LIBERTY, SECURITY, AND INDIANA LIBRARIES

by J. Douglas Archer

"Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety." (Franklin, as cited in Platt, 1989, #1056)

PATRON PRIVACY AND CONFIDENTIALITY

Until recently, most library literature on intellectual freedom and censorship focused on external efforts to restrict access to materials already owned or made accessible by libraries. With 9/11 and the passage of the USA PATRIOT Act, the defense of patron privacy and the confidentiality of patron records, long a growing concern, has jumped to the fore. Self-censorship by citizens afraid to exercise their freedom to read out of fear that someone may uncover their reading habits and subject them to social or state sanctions has become a major issue. ("Read" is used throughout this essay for "read, view, listen to, or access.") In legal terms such fears exert a "chilling effect" on the exercise of First Amendment liberties (American Library Association, Manual, 2006).

People often ask why anyone would care whether his or her reading habits were known. They seem to assume that unless a person was doing something illegal or otherwise inappropriate he or she would not care if people knew. However, it does not take long to think of exceptions to this assumption. Consider the person who is seeking information about sexual or physical abuse because a friend or family member or the person in question is suffering such abuse. Then there is the pregnant and scared teenager or the person considering divorce or bankruptcy or the person facing any of a vast number of similarly sensitive, personal challenges.

In addition, there are always those topics which are politically sensitive. They vary from time to time but they are always present. For example, in the 1950s reading about communism, especially in small town America could cost a person his or her job – even if his or her only purpose was to better understand the "enemy." In post 9/11 America, reading about Islam can produce the same result not to mention actually requesting books on Osama Bin Ladin (Airoldi, 2005). This author is personally acquainted with students who have been challenged by friends because they were reading *Messages to the World: The Statements of Osama Bin Laden* for a class.

THE USA PATRIOT ACT – PASSAGE AND PROVISIONS

Five years ago, shortly after 9/11, both houses of Congress overwhelmingly passed the USA PATRIOT Act with bi-partisan support. The sense of urgency present at that time, the need to "do something" was immense. In what appeared to be a state of near but understandable panic, the USA PATRIOT Act was introduced, passed, and signed in four days without a single public hearing (USA PATRIOT Act, 2001). Consequently, debate about the implications of its provisions for civil liberties in general and intellectual freedom in America's libraries in particular could only begin after the fact. It did and has increased steadily since then with the library profession taking a leading role.

Of special interest to librarians were the act's key provisions, sections 214, 215, 216, and 505. Section 215, authorizing the issuance of subpoenas and warrants for business records and the conditions under which those subpoenas and warrants might be challenged, was of particular concern. Since no exemption for libraries was included, library records were subject to these new regulations. Of primary concern were 1) the lowering of the standard for the issuance of court orders from "show probable cause" to the affirmation that the information sought was "relevant to an ongoing terrorism investigation," 2) the almost automatic issuance of accompanying gag orders prohibiting recipients from notifying anyone of the service of such orders or of effectively appealing them, and 3) the expanded authorization of "National Security Letters" (American Library Association, USA PATRIOT Act of 2001, 2006). The latter are essentially administrative warrants or subpoenas not requiring court approval. All of these provisions have the potential of creating a particularly strong "chilling effect" in libraries and consequent self-censorship by library users.

Before proceeding further, it is important to note that ALA has never sought a repeal of the entire USA

PATRIOT Act, only a modification of specific sections. In addition, it has never denied that there may be times when the executive branch may have a legitimate need to access library records. Its concern has always been for a revision of the justification required for the issuance of warrants and subpoenas and the absence of effective judicial and/or congressional oversight of the executive when exercising such powers. It is also imperative to note that neither the passage nor revision of the Act has been or should be strictly partisan. One need not belong to any particular political party or reside at any particular point on the political spectrum to be concerned about civil liberties. Finally, it is essential to note that this author is not an attorney and is expressing purely lay opinions of constitutional law.

THE USA PATRIOT ACT – REAUTHORIZATION AND REVISION

During the last five years several attempts have been made to amend the Act. Support for such revision has grown and expanded due to intense lobbying by interested groups, especially ALA. The fact that former Attorney General Ashcroft referred to librarians as being "hysterical" while denying any interest in library records indicated that the profession was making itself heard (McFeatters, 2003). Another indicator that the profession was making its point was the release of an internal FBI email indicating frustration with having to deal with "radical, militant" librarians (Lichtblau, 2005).

In addition, the general public and the Congress have reacted strongly to various other actions of the current administration which impact privacy rights. Among these are revelations about the run up to, and subsequent conduct of, the Iraq war, especially torture at Abu Ghraib, the disclosure of a domestic surveillance or spying program, the increasing use of "presidential signings" (the signing of a bill into law with stated presidential exceptions), and the lesser known but still troubling reclassification of previously published government documents. Finally, the irony of increasing government demands for access to the private business, medical, legal, and library records of its citizens while at the same time it maintains an increasingly reticent stance on revealing information about the conduct of government (i.e. public) business has began to dawn upon large segments of the American public.

Early on, most concern was being expressed by the usual suspects, the library profession as represented by ALA, the ACLU, and several other groups often identified as liberal or "left wing." Then several conservative groups including the Eagle Forum, the American Conservative Union, and the Citizens for the Right to Keep and Bear Arms entered the fray in support of revision out of concern for eroding first, second, and fourth amendment rights (Teepen, 2005). Recently, several mainstream organizations in the business community including the National Association of Manufacturers and the U. S. Chamber of Commerce also came out in support of further revisions (Swibel, 2005). In addition, hundreds of municipalities and associations passed ordinances or resolutions calling for revision or outright repeal of the Act (American Library Association, USA PATRIOT Act and Intellectual Freedom, 2006).

Responding to this growing public concern, the Senate passed language several times which would have ameliorated the worst features of these sections but saw them fail in the House. Representative Bernie Sanders, an Independent from Vermont, first proposed such changes in 2003 with 130 cosponsors (Allen, 2003). In 2004 he introduced legislation tied to a budgetary bill that would have prevented enforcement of selection affecting libraries and book sellers. Passage failed on a tie vote (McCahill, 2004).

With several provisions of the Act approaching "sunset" in the end of 2005, the 109th Congress seriously grappled with revision. For three months the reauthorization bill was a moving target as various compromises were discussed and then were superseded by new language. Debate included a threatened filibuster, a bipartisan compromise, and a cloture vote. Meanwhile the administration remained steadfast in its stance that the Act was essential for national security in the ongoing war against terrorism. The primary bill and an accompanying bill with the compromise language received final approval by the House on March 3 and were signed on March 9, 2006, becoming Public Laws 109-177 and 109-178. They made permanent or reauthorized for a limited period of time those sections specifically relevant to libraries – with only modest adjustments.

THE USA PATRIOT ACT – THE CURRENT SITUATION

Since the compromise legislation was only agreed to and the bill passed as this essay was being completed, no in-depth analysis by knowledgeable legal experts in constitutional law as applied to libraries is yet available. The key differences of opinion on the extent and significance of the recent changes according to the national press seem to focus on whether libraries have been partially exempted from the effects of 215 and whether the ability to challenge gag orders included in the new law is significant or cosmetic (Reynolds, 2006).

Section 215 now exempts libraries in the normal course of their traditional activities if they are not Internet service providers. The problem is that there does not appear to be unanimous agreement among the Congress, the executive branch, and the profession as to what this means. Some argue that simply provid-

ing an Internet access does not constitute being an "Internet service provider," the technical understanding of ISPs. This is the position of the sponsors of the compromise. Others argue that the provision of a connection to the Internet which allows email could be considered the provision of Internet service, a position held previously by the FBI. This understanding would encompass most public and academic libraries (Reynolds, 2006).

Another issue is the effectiveness of the provision allowing challenges to gag orders. Some have touted it as an effective solution. Others have been quick to point out that while one can appeal, one must wait a year before appealing. Not only is that delay a major problem, but the government may have the gag continued by merely asserting that its continuation is necessary for national security. No presentation of evidence is required. Thus the technical ability to appeal appears to be meaningless (Reynolds, 2006).

A more thorough analysis of the library implications of this re-authorization should become available from the American Library Association's Office for Intellectual Freedom website in the near future. Until then it is difficult to speculate as to the most effective course of action intellectual freedom advocates might take to seek further protection of patron privacy and confidentiality. The latest compromise has taken the wind from the political sails – for the time being. Court cases progress. New revelations of creative executive power claims occur without warning. Since the one constant in this ongoing drama is change, stay tuned for the next development.

THE LARGER ISSUES – CHECKS, BALANCES, AND OVERSIGHT

In the meantime, consider that threats to patron privacy and confidentiality and their consequences, a "chilling effect" on the exercise of First Amendment liberties, and subsequent self-censorship are embedded in a much larger context, continually expanding challenges to the checks and balances build into the United States Constitution in the name of national security. These checks and balances are embodied in the separation of powers among the three co-equal branches of government. A recent, quite unscientific but none the less telling, viewer poll was conducted on CNN's Lou Dobbs program. Ninety-eight percent of those who responded indicated that Congress had abrogated its oversight responsibilities (Dobbs, 2006).

This balancing of powers was no accident. The framers of the United States Constitution and authors of its subsequent Bill of Rights were a very mixed group from diverse backgrounds, many religious traditions, and divergent views of human nature, but with a common history. They brought together a Calvinistic understanding of human depravity with Deistic appreciation for human potential (Mount, 2005). They had experienced the outrages of autocratic power (Jefferson, 1776). They had fought a revolution. They were pessimists. They knew well the depths to which human beings could sink when given unchecked power. They had experienced the Lord Acton's aphorism before he composed it: "Power tends to corrupt and absolute power corrupts absolutely" (Acton, as cited in Platt, 1989, #1443). They had a healthy fear of power. And yet they were also optimists. They took the incredibly positive step of proclaiming a republic and a representative democracy at a time when such forms of government were few and far between. Who would have thought that they of all people would put their trust in democracy?

They did so by dividing power among three branches of government, separating the legislative, judicial, and executive functions. They gave each branch the ability to check and balance the other two. They trusted no human being, but rather trusted in the rule of law. Throughout American history when national security has been threatened there has been a tendency to curb civil liberties, often but not always, at the instigation of the executive branch to promise security at the cost of liberty. Always in the past the other branches, sometimes speedily and sometimes with great delay, have corrected such imbalances, curbing the abuse of power and restoring those threatened liberties. But there is no guarantee. Every generation must reaffirm the system if it is to survive (Fischer, 2005).

If the founders, including John Adams, Thomas Jefferson, James Madison, Ben Franklin, and James Monroe, could not and would not trust George Washington why should Americans today trust George W. Bush? For that matter, why should they trust any person of any party at any time to exercise presidential power unchecked by legislative and judicial oversight – or the law? All a person needs to do to appreciate the truth of this statement is to imagine his or her worst political opponent as president and imagine what he or she is capable of. The temptation of power does not discriminate; every leader must be watched, especially the leader of the most powerful nation in the world.

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