the Act through reauthorization and beyond. It discusses the role of libraries in a free information society, the reaction of the library community to the PATRIOT Act, and the importance of developing library policy that anticipates information requests from law enforcement. It also examines the court cases involving libraries with the PATRIOT Act and the implications of the court decisions for libraries, with a brief discussion of the Obama administration’s likely approach to the PATRIOT Act.

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Library and the state/Right of privacy

Library records/Policy statements
THE USA PATRIOT ACT AND THE IMPACT ON LIBRARIES

by
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Introduction

The passage of the USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism), along with its special search and seizure provisions, has challenged the traditional Fourth Amendment safeguards of library privacy. In particular, sections 215 and 505 of the Act allow federal agencies access to patrons’ print and electronic records, as well as access to broader institutional records, without showing probable cause and without prior judicial approval. The primary potential instrument of these intrusions are the enhanced National Security Letter (NSL) provisions, which may compel transference of library records while imposing perpetual gag orders upon their recipients.

This paper examines the impact of the PATRIOT Act on libraries. It stresses the importance of libraries having patron confidentiality policies and a set of procedures to respond to information requests from law enforcement in a post-PATRIOT Act environment. Much of the debate surrounding the Act has focused on the ability of federal agents to demand information from and conduct surveillance on libraries, and two significant court cases testing provisions of the Act have involved libraries.

The paper considers the traditional role of libraries in a free information society and the chilling effect of governmental supervision of patron behavior. It discusses the circumstances leading to the original passage of the Act, the reaction of the library community to the legislation, and the events and controversy surrounding the
reauthorization of the PATRIOT Act in 2006. It examines the court rulings that directly impact libraries and concludes with a brief discussion of the Obama administration’s approach to the Act.

The impact of the PATRIOT Act on libraries is serious, far-reaching, and manifests in a variety of ways. Although it is impossible to determine how many information requests are being made of libraries in the wake of the Act because of the secrecy surrounding the requests, the available evidence indicates significant numbers of requests are being made. For example, a 2005 survey of Vermont libraries reported that about 10% of libraries in the state had received at least one information request from law enforcement.\(^1\) It is assumed by researchers that reported requests are understated because of the fear of violating secrecy restrictions.

The PATRIOT Act clearly has an impact on how libraries interact with and serve their patrons. The Act also has a potentially large impact on the information seeking behaviors of patrons. But it also impacts the institutional function of the libraries themselves. The secrecy provisions of the Act make it nearly impossible to conduct informational policy research into the effects on libraries, severely limiting the ability of libraries not only to understand and analyze what is taking place, but to formulate policy in response to current events.\(^2\)

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Libraries have a traditional ethical, and in most states, a statutory obligation to protect the privacy of their patrons. Librarians need to be informed about the various types of requests they may be confronted with in order to respond appropriately. By understanding the subtle differences between different categories of requests, and the legal weight they may carry, librarians will be in a better position to formulate policies to deal with each potential situation.

However, over seven years after passage of the PATRIOT Act, many libraries do not have either a patron confidentiality policy or a set of procedures to guide them in the event of an information request by law enforcement. The survey of Vermont libraries found that fewer than half had a written patron confidentiality policy, and of those that did, only half stipulated that an attorney review information requests from law enforcement authorities. Without such policies, libraries are at a disadvantage when confronted by intimidating requests, and their ability to safeguard the privacy rights of their patrons may be compromised.

While most librarians understand the need to comply with information requests that are accompanied by duly executed warrants and subpoenas pertaining to legitimate criminal investigations, they have a responsibility to protect their patrons’ privacy from open-ended secret requests for information or surveillance whenever possible.

**The Role of the Library**

The traditional role of the library as a trusted center of free inquiry and information is under threat by PATRIOT Act provisions. Libraries have come to be

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3 Magi, “gap between theory and practice”. 

regarded by many as the institutional embodiment of First Amendment freedoms. Unfettered access to information, without fear of consequence or governmental sanction, is seen as a foundational pillar of American democracy. If citizens are left to wonder whether their interest or research in a controversial topic will be scrutinized or whether it may subject them to suspicion or worse, then self-censorship has already occurred and the exercise of the First Amendment is effectively curtailed.

The chilling effect fostered in such a climate is not limited to the individual, but extends to the library itself. Libraries may begin to impose their own self-censorship by altering their collection policies to remove potentially objectionable materials before they reach the shelf. If libraries are not able to maintain the trust in their services that has historically been awarded them by the public, then the traditional role of the library is undermined and the continuing function of the library as an information institution in the modern era is called into question.

An example may serve to clarify these issues and bring them into sharper focus. In June, 2004, an FBI agent appeared at a branch of the Whatcom County Library System in Washington State. The agent requested a list of the people who had borrowed a biography of Osama bin Laden. The attorney for the library called the local FBI office and asked why the information was important. The attorney was told that a patron had written a quote from bin Laden into the margin.

The library refused the request, saying it would have to be made through proper legal channels before the board would consider it. A week later, the FBI served the library with a subpoena demanding a list of all patrons who had borrowed the biography.

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since November, 2001. The library staff was uncomfortable. Joan Airoldi, director of the library district, commented “Who would check out a biography of bin Laden knowing that this might attract the attention of the FBI?” The board voted unanimously to challenge the subpoena in court. The FBI withdrew the request fifteen days later.

The incident illustrates the immediate and pervasive chilling effect that can occur when the government collects general patron information that was not shown to be directly relevant to a criminal investigation. If anyone who has utilized materials concerning terrorism is at risk of placing herself under suspicion or perhaps surveillance, then the mission of the library to provide its patrons with a free and open information exchange is inhibited.

The incident at the Whatcom County Library also emphasizes the importance of having a policy in place that has anticipated that such requests may occur, with a set of procedures that guide the library’s response. Such a policy can determine whether a library will be successful or not in protecting the rights of its patrons.

The right of the patron to privacy and confidentiality, as well as the right to free expression and access to information, are core values of the library profession. The relationship between librarian and patron is similar to the attorney/client or doctor/patient relationship. Protecting patron privacy and confidentiality has long been an integral part of the mission of libraries. The American Library Association (ALA) has affirmed a right to privacy since 1939. One of the principles affirmed in the ALA statement

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5 Ibid.
“Libraries: An American Value” is to “protect each individual’s privacy and confidentiality in the use of library resources and services.”

The ALA also affirms the principle of patron confidentiality in its Code of Ethics, Library Bill of Rights, and Policy Manual. For example, the ALA Code of Ethics, Section III, states "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.”

No federal statute provides protection for library records. The House of Representatives introduced the Video and Library Privacy Protection Act in 1988, guaranteeing broad protection to library records, including circulation records, reference interview records, database search records, interlibrary loan records, and other records concerning a person’s use of library materials and services. The bill was stripped of the language referring to libraries after the FBI objected, fearing the legislation would diminish the agency’s Library Awareness Program.

Although there is still no federal protection of library privacy, 48 states and the District of Columbia have explicit statutory protection for patron privacy, building upon

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12 Ibid.
the safeguards provided by the First and Fourth Amendments to the Constitution. For example, North Carolina protects any “library record that identifies a person as having requested or obtained specific materials, information, or services or as otherwise having used the library.” This protection extends beyond public libraries to “any private library open to the public.” The remaining two states, Hawaii and Kentucky, have opinions from the Attorney General identifying library records as belonging to a different category from other state government records and therefore protected from disclosure under open record laws.

The Fourth Amendment guarantees against search and seizure apply not only to physical materials, they also protect against electronic monitoring and surveillance. The Supreme Court held in 1967 that the Fourth Amendment applies to electronic surveillance and physical searches equally. The Court reaffirmed in 1972 that court approval was required for domestic surveillance, saying “Fourth Amendment freedoms cannot be guaranteed if domestic surveillances are conducted solely by the Executive.”

Despite constitutional and other statutory protections, libraries have faced intrusions upon patron privacy from federal law enforcement over the years. In the 1970s, the Bureau of Tobacco and Firearms established a program to check who was borrowing materials related to explosives or guerrilla warfare. In the late 1970s and 1980s, the

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14 Ibid., 206.
15 Ibid., 176.
FBI mounted its Library Awareness program to track books borrowed by patrons who had emigrated from communist countries and other persons considered security risks.\textsuperscript{20}

The Library Awareness Program’s attempt to monitor the reading habits of patrons targeted libraries that served high populations of foreigners, intellectuals, or liberals.\textsuperscript{21} Typically, an FBI agent would approach a library and request help in tracking the dissemination of sensitive but unclassified material. The agent’s request usually was not backed by the force of law, and the librarian was under no compulsion to comply.\textsuperscript{22}

In the twenty-first century, libraries face the most comprehensive and unchecked threat to privacy in history. The threat has been substantially enhanced because it is the first intrusion upon library privacy specifically sanctioned by Congress. Unlike Library Awareness Program requests, PATRIOT Act requests for information do carry the force of law. The powers bestowed upon law enforcement to compel information under the PATRIOT Act are almost unlimited, and those forced to turn records over are often enjoined from divulging they have done so.

**FISA and Section 215**

The USA PATRIOT Act made changes to at least 15 existing federal statutes.\textsuperscript{23} Many of the changes brought about by the Act were not done through new legislation contained within the Act but through alterations to existing federal laws. This can make it a somewhat difficult and complex task to trace through the maze of statutes to separate

\textsuperscript{20}Ibid., 3.
\textsuperscript{21}Jaeger, “USA PATRIOT Act,” 103.
\textsuperscript{22}Ibid.
\textsuperscript{23}Bowers, “Privacy and library records,” 380.
the PATRIOT Act innovations from what was already in place. It also makes it possible for federal agents to collect information under PATRIOT Act provisions while claiming authority from different statutes, perhaps throwing off guard the vigilance of librarians who may have a heightened awareness of “PATRIOT Act” requests.24

Some of the most significant changes were made to the Foreign Intelligence Surveillance Act (FISA), and these include the changes with the greatest import for libraries. FISA was enacted in 1978 in response to the Church Committee hearings, which had uncovered domestic spying for political purposes taking place within the Nixon administration.25 The 1967 Supreme Court ruling specifically extending Fourth Amendment search and seizure protections to include electronic searches had limited its holding to cases not “involving the national security.”26 As a consequence, surveillance conducted under the auspices of national security had received little scrutiny until the widespread abuses of the Nixon administration came to light.27

FISA was conceived as a mechanism to allow intelligence agencies to gather information on foreign threats while maintaining judicial and congressional oversights on these activities. Since foreign intelligence issues are considered matters of national security, it was intended to prevent domestic surveillance by erecting a wall between foreign surveillance efforts and domestic criminal surveillance, the loophole which had been exploited by the Nixon administration. Ironically, the changes written into FISA by

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24 Foerstel, Refuge of a scoundrel, 64.
26 Katz v United States
the PATRIOT Act have opened the door to greater domestic surveillance than ever before, with little or no meaningful oversight.

Under the original FISA, surveillance was only permitted if the primary purpose of the investigation was to obtain foreign intelligence information and if there was probable cause to believe the target of the surveillance was a foreign power or an agent of a foreign power. FISA created a special court that meets in secret to consider requests for search warrants pertaining to foreign intelligence investigations. Only the number of requests and warrants issued are released to the public. The threshold for establishing probable cause for a FISA warrant is less rigorous than the standard required for a normal criminal investigation.

Observers of the FISA court might ponder how much it actually did check executive abuse, or alternatively, whether its presence was astonishingly successful in checking such abuse, given that the special court granted 11,883 warrants between 1978 and 1999, while denying none. Whatever the inhibiting effect of the court, the PATRIOT Act rewrite of the FISA statute removed every institutional obstacle the executive might encounter to a desired investigation.

Section 215 of the PATRIOT Act substantially altered FISA, extending its sphere of influence from tightly constrained foreign entities to include every library in the United States. The language requiring that targets of an investigation be limited to foreign powers or agents of a foreign power was removed. New language extensively

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29 Bradley, “Extremism”.
30 Ibid.
expanded the scope of investigation to include any business or entity, including libraries.\textsuperscript{32}

Section 215 allows federal agents to seize “any tangible thing” by merely asserting that the material is “relevant” to an investigation related to terrorism or intelligence.\textsuperscript{33} The language of the section specifies that the agency must “apply” for a court order, but the court \textit{must} grant the warrant, regardless of whether the judge believes the request has merit. “Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested,” so long as the request fulfills the requirements of the section.\textsuperscript{34} The only restraining stipulation in the section is that the investigation not be undertaken \textit{solely} as a result of activities protected by the First Amendment, a limitation that permits investigation of religious speech, political speech, and the press as long as \textit{any} other criteria is attached to it (e.g. relevance to an intelligence investigation).

The practical effect of Section 215, by extending the targets of investigations to domestic persons with essentially no probable cause stipulations, allows “arbitrary and aimless investigation of library records and electronic information systems.”\textsuperscript{35} Of still further concern are the accompanying gag order provisions that preclude anyone associated with an investigation from disclosing that an investigation or request for information even exists.\textsuperscript{36}

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\textsuperscript{33}Foerstel, \textit{Refuge of a Scoundrel}, 57.
\textsuperscript{35}Matz, “Libraries and the USA PATRIOT Act,” 74.
\textsuperscript{36}Ibid., 75.
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The PATRIOT Act

The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act) was signed into law on Oct. 26, 2001 in the wake of the September 11 attacks. The attacks provided a rare opportunity for the executive branch to shift the balance in the struggle between governmental power and individual rights.

Arguing that the expanded powers were necessary to prevent another terrorist attack, the Bush Administration presented Congress with draft legislation on September 19 that “enhanced” over a dozen federal criminal statutes. Congress was under tremendous pressure to act quickly, lest they be accused of putting the country in jeopardy by failing to give the administration the tools needed to protect the nation. Attorney General John Ashcroft publicly warned that further terrorist attacks were imminent, and said he was “deeply concerned” with the slow pace of congressional deliberations less than two weeks after he had submitted the legislation.

Despite the intense pressure, some members of Congress were worried that the proposed legislation would remove vital individual rights guaranteed in the Fourth Amendment. Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, was afraid the Act was a “knee-jerk reaction” and said Congress was not about to grant “the
unfettered power the attorney general wanted.” Senator Russ Feingold warned that the Act contained “radical changes to law enforcement” that resembled those of a police state. Even conservative House Majority Leader Richard Armey was concerned about Fourth Amendment erosions.

However, both houses of Congress passed similar versions of the bill on Oct. 12. Political pressure was such that Senate Majority Leader Tom Daschle insisted his fellow Democrats pass the legislation unanimously. Senator Feingold urged including amendments to protect personal privacy but Daschle refused to allow them to reach the floor. Daschle admitted “my argument is not substantive, it is procedural. We have a job to do.” Feingold replied this is “one of the most important civil liberties bills of our time, and [Daschle] has asked Senators not to vote on the merits of the issue”. Feingold cast the sole Senate vote against the Act.

The House vote of 357-66 was less lopsided. It included sunset provisions sponsored by Speaker Armey which Leahy had not been able to include in the Senate bill. But the bill passed by the House was not the one delivered unanimously by the House Judiciary Committee the day before. In an extremely irregular procedure, the Justice Department persuaded the House Rules Committee to rewrite the bill to conform to Ashcroft’s specifications the night before the vote.

39 Foerstel, Refuge of a Scoundrel, 48.
40 Ball, The USA PATRIOT Act, 47.
41 Foerstel, Refuge of a Scoundrel, 48.
42 Ibid., 49.
43 Ibid., 51.
44 Ibid.
45 Ball, The USA PATRIOT Act, 47.
46 Ibid., 53.
The ranking Democrat on the House Judiciary Committee, John Conyers, was frank in his assessment. “How … could the Attorney General become a legislative member and replace all 43 members of the House Judiciary Committee? … We came the next morning … and there was a different document in front of us. Nobody had read it … but we had to vote. … It was a usurpation of the congressional prerogative.”

As awareness of the potential repercussions of the PATRIOT Act began to grow, some librarians were becoming increasingly concerned. Potential library records affected included “patron footprints in books, flash drives, servers and individual hard drives, logs of Internet use, circulation transactions, and associated registration data in print and electronic format.” Electronic transactions within the library could be accessed without the library ever knowing about it, since ISPs and telecom companies would also be subject to monitoring from the government. Some librarians also anticipated the potential for scarce resources diverted from normal library operations to comply with PATRIOT Act warrants and orders.

The climate of fear in the immediate aftermath of the September attack created a unique opportunity for the Bush administration to dictate, almost unopposed, its wish list of executive powers. The PATRIOT Act not only invested the executive branch with unprecedented and historically extra-constitutional powers of surveillance and search and seizure, it also eliminated any meaningful oversight of those powers from either Congress or the courts. Politicians in both houses of Congress had little incentive to voice misgivings about abstract transfers of civil power at a time when many Americans were

47 Ibid., 54.
49 Ibid.
persuaded by the Bush administration argument that the PATRIOT Act was an indispensable tool to protect Americans from further imminent attacks.

However, there was enough concern about some potential dangers of the legislation, voiced or unvoiced, to include sunset provisions for a few sections of the Act. Of the one hundred fifty eight sections of the PATRIOT Act, fourteen sections plus two subsections of a fifteenth section were scheduled to expire on December 31, 2005.50 Among them was the controversial Section 215, authorizing FISA court orders for FBI access to any tangible item.

**National Security Letters – Section 505**

National Security Letters (NSLs) were first authorized for use by the FBI in 1988, under provisions enacted by Congress in two separate pieces of legislation, the Right to Financial Privacy Act (RFPA) and the Electronic Communications Privacy Act (ECPA).51 NSLs granted agents access to financial institution and communication service provider records. Often described as administrative subpoenas, they authorized the collection of a significant amount of information, including subscriber information, billing records, electronic communication transactional records, financial records, and consumer identification information.52 NSLs include a non-disclosure order, making it a

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52 Ibid. , 627.
federal crime to disclose to anyone that a NSL has been issued or that an investigation is taking place.

NSLs were intended to provide a secret investigative tool to be used against foreign agents, and the authorization language was very similar to the language used for FISA court orders. They were narrowly permitted only when the sought information was “relevant to an authorized foreign counterintelligence investigation” and when “the person or entity to whom the information pertains is a foreign power or an agent of a foreign power.” There was also a probable cause standard similar to the FISA standard. Section 505 of the PATRIOT Act struck the “foreign” requirements from the NSL provision, thus expanding the reach to any domestic person or entity. But unlike the Section 215 requirement that the FBI make application for a search and seizure FISA court order (which must, by law, be granted), a Section 505 NSL does not have even token judicial review, either before or after issuance of the letter.

A Section 505 NSL, like a Section 215 request, relaxes the probable cause standard to an affirmation that the request is related either to a terrorist or an intelligence investigation, practically removing any probable cause obstacle. While Section 505, along with Section 215, also provides “that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first

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53 Ibid.
55 Foerstel, Refuge of a Scoundrel, 65. See also 107th Congress, USA PATRIOT Act, Pub Law 107-56, Section 505.
56 Mart, “Lady from Toledo,” 462.
amendment”, this leaves open the possibility that it may be conducted “primarily,” or even “overwhelmingly” on the basis of First Amendment activities.\(^{58}\) (See Appendix A)

A NSL is an administrative subpoena, not a warrant, and is never seen by a judge. The category of NSL most likely to be encountered by a library requires delivery of electronic communication transactional records to the bearer. This includes all internet traffic on a library terminal. The section also mandates that no one “shall disclose to any person” that the government has sought or obtained information.\(^ {59}\) Such a gag order, or prior restraint, has rarely been upheld when imposed by the executive or judicial branch, except in cases of clear military or national security secrets,\(^ {60}\) and a legislatively mandated prior restraint broadly tailored to apply in every investigative case unto perpetuity was previously unheard of.\(^ {61}\)

Section 215 specifically circumvents the Fourth Amendment requirements of probable cause and judicial oversight in the issuance of warrants, warrants that were already issued in secret by the FISA Court. Section 505 bypasses the Fourth Amendment altogether by allowing information to be collected “administratively”, without requiring a warrant, and compels perpetual secrecy over disclosure that the information was ever collected.

\(^{58}\) Foerstel, *Refuge of a Scoundrel*, 65.


NSLs are an important tool in the practice of pre-emptive justice, a justice that seeks to identify and stop criminals before they commit a crime. According to Justice Department testimony before Congress, “the prior standard ... put the cart before the horse. Agents trying to determine whether or not there were specific and articulable facts that a certain individual was a terrorist or spy were precluded...because...they first had to be in possession of such facts.”

NSLs are likely to be the preferred method of collecting information from libraries because of the speed and ease with which they can be issued. A NSL is sufficient authority to collect most information the FBI is likely to be interested in, and a NSL receives the least amount of scrutiny.

Library Reaction

The official library community reacted to the PATRIOT Act provisions with alarm. The ALA Council published a resolution that “considers sections of the USA PATRIOT Act ... a present danger to the constitutional rights and privacy rights of library users” and urged libraries to retain only those records necessary to fulfill the mission of the library. All fifty state library associations passed resolutions either endorsing the ALA resolution or protesting the Patriot Act in their own language. For example, the North Carolina Library Association Executive Board adopted a resolution urging legislation “which would exempt libraries and booksellers from the most onerous

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provisions (Section 215) of the USA Patriot Act." In addition, the International Federation of Library Associations (IFLA), representing 133 nations, called for the repeal or amendment of the USA PATRIOT Act in 2003.

By January, 2002, the ALA had published policy guidelines advising libraries what to do in the event of a PATRIOT Act request for information. The guidelines recommended reviewing policy in the new environment and emphasized the importance of consulting legal counsel during each step of the request process.

There was also widespread reaction within the broader library community. Many libraries did undertake a review of policies, considering their responsibilities to patrons, how to balance national security concerns with privacy preservation, weighing the feelings of the populations they served, and finally formulating a set of procedures to respond to information requests. Some libraries decided to respond by destroying records that were not necessary to the administrative operation of the library, such as computer access logs, circulation records, sign-up sheets, reference request lists, interlibrary loan records, and reserve records. Some library directors began to inform the board and staff at monthly meetings that “the FBI did not visit our library this month”, so that a future failure to convey the message would indicate the library had been subject to an FBI request.

65 Dick Kaser, "World Library Congress denounces USA PATRIOT Act (Report From the Field)," Information Today 20, no. 8 (Sept 2003).
Some libraries responded by posting signs warning patrons that the government might be spying on them, and that the library was prevented by law from informing them of the eavesdropping. For example, the Skokie, Illinois Public Library System posted signs in prominent places throughout the library advising patrons that while “the Library makes every effort to guard your privacy … Federal officials may require the Library to provide information about your use of library resources without informing you…”68 The public library in Guilford, Vermont posted signs reading “Q. How can you tell when the FBI has been to your library? A. You can’t.”69 The New Mexico legislature proposed resolutions encouraging libraries to display similar signs.70

However, not all libraries or librarians were opposed to the PATRIOT Act. The Washington Post reported in early 2003 that some librarians saw no harm in the Act, and that some libraries had removed potentially provocative material from their shelves.71 A survey by the Library Research Center at the University of Illinois found that 49% of public libraries voluntarily handed over patron records when asked to do so.72 Assistant Attorney General Viet Dinh told the House Judiciary Committee in 2003 that many FBI visits to libraries were at the invitation of suspicious librarians.73

Still, the outcry from concerned librarians was loud enough to get Attorney General John Ashcroft’s attention, who labeled the ALA’s statements on the Act

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68 Foerstel, *Refuge of a Scoundrel*, 76.
69 Ibid. , 78.
70 Ibid. , 76.
72 George M. Eberhart, "Librarians divided over PATRIOT Act compliance (News Fronts)," *American Libraries* 34, no. 3 (March 2003).
“baseless hysteria.” Ashcroft further mocked librarians for thinking the Justice Department wanted to know "how far you have gotten on the latest Tom Clancy novel.” If such non-substantive dismissals were able to gain a certain amount of currency, it was because so little was known about whether or how the Justice Department was actually using the new PATRIOT Act powers. Without evidence of use or abuse, abstract discussions about powers and rights could never carry the same sense of urgency they would assume with concrete evidence of how the Act was actually being used.

Prior to the March 2007 release of the Inspector General’s report to Congress on the use of NSLs, there was little hard evidence on how many NSLs were being issued or how often libraries were being asked for information under sections of the Patriot Act. Barring disclosure from the government, the only sources of information were either anecdotal or garnered from informal surveys. The University of Illinois reported that 545 of 906 library respondents had reported visits from law enforcement in the year following the 9/11 attacks. But the number of those visits occurring under the Patriot Act, or whether the survey results were under-reported due to the fear of breaching secrecy requirements, which carried criminal penalties, was unknown.

Attorney General Ashcroft asserted in September, 2004 that the Justice Department had never invoked Section 215 to access library records. Four days later, a

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survey released by the California Library Association revealed 14 libraries in the state had been formally approached by the FBI with requests for patron records.\textsuperscript{77}

Another survey, undertaken on behalf of the ALA, was released in June, 2005. Researchers contacted 1536 public libraries, of which 33\% responded, and 4008 academic libraries, of which 23\% responded.\textsuperscript{78} Some few librarians contacted the ALA to indicate they were afraid to take the survey because of the gag order. The survey revealed 137 legally-executed requests by law enforcement since October, 2001, 63 in public libraries and 74 in academic libraries, indicating approximately 10\% of libraries had been compelled to deliver records. The percentage of information requests obtained from this survey is nearly identical to the number obtained from the Vermont survey, during approximately the same time period.

Beyond this murky and incomplete information, almost nothing was known, since the Justice Department, citing national security, declined to answer questions regarding whether they had requested library records. Still claiming that Section 215 had never been invoked as late as 2007, the Justice Department in 2005 had said nothing at all regarding the use of NSLs to obtain library records.\textsuperscript{79}

Nearly four years after passage of the Patriot Act, with the sunset provisions up for reauthorization in late 2005, little had changed in the standoff between libraries and the Justice Department. While librarians remained suspicious of the objectionable

\textsuperscript{77}“FBI Visited 16 California Libraries Since 9/11,” \textit{American Libraries} 34, no. 10 (Nov 2003).
\textsuperscript{79}Norman Oder, “FBI Won’t Reveal NSLs at Libraries (Federal Bureau of Investigation on National Security Letters ),” \textit{Library Journal} 132, no. 8 (May 1, 2007).
provisions of the Act, they had little concrete evidence of its abuse. Then, in August 2005, the American Civil Liberties Union announced a court case that galvanized the library world anew.

**Doe v Gonzales**

The first confirmed instance of an attempt to collect library records under the PATRIOT Act was revealed on August 25, 2005, when the American Civil Liberties Union (ACLU) announced that it had filed a lawsuit on August 9 in Federal District Court, Bridgeport, Connecticut, on behalf of a Connecticut library. The FBI had demanded library records under Section 505 of the Patriot Act, in the form of a National Security Letter. The library refused to comply.

The lawsuit, John Doe v Alberto Gonzales (John Ashcroft had resigned as Attorney General in late 2004 and Gonzales had replaced him), was filed under seal, and names and other information were redacted from the public court documents because of federal secrecy requirements.

The suit challenged the constitutionality of National Security Letters under Section 505, codified in 18 U.S.C. §2709(c). It asserted violations of the First, Fourth, and Fifth Amendments on five separate grounds. The main thrust of the arguments against the government was that the NSL violated the Fourth Amendment by demanding information without demonstrating a compelling need, and the First Amendment by prohibiting Doe from disclosing that information was sought.

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81 Ibid.
Doe was anxious to speak out on his experience as a recipient of a NSL. Congress was debating the reauthorization of the Patriot Act, and as the only known recipient of a NSL served on a library, his testimony could have great influence, both on Capitol Hill and with the public. According to the New York Times, the issue over library records was the single most divisive issue in the reauthorization debate.\(^{83}\)

The ACLU sought a preliminary injunction that would restore Doe’s right to identify himself as the recipient of the NSL. Doe was prevented from attending the hearing, and the Court strove to refer to him as “it”, presumably to offer no gender clues, despite the plaintiff being named “John” in the title of the case.\(^{84}\)

Barely one week later, Judge Hall ruled in favor of Doe and granted the injunction. The ruling declared the gag provision of Section 505 unconstitutional on First Amendment grounds. Hall commented “The potential for abuse is written into the statute: the very people who might have information regarding investigative abuses and overreaching are preemptively prevented from sharing that information with the public.”\(^{85}\) And further “Considering the current national interest in and the important issues surrounding the debate on renewal of the PATRIOT Act provisions, it is apparent to this court that the loss of Doe’s ability to speak out now on the subject as a NSL recipient is a real and present loss of its First Amendment right to free speech that cannot be remedied.”\(^{86}\)

\(^{83}\) Lichtblau, “F.B.I., Using PATRIOT Act.”
\(^{86}\) Ibid., 9.
However, Hall stayed the decision until September 20, to allow the government time to appeal. On that date, the US Court of Appeals for the Second Circuit in Manhattan extended the stay to grant further time for the government to prepare its case in the appeal.\(^{87}\)

The next day, the New York Times revealed that the recipient of the NSL was Library Connection, a 26-library consortium based in Windsor, Connecticut.\(^{88}\) It had previously been reported that Library Connection was thought to be the recipient, inferred from court documents. That was confirmed to be correct when the government so bungled the case as to publish the name of the plaintiff’s organization in the court docket, submitted by the Justice Department defendants – thus revealing the very information they were fighting in court to prevent being released.

The case was now moot, as far as the information itself was concerned, but the government refused to relent and allow John Doe to speak. Frustrated, and with the debate over reauthorization at a high pitch on Capitol Hill, the ACLU applied to Supreme Court Justice Ginsburg, who handled emergency appeals from the Second Circuit, to lift the gag order. Although Justice Ginsburg praised the “cogent” arguments presented by the library system, she declined to grant relief, saying the situation was not an emergency justifying Supreme Court intervention.\(^{89}\)

\(^{88}\) Ibid.
Reauthorization

The debate over reauthorization of the Patriot Act continued in the halls of Congress, but John Doe and Library Connection of Windsor, Connecticut would not be a part of it. Still, the issue of library records and Section 505 was one of the most contentious. In fact, it was a measure of the success of librarians in calling attention to Section 505, as well as the attention that the Library Connection case had garnered, that Section 505 was being debated in Congress at all, since the section was not one of those scheduled to sunset.90 It was a permanent provision of the PATRIOT Act. The concerns raised by librarians occupied center stage. “Even supporters of the Patriot Act acknowledged that the image of plucky librarians standing up to the Bush administration and refusing requests for information about their users was a politically powerful one.”91

Librarians lobbied heavily to have language included that would exempt them from NSLs. But the Bush Administration was resistant to any changes in the Act. In an effort to reach a compromise that would allay the concerns of civil libertarians, four Republican Senators, led by John Sununu of New Hampshire, crafted legislation that was acceptable to both the White House and the Democrats.92

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90 Gorham-Oscilowski, “National security letters,” 635.
Included within the compromise was language specifically excluding libraries from the jurisdiction of National Security Letters (libraries had not been mentioned in the original Patriot Act). At least, that is how the legislation was represented. Senator Durbin engaged Senator Sununu in a colloquy on the Senate floor on that precise point:

Durbin: I understand that section 5 of Senator Sununu's bill, S. 2271, will help protect the privacy of Americans' library records. … I would like to ask Senator Sununu … if he could explain to me what section 5 will accomplish.
Sununu: … section 5 is intended to clarify current law regarding the applicability of National Security Letters to libraries. … Section 5 clarifies … that a library providing basic Internet access would not be subject to a national security letter …

This appeared to resolve the matter. The media reported that libraries had been excluded from provisions of the Patriot Act. This concession, along with a provision that no longer required NSL recipients to inform the FBI of the name of their lawyer, were the primary substantive changes to Section 505 in the Patriot Act Reauthorization Bill.

The Reauthorization passed in March, 2006, in part due to the mollification of librarians. But celebration of the librarians’ victory was short-lived. Inspection of the language revealed that nothing had changed.

A library … is not a wire or electronic communication service provider for purposes of this section, unless the library is providing the services defined in section 2510(15) (‘electronic communication service’) of this title. (emphasis added)

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93 Congressional Record, 16 February, 2006, (Senate). S1379-S1403.
Section 2510(15) defines an electronic communication service as “any service which provides to users thereof the ability to send or receive wire or electronic communications,” a definition that includes virtually every library in operation today.

Senator Feingold drew the same conclusion:

This modification states that the FBI cannot issue an NSL … to a library unless the library is offering ‘electronic communication services’. … But that just restates the existing requirements of the NSL statute. …So that provision has no real legal effect whatsoever. Perhaps that explains why the American Library Association issued a statement calling this provision a ‘fig leaf’.

Ann Beeson, the ACLU lawyer who filed the case for Library Connection, commented "The revised law provides almost no protection whatsoever for libraries. It's virtually meaningless."

FBI Director Robert S. Mueller also appeared to agree that libraries were still subject to NSLs. Responding to a question from the Senate Committee on the Judiciary in May 2006 on whether libraries were subject to NSLs or not, his answer recalled the text of the legislation - “a library is only subject to an NSL if it provides electronic communication services."

The reauthorized PATRIOT Act incorporated some changes, most of them not substantially altering the original Act. Much of the focus was on Section 215, which

allowed agents to seize “any tangible thing”, and the threshold for authorizing an
investigation was tightened to reasonable grounds that the sought information was
relevant to a terrorist or intelligence investigation.\textsuperscript{100} Also, the Attorney General was
now required to report annually to Congress on the number of 215 orders.

Section 505 included a reauthorization provision providing for judicial review of the nondisclosure order, but the government merely had to assert that nondisclosure was
necessary to national security for nondisclosure to prevail.\textsuperscript{101}

The PATRIOT Act was now permanent, except for two sections scheduled to expire on December 31, 2009.\textsuperscript{102} One of them was the controversial Section 215, the other the lesser-known Section 205, authorizing roving wiretaps.

\textbf{Doe v Ashcroft}

While Congress was debating the reauthorization in late 2005, the Second Circuit Appeals Court was beginning to hear arguments in the Library Connection case, as well as another case involving a NSL.\textsuperscript{103} The second case, also filed by the ACLU, this time in US District Court in Southern New York, was an earlier one, filed in April 2004, on behalf of an Internet Service Provider. In circumstances similar to the Library Connection case, Doe (Doe v Ashcroft) received a telephone call from the FBI informing him he would be served with a NSL.\textsuperscript{104} He then received a document directing him to provide

\textsuperscript{100} Matz, “Libraries and the USA PATRIOT Act,” 81.
\textsuperscript{101} Gorham-Oscilowski, “National security letters,” 636.
\textsuperscript{102} Matz, “Libraries and the USA PATRIOT Act,” 81.
certain information under the authority of Section 505, and certifying that the information was relevant to a terrorist or intelligence investigation. He was further prohibited “from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.” Doe was instructed to provide the records “personally”, not by mail, and not to mention the NSL in any telephone conversation.

Doe decided to consult with ACLU lawyers, in itself a risky decision, given that the prior restraint made no exception for legal counsel. He decided not to comply with the request and engaged the ACLU to bring suit against the government. Also similar to the Library Connection case, the suit challenged the constitutionality of NSLs under Section 505 on First, Fourth and Fifth Amendment grounds.

United States District Judge Victor Marrero delivered his ruling on September 28, 2004, nearly a full year prior to the filing of the Library Connection case and the contentious debate over reauthorization in Congress. His decision substantially echoes, in unusually clear language, the concerns over the NSL provisions so often voiced by critics of the PATRIOT Act, concerns dismissed as misplaced by the Bush administration.

The Court concludes that §2709 violates the Fourth Amendment because…it effectively bars…any judicial challenge to the propriety of an NSL request. … The Court also concludes that the permanent ban on disclosure contained in 18 U.S.C. §2709(c) … operates as an unconstitutional prior restraint on speech in violation of the First Amendment.
The judge was clear about both his reasoning and the intended effect on Section 505 NSLs:

In simplest terms, §2709(c) fails to pass muster under … First Amendment standards … because it is so broad and open-ended. … It prohibits the NSL recipient … from revealing the existence of an NSL inquiry the FBI pursued under §2709 in every case, to any person, in perpetuity, with no vehicle for the ban to ever be lifted from the recipient or other persons affected, under any circumstances, either by the FBI itself, or pursuant to judicial process. … the Court…[enjoins] the Government from using §2709 in this or any other case as a means of gathering information from the sources specified in the statute.108

The judge went on to explain that even if the statute were read to allow the recipient to consult an attorney and challenge the NSL in court, it would still be unconstitutional because it forces “the reasonable NSL recipient to immediately comply with the request. This lack of effective process … renders §2709…unconstitutional, in violation of the Fourth Amendment.” The Court also affirmed that “the Fourth Amendment’s protection against unreasonable searches applies to administrative subpoenas.”

The decision was a shattering blow to one of the two PATRIOT Act sections librarians had most vociferously opposed. However, it had no immediate effect since, as Judge Hall would do in the Library Connection case almost a year later, Judge Marrero stayed his decision for a short period, in deference to the government’s national security claims, to give the government time to appeal. Final resolution for the case would not come until over four years later, in December, 2008.

108 Ibid.
Doe v Ashcroft was significant not only because it invalidated the use of national security letters under the PATRIOT Act, but because it was the first time anyone had challenged a NSL since they were first authorized in the 1980s. As the judge pointed out, the NSLs were structured to be so coercive that despite the thousands of letters which had been issued “the Court finds it striking that, in all the years during which the FBI has been serving NSLs … no single NSL recipient has ever sought to quash such a directive.\textsuperscript{109} … For the reasonable NSL recipient confronted with the NSL’s mandatory language and the FBI’s conduct related to the NSL, resistance is not a viable option.”\textsuperscript{110}

In April, 2006, one month after reauthorization of the Patriot Act, and while the Second Circuit Court was considering the government’s appeals in both the Library Connection case and the ISP case, the government dropped its appeal of the Library Connection ruling. The timing fueled suspicion that the Justice Department had kept the appeal going only to prevent John Doe from speaking out while Congress was considering renewing the Act, especially since it had already, months earlier, inadvertently released the information it was litigating to keep secret.\textsuperscript{111}

The Library Connection case was over and John Doe would finally be able to reveal his name and speak out on his experiences. But renewal of the PATRIOT Act meant Judge Marrero had to hear the ISP case all over again, since the language of §2709(c) had been subtly altered, rendering his original decision inoperable.

\textsuperscript{109} Ibid.
\textsuperscript{110} Ibid.
\textsuperscript{111} Amy Stone, “Government Drops Appeal In Patriot Act Case,” \textit{American Libraries} 37, no. 5 (May, 2006).
On September 6, 2007, Judge Marrero again struck down the NSL.\textsuperscript{112} He ruled that the revised statute violated the First and Fourth Amendment and was unconstitutional on its face. He described the NSL in strong language as the first step towards “the legislative equivalent of breaking and entering, with an ominous free pass to the hijacking of constitutional values. The pernicious consequences which that prospect could trigger cannot be overstated. …”\textsuperscript{113} Once again, the Judge granted a stay to allow the government to appeal. It would finally be resolved by the Second Circuit Court of Appeals in December, 2008, this time as Doe v. Mukasey.

Library Connection

John Doe of Library Connection, a consortium of 27 libraries located around Hartford, Connecticut, was actually a group of 4 plaintiffs. One of them, George Christian, the library’s Executive Director, was informed by his telecommunications manager, Ken Sutton, that the library was about to be served a NSL after Sutton received a telephone call from an FBI agent on July 8, 2005. The agent advised Sutton that the library was being served an NSL, and asked the proper person to address the order.\textsuperscript{114} Sutton replied the proper person was George Christian.

The NSL arrived five days later (See Appendix B), addressed to Ken Sutton, dated May 19, almost two months earlier. It instructed the library to provide “any and all” patron information, including computer access logs, related to a specific IP address over a


\textsuperscript{113} Ibid., 72.

\textsuperscript{114} Matz, “Libraries and the USA PATRIOT Act,” 78.
period of time on the previous February 15. The letter contained the same certification that the information was relevant to a terrorist or intelligence investigation, the same prohibition on disclosure, and the same instruction to provide the information personally, as in the letter the John Doe ISP had received a year earlier.

Christian was aware of the New York District Court’s decision invalidating the NSL statute on constitutional grounds, and he had already decided to challenge the letter before it arrived, but he felt the Executive Committee should make the decision for the consortium.\textsuperscript{115} He called an emergency meeting with Barbara Bailey, Peter Chase, Janet Nocek, and the consortium’s legal counsel. The committee agreed to challenge the order and decided to seek assistance from the ACLU. They also planned to seek relief from the nondisclosure provision to increase public awareness of the PATRIOT Act’s power over libraries during the reauthorization debate.\textsuperscript{116}

One aspect of the letter’s demand that troubled the committee was that it was impossible to provide the information requested without also providing information on other computer users during the time period and possibly, every user in the library.\textsuperscript{117} This was due to the router’s configuration and the period of time that had elapsed since the use.

Another troubling aspect was the eight week period between the date of the letter and the time it was received. It seemed unlikely that speedy compliance was an urgent matter of national security.\textsuperscript{118} These considerations, along with their existing

\begin{footnotes}
\item[115] Ibid.
\item[116] Ibid., 79.
\item[117] Ibid.
\item[118] Ibid.
\end{footnotes}
commitment to protect the rights of their patrons, persuaded the committee that some form of judicial review was necessary and appropriate.

The ACLU filed the suit in August, 2005 and a hearing was scheduled. The plaintiffs were not allowed to be present at their hearing because of the possibility they could be identified.\textsuperscript{119} Instead, they had to watch the proceedings via closed-circuit television. After the government failed to redact information identifying the plaintiffs from the court documents, and after the New York Times published the name of the library in September, there was little reason to insist on secrecy any longer, but the Justice Department persisted. When the Second Circuit Court of Appeals heard arguments in November, Christian and Chase were allowed to attend, but they had to enter, sit and leave the building separately.\textsuperscript{120} Further, the government insisted that the newspaper articles submitted to the Court identifying the plaintiffs remain under seal, although the contents of the media article, and the names of the plaintiffs they identified, were obvious public knowledge. Not until the PATRIOT Act was reauthorized did the government suddenly drop the case.

A further aspect of the case served to heighten the Orwellian aura surrounding it for plaintiff Peter Chase. Chase was also chair of the Intellectual Freedom Committee for the Connecticut Library Association. He was invited on several occasions during 2005-2006 to debate the PATRIOT Act with federal defense attorney Kevin O’Connor. O’Connor was the government attorney defending the Library Connection case.\textsuperscript{121} Chase refused the invitations, afraid that he would “inadvertently reveal that I was a John

\textsuperscript{120} Matz, “Libraries and the USA PATRIOT Act,” 80.
\textsuperscript{121} American Library Association, “Connecticut librarians”.
Doe.” But O’Connor was free to “travel around the state telling people that their library records were safe, while at the same time he was enforcing a gag order preventing me from telling people that their library records were not safe.”¹²²

The Library Connection plaintiff’s were finally free to speak, and they were all present at a press conference on May 30, 2006.¹²³ Chase announced “I’m John Doe, and if I had told you before today that the FBI was requesting library records, I could have gone to jail.” Christian commented:

Free public libraries exist in this country to promote democracy by allowing the public to inform itself on the issues of the day. The idea that the government can secretly investigate what the public is informing itself about is chilling. … The entire Patriot Act was up for renewal last winter…and as the recipient of a National Security Letter I felt I had an important perspective to offer. … The fact that I can speak now is a little like being permitted to call the Fire Department only after a building has burned to the ground. … Being gagged has … [placed] … me in uncomfortable circumstances where I couldn’t be completely open and honest. … neither I nor the committee members could reveal to the rest of the board or to the membership at large … that we were committing the corporation to a lawsuit against the Attorney General of the United States.¹²⁴

**Extent of Use**

It is likely that librarian interest in and awareness of the PATRIOT Act began to wane after 2006. The Act had been reauthorized and consequently there was far less public comment and debate. It had been widely reported that the reauthorization legislation had excluded libraries from PATRIOT Act provisions, and even though the

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¹²² Ibid.
¹²³ Ibid.
ALA and others sought to counter these impressions (for example, George Christian testified before the Senate Judiciary Committee “It is widely believed that some civil liberties were restored in [the reauthorized version of] the PATRIOT Act, but they were not”)[125], it is doubtful whether librarians were exercising the same amount of vigilance they had previously.

It was also widely perceived that the Connecticut librarians had prevailed in the legal battle. After all, the government had dropped the case and the librarians had been allowed to speak. However, after three years of litigation and a district court ruling declaring national security letters unconstitutional, there had as yet been no practical effect on the government’s use of PATRIOT Act powers.

How extensively were these powers being used? Senator Patrick Leahy asked FBI Director Robert Mueller how many times NSLs had been served on libraries in early 2007. [126] While a number was eventually given to Leahy, it was classified.

The evidence of the overall extent came from the government itself. The Inspector General of the Justice Department was mandated by the original legislation to make reports to Congress about both the numbers of Section 215 orders and 505 NSLs. Two reports have been issued, the most recent in March, 2008.[127] For the four-year period 2003-2006, 192,499 NSLs were issued.[128] Extrapolating from these numbers, and considering the rate of increase reported each year, well over 300,000 NSLs can be estimated to have been served since the PATRIOT Act was authorized in 2001.

[128] Ibid., 9.
The Office of the Inspector General’s report detailed abuses, including violations of the law, improper requests, improper authorization, and collecting too much data.\textsuperscript{129} It also revealed that more than half of the NSLs targeted US citizens. A few months later, the number of abuses swelled to several thousand, far more than disclosed in the OIG report, when an internal FBI audit became public.\textsuperscript{130} The abuses included issuing NSLs before the FBI had even opened the certified investigation, and using NSLs to obtain information about persons several steps removed from the subject of an investigation.

The OIG report on Section 215 orders, also released in March, 2008 is heavily redacted.\textsuperscript{131} It reports 68 orders issued between 2002-2006. The wide disparity of numbers between Section 215 and Section 505 orders confirms the predictions of civil libertarians who argued that the preferred method of gathering information by the FBI would be NSLs due to their ease of use. Although the PATRIOT Act relaxed the standard required for Section 215 orders, the FBI still has to fulfill the procedural application for FISA approval. No such extra-agency procedure is required for a NSL.

The number of NSL orders should serve to inform librarians that Section 505 is by far the most likely avenue through which they will face a PATRIOT Act request. In the past, especially before the Library Connection case raised the profile of NSLs, Section 215 received the greatest amount of coverage in the library, as well as national press.

Internet Archive

The Internet Archive, founded by Brewster Kahle in 1996, is a large electronic library involved in the digitization and preservation of web pages, books, and other multimedia formats. The second known case of a library being served a NSL became public on May 7, 2008, when the Internet Archive announced it had successfully challenged a request for information.\(^{132}\) Kahle received the letter on November 26, 2007, asking for the name, address, and electronic activity of one of the Archive’s registered users.

The ACLU and Electronic Frontier Foundation (EFF) filed suit in December on behalf of the Archive.\(^{133}\) In April, 2008, the government withdrew the letter and gag order and settled the case. The court unsealed the documents in May. As part of the settlement, Kahle agreed not to speak about certain aspects of the case, such as exactly what information the FBI had sought, and parts of the unsealed documents are still redacted.

The case did apparently settle the question of whether the FBI considers libraries to be electronic communication services. The Internet Archive is a member of the ALA and is recognized as a library by the State of California.


The Archive retains very little information from its users – only an unverified email address. It does not log IP addresses or keep information about what users access on the site. Kahle commented “As a library, we know that we've long protected patrons from government intrusions. Our document retention policies did exactly what we intended them to do.”

**Doe v Mukasey**

The NSL case involving the Internet service provider was finally resolved, four and a half years after it began, in December, 2008. It was the only remaining case pertaining to a NSL order, the other two library cases having been dropped by the government. At stake was the constitutionality of the NSL itself, the statute authorizing it having been declared unconstitutional on two separate occasions by District Court Judge Marrero. Also at risk was the nondisclosure portion of the statute. It had been invalidated three times, once by District Court Judge Hall in the Library Connection case.

The three-judge Second Circuit panel ruling was a partial victory for civil libertarians. It affirmed that the nondisclosure gag order portion of the statute was unconstitutional in the absence of judicial review, but allowed the rest of the statute authorizing NSLs to stand. In essence, it avoided considering whether the NSL statute itself was unconstitutional because the government had withdrawn the information request. It had not, however, withdrawn the nondisclosure requirement. “The validity of

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134 Singel, “FBI targets Internet Archive”.
the NSL … is no longer at issue because the Government has withdrawn it. We therefore consider only the Government’s challenges to the District Court’s rulings with respect to the nondisclosure requirement.\textsuperscript{137} The Court spent some length discussing the precedence for severing part of a statute from another, while leaving the rest intact. Then, “With the NSL statutes now construed to avoid some of the Plaintiffs’ constitutional challenges … we disagree that section 2709 … must be stricken and their enforcement enjoined.”\textsuperscript{138}

The practical effect of the ruling is that NSLs can be issued as before, but the government now has the burden of justifying in court that the recipient must be silenced. “We construe subsection 2709(c)…to place on the Government the burden to show that a good reason exists to expect that disclosure of receipt of an NSL will risk an enumerated harm.”\textsuperscript{139} And “The fiat of a governmental official…cannot displace the judicial obligation to enforce constitutional requirements. ‘Under no circumstances should the Judiciary become the handmaiden of the Executive.’”\textsuperscript{140}

The court decision should mean that if a library receives a NSL in the future, it will not contain the gag order. But in view of past disclosed abuses, a library cannot assume that a NSL issued in the future will reflect the court ruling. Therefore, librarians should be aware that the gag order portion of the NSL has been ruled unconstitutional, and they cannot be prevented from speaking about it.

\textsuperscript{137} Ibid., 19. 
\textsuperscript{138} Ibid., 53. 
\textsuperscript{139} Ibid., 48. 
\textsuperscript{140} Ibid., 47.
Obama Administration

It is unclear what changes, if any, the Obama Administration and Justice Department may seek regarding either the use of NSLs or the PATRIOT Act in general, but preliminary indications signal a continuation of the post-PATRIOT Act status quo. Prior to Obama’s election, the Democratic Party made several statements that raised the hopes of civil libertarians, but since the election there is little to indicate a strong departure from current practice.

The Democratic Party Platform of 2008 statement on civil liberties said “We reject the use of national security letters to spy on citizens who are not suspected of a crime” and “We will revisit the PATRIOT Act.” However, Section 505 is a permanent part of federal law, not scheduled for sunset. Whether the new Obama administration will consider revising the NSL statute to meet civil libertarian’s concerns a high priority or not remains to be seen, but there are indications that it will not.

As a senator, Obama’s understanding of the reauthorized PATRIOT Act, and what it meant for libraries, was not quite in line with the ALA position, which considered the changes on behalf of libraries not meaningful. Obama supported reauthorization, saying:

We protected most libraries from being subject to national security letters … we strengthened judicial review of National Security Letters. … I would have liked to see stronger judicial review of National Security Letters. … So, I will be supporting the PATRIOT Act compromise. But I

urge my colleagues to continue working on ways to improve the civil liberties protections in the PATRIOT Act after it is reauthorized.\textsuperscript{142}

Since his inauguration, there are indications that libraries can expect a continuation of some past policies. Attorney General Eric Holder said at his confirmation hearing that he supported renewing Section 215 that allows FBI agents to seek records from businesses, libraries and bookstores.\textsuperscript{143}

\section*{Library Policy}

Librarians have a proud tradition of defending First Amendment rights, and they continue to defend those rights today. Over a quarter million national security letters have been issued, yet they have only been challenged three times. Two of those three challenges came from librarians. Despite the difficulties of mounting legal challenges which require anonymity, these librarians have been willing to shoulder those burdens in an effort to preserve their patrons` privacy.

However, not all libraries have policies in place that recognize and anticipate the information requests from law enforcement that they may be confronted with. Some libraries still do not have patron privacy policies. Libraries without privacy or information protection policies may be at a disadvantage in fulfilling their traditional ethical responsibility to protect the rights of their patrons.

The American Library Association provides policy guidance. Their recommendations can be distilled into three general principles: (1) formally adopt a

\begin{thebibliography}{99}
\bibitem{142} Congressional Record – Senate, Feb 16, 2006, S1401.
\end{thebibliography}
policy that recognizes circulation and other patron records confidential, (2) advise all librarians and library employees that records are not to be provided to law enforcement except under due authorized process, and (3) resist turning records over until good cause is shown in court.144

Librarians and library employees should refer information requests to the library director, who can then consult the library’s attorney to determine the proper response. The only information that will be collected immediately, on demand, is information accompanied by a legal search warrant. In the event of a search warrant, the library can ask for counsel to be present.

If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land...Then the spectre of a government agent will look over the shoulder of everyone who reads.

Associate Justice William Douglas, US v Rumely

Appendix A

Comparison showing struck portions of §2709 with highlighted PATRIOT Act additions.

18 U.S.C. § 2709 -- Counterintelligence access to telephone toll and transactional records

(a) Duty to provide.—A wire or electronic communication service provider shall comply with a request for subscriber information and toll billing records information, or electronic communication transactional records in its custody or possession made by the Director of the Federal Bureau of Investigation under subsection (b) of this section.

(b) Required certification.—The Director of the Federal Bureau of Investigation, or his designee in a position not lower than Deputy Assistant Director at Bureau headquarters or a Special Agent in Charge in a Bureau field office designated by the Director may—

(1) request the name, address, length of service, and local and long distance toll billing records of a person or entity if the Director (or his designee in a position not lower than Deputy Assistant Director) certifies in writing to the wire or electronic communication service provider to which the request is made that—

(A) the name, address, length of service, and toll billing records sought are relevant to an authorized foreign counterintelligence investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States; and

(B) there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801)

(2) request the name, address, and length of service of a person or entity if the Director (or his designee in a position not lower than Deputy Assistant Director) certifies in writing to the wire or electronic communication service provider to which the request is made that—

(A) the information sought is relevant to an authorized foreign counterintelligence investigation to protect against international terrorism or clandestine intelligence activities, provided that such an investigation of a United States person is not conducted solely on the basis of activities protected by
the first amendment to the Constitution of the United States.

(B) there are specific and articulable facts giving reason to believe that communication facilities registered in the name of the person or entity have been used, through the services of such provider, in communication with—

(i) an individual who is engaging or has engaged in
international terrorism as defined in section 101(c) of the
Foreign Intelligence Surveillance Act or clandestine
intelligence activities that involve or may involve a
violation of the criminal statutes of the United States; or

(ii) a foreign power or an agent of a foreign power
under circumstances giving reason to believe that the
communication concerned international terrorism as
defined in section 101(c) of the Foreign Intelligence
Surveillance Act or clandestine intelligence activities that
involve or may involve a violation of the criminal statutes
of the United States.

(c) Prohibition of certain disclosure.—No wire or electronic
communication service provider, or officer, employee, or agent thereof,
shall disclose to any person that the Federal Bureau of Investigation
has sought or obtained access to information or records under this
section.

(d) Dissemination by bureau.—The Federal Bureau of Investigation
may disseminate information and records obtained under this section
only as provided in guidelines approved by the Attorney General
for foreign intelligence collection and foreign counterintelligence
investigations conducted by the Federal Bureau of Investigation, and,
with respect to dissemination to an agency of the United States, only if
such information is clearly relevant to the authorized responsibilities of
such agency.

(e) Requirement that certain congressional bodies be informed.—On a
semiannual basis the Director of the Federal Bureau of Investigation
shall fully inform the Permanent Select Committee on Intelligence of the
House of Representatives and the Select Committee on Intelligence of
the Senate, and the Committee on the Judiciary of the House of
Representatives and the Committee on the Judiciary of the Senate,
concerning all requests made under subsection (b) of this section.
Appendix B

U.S. Department of Justice
Federal Bureau of Investigation

in Reply, Please Refer to
File No. NH-43906

New Haven Division
600 State Street
New Haven, Connecticut 06511

May 19, 2005

Mr. Kenneth Sutton
Systems and Telecommunication Manager
Library Connection, Inc.
599 Mattatuck Avenue
Windsor, Connecticut

Dear Mr. Sutton:

Under the authority of Executive Order 12333, dated December 4, 1981, and pursuant to Title 18, United States Code (U.S.C.), Section 2709 (as amended, October 26, 2001), you are hereby directed to provide to the Federal Bureau of Investigation (FBI) any and all subscriber information, billing information and access logs of any person or entity related to the following:

**IP Address:** 216.47.180.118, **Date:** 02/15/2005; **Time:** 16:00 to 16:45 (PM) EST

In accordance with Title 18, U.S.C., Section 2709(b), I certify that the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities, and that such an investigation of a United States person is not conducted solely on the basis of activities protected by the first amendment to the Constitution of the United States.

You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions.

You are requested to provide records responsive to this request personally to a representative of the New Haven field office of the FBI. Electronic versions of the records are requested, if available. Any questions you have regarding this request should be directed only to the New Haven field office. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation or electronic communication.

Your cooperation in this matter is greatly appreciated.

Sincerely,

Michael J. Wolf
Special Agent in Charge
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