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U.S. Department of Justice and the American
Library Association Regarding the USA PATRIOT
Act

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“Baseless Hysteria”: The Controversy between the Department of Justice and the American Library Association over the USA PATRIOT Act*

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Ms. Coolidge examines the controversy that developed in September 2003 between the Department of Justice and the American Library Association over provisions of the USA PATRIOT Act relating to library patron records.

¶1 On August 19, 2003, Attorney General John Ashcroft launched a twenty-city tour of the United States promoting the USA PATRIOT Act of 2001¹ and what he hoped would be a supplement to it, the Victory Bill. About a month into the tour, the tenor of his speeches became sarcastic with remarks against the American Library Association (ALA), the American Civil Liberties Union (ACLU), and anyone sharing what Ashcroft believed to be alarmist, antipatriotic sentiments. The ALA and ACLU responded by increasing their demands for accountability by the Department of Justice with respect to the use of the USA PATRIOT Act to obtain library patron records. The controversy provides lessons to librarians as professional information managers and as educators.

¶2 The objective of this article is twofold. First, to advance the understanding of the USA PATRIOT Act and the practical application of the law, in particular the Foreign Intelligence Surveillance Act of 1978 (FISA)² and the Foreign Intelligence Surveillance Court (FISC) processes, since the opportunity to do so was missed in the heat of the controversy that arose between the Department of Justice and the ALA. Second, to explore in detail the controversy that was sparked by Ashcroft’s September 2003 speech to the National Restaurant Association where he dismissed the ALA’s concerns about the USA PATRIOT Act as “baseless hysteria.” Each side to the controversy represented the other in ways counter to its respective professions, leading to little, if any, advance in the understanding of the significance of the USA PATRIOT Act with respect to librarians and library

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1. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter, USA PATRIOT Act].
2. Pub. L. No. 95-511, 92 Stat. 1783 (1978).

patrons, or of the consequences of its enforcement on the exercise of civil liberties and on the deterrence of terrorist acts.³

¶3 At the heart of the concerns of librarians about the USA PATRIOT Act are the secrecy of the FISC and the prohibition against communicating with anyone when a FISA surveillance order has been served. Secret courts and gag orders go against the very basis of democratic principles, particularly the First and Fourth Amendments. However, the FISC process, the congressional oversight measures, and the sunset provisions of the USA PATRIOT Act provide evidence that checks and balances are in place and the likelihood of abuse of library patrons' rights is very slim.

The Law and Its Application

Background of the Act

¶4 The USA PATRIOT Act was passed into law in just six weeks following the terrorist attacks on New York City and Washington, D.C., and the thwarted attack that ended in Somerset County, Pennsylvania, on September 11, 2001. The process of creating the law from its introduction in the House until signed by President Bush took a mere four days from October 23 to October 26, 2001. The final bill, H.R. 3162, incorporated provisions of H.R. 2977, passed by the House of Representatives on October 12, 2001, and S. 1510, passed by the Senate on October 11, 2001. While it is apparent that the House and the Senate were wrestling with and probably were consumed by the issue of antiterrorism during the six intervening weeks from September 11 to October 26, 2001, it is still remarkable that a bill more than three hundred pages long could be taken from introduction to enactment at such lightning speed. Clearly, the legislators could not have given the law careful consideration. It is safe to say that it was, in part, an emotional reaction to a serious crisis.

¶5 The process in the House appears to have been to refer the bill simultaneously to the committees on the Judiciary, Intelligence, Financial Services, International Relations, Energy and Commerce (and its Subcommittee on Telecommunications and the Internet), Education and the Workforce, Transportation and Infrastructure, and Armed Services on October 23, 2001. By 7:15 P.M. that evening, Representative Sensenbrenner, the bill's sponsor, moved to suspend the

3. The process of research for this article included following the controversy in the news media, researching the law, and interviewing representatives of the ALA and local and federal law enforcement agencies. Separate interviews were conducted in November 2003 with Paula Meara, Chief of Police of the Springfield, Massachusetts, Police Department; Emily Sheketoff, Associate Executive Director of the American Library Association, Washington Office; and Kevin J. O'Connor, United States Attorney, District of Connecticut, in order to give a voice to the variety of opinions on this subject. It is recognized that no single person's opinion can speak for all the membership of the ALA or all of law enforcement. The opinions expressed by the interviewees are their own and do not necessarily represent the opinions of their employers.

rules and pass the bill. Debate concluded by 8:27 P.M. and a vote was demanded but postponed until the morning of October 24. By 11:03 A.M., it was again moved to suspend the rules, and the bill passed the House by a 357 to 66 vote.⁴ The bill was then sent to the Senate and read twice. The Senate vote occurred on October 25 and the bill passed without amendment by a 98 to 1 vote.⁵ It was immediately cleared for the White House and presented to the president who signed it into law on October 26, 2001.⁶

¶6 According to Kevin O’Connor, United States Attorney for the District of Connecticut, many of the provisions of the Act already existed in pending bills that were beginning to address changes in technology such as the use of digital communication devices instead of rotary phones.⁷ These bills had been previously considered by Congress, but had not been passed and may not have even been debated. This explanation allays some of the concern that members of Congress may not have given the Act careful thought in the six weeks following September 11, 2001. O’Connor also points out that in recognition of the haste with which Congress felt it needed to act in order to prevent additional losses from terrorist acts, Congress added a so-called “sunset” provision that will require Congress to revisit all or most of the provisions of the law in 2005 to consider whether they should remain in effect.⁸

The Foreign Intelligence Surveillance Court

¶7 The portion of the USA PATRIOT Act that concerns librarians the most is the part of section 215 that amended section 501 of FISA.⁹ FISA is the act under which the FBI and CIA have operated since 1978 in fighting international crime and terrorism. Attorney General Ashcroft asserted that the amendments of FISA under the USA PATRIOT Act simply give to international crime fighting agencies the tools that have been available to federal law enforcement agencies in their fight against domestic organized crime and drug trafficking for quite some

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4. Nine representatives did not vote. 147 CONG. REC. H7224 (daily ed. Oct. 24, 2001) (results of roll call vote no. 398).
 5. One senator did not vote. 147 CONG. REC. S11059–11060 (daily ed. Oct. 25, 2001) (results of roll call vote no. 313).
 6. For a complete chronology of the progress of H.R. 3162, 107th Cong. (2001) through Congress, see Library of Congress, Thomas: Legislative Information on the Internet, Bill Summary and Status, at <http://thomas.loc.gov/bss/d107query.html> (last visited Oct. 29, 2004).
 7. Interview with Kevin J. O’Connor, United States Attorney for the District of Connecticut, in Hartford, Conn. (Nov. 21, 2003). A portion of the interview included the participation of John Danaher, United States Attorney for the District of Connecticut specializing in foreign intelligence investigations, who participated at the request of Mr. O’Connor.
 8. *Id.*
 9. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, tit. V, § 501, as added Oct. 22, 1998, Pub. L. No. 105-272, § 602, 112 Stat. 2396, 2410.

time.¹⁰ Ashcroft claimed that FISA investigations may be conducted only against non-U.S. citizens suspected of involvement in terrorist activities.¹¹ However, librarians have looked at the letter of the law and are concerned by the broad language that allows a surveillance order to be obtained “to protect against international terrorism or clandestine intelligence activities.”¹² Nothing in this clause limits the investigation to records of a non-U.S. citizen. O’Connor, in fact, admits that FISC surveillance orders could be used to investigate U.S. citizens, but points out that there are practical reasons why a U.S. attorney would not choose that route. These include: (1) the process requires “Main Justice’s” approval in Washington, D.C., and must be signed personally by the attorney general; (2) the FISC only sits in Washington, D.C., so the attorney seeking the surveillance order potentially must travel a great distance to the court; (3) the attorney must convince three judges (not just one as with Title III warrants) that the surveillance order is related to an international terrorism investigation; and (4) the evidence obtained cannot be used in a criminal trial.¹³ However, librarians have been leading the charge to educate their patrons and the public about the implications of the Act because (1) the possibility exists that a FISC surveillance order could be issued to investigate a U.S. citizen if he or she is suspected of being an agent of a foreign power or foreign government, (2) FISC surveillance orders are issued by a special court that is not open to the public, and (3) the keeper of the records sought is prohibited from disclosing that a FISC surveillance order has been served.¹⁴ In addition to making patrons aware of the possibility of foreign intelligence surveillance in libraries, librarians might also educate their patrons as to the probability, the practicality, and the process of such surveillance.

¶8 A FISC surveillance order must be sought through the processes of the FISC itself. Although Emily Sheketoff asserts that the FISC is merely a “rubber stamp” for the Department of Justice,¹⁵ in fact it is not. The court consists of eleven fed-

10. This assertion is borne out by Kevin O’Connor who reports that
it’s not a fundamental change in the law and it hasn’t fundamentally changed the way we’ve always done our jobs. . . . [M]ost of these things—“sneak-and-peek” warrants, as the critics call them, the roving wiretaps—we’ve always been able to do that. That’s not new. . . . [W]e didn’t wake up one day and walk in and say, “My God, the PATRIOT Act, now all these cases that have been sitting here unsolved are going to be solved,” because it has not been a fundamental change.
Interview with Kevin J. O’Connor, *supra* note 7.
11. *United States Department of Justice: Hearing Before the House Comm. on the Judiciary*, 108th Cong. 21 (2003) [hereinafter *DOJ Hearing*] (statement of United States Attorney General John Ashcroft), available at <http://www.house.gov/judiciary/87536.PDF#xml>.
12. USA PATRIOT Act, Pub. L. No. 107-56, § 215, 115 Stat. 272, 287 (codified at 50 U.S.C. § 1861(a)(1) (Supp 2001)).
13. Interview with Kevin J. O’Connor, *supra* note 7.
14. Telephone Interview with Emily Sheketoff, Associate Executive Director, American Library Association, Washington Office (Nov. 11. 2003).
15. “It’s a panel of judges that have had over 1200 requests for court orders and have given over 1200 court orders. They have never turned a request down. Sounds like a rubber stamp. You know, if it quacks like a rubber stamp, and it looks like a rubber stamp, it’s a rubber stamp. And these judges freely admit that they have never turned down law enforcement. So, there’s no judicial review.” *Id.*

eral district court judges, three of whom are rotated into the court every two to three months. The judges are selected from districts throughout the United States; however, three judges must reside within twenty miles of the District of Columbia where the court sits. While federal judges are appointed to the federal bench for life through a process requiring congressional approval, an appointment to the FISC bench is limited to a maximum seven-year term, and the expiration of the terms is staggered so that there is always a complement of judges with varying levels of experience on the FISC bench.¹⁶

¶9 The FISC judges have years of experience on the federal bench issuing warrants in domestic criminal investigations. The FISC critics would have people believe that, once the FISC judges accept their term of service on the FISC bench, suddenly their standards of professional conduct and respect for the integrity of the legal profession dissipate.¹⁷ However, there are three judges present at all times. If nothing else, the judicial code of ethics and a concern for their professional reputation serve to control potential abuses. The FISC judges view themselves as specialists.¹⁸

¶10 Additionally, there is a Foreign Intelligence Surveillance Court of Review (Court of Review), consisting of three United States district or appellate court judges. The Court of Review serves to review decisions of the FISC when it rejects applications for orders related to foreign intelligence surveillance.¹⁹ Again, these judges are appointed for a term not to exceed seven years.

¶11 In May 2002, the Department of Justice brought a motion before the FISC to expand sharing among law enforcement agencies of information gathered from evidence secured by means of FISC surveillance orders, including the use of information for criminal investigations. The FISC entered an order placing several restrictions on the Department of Justice for obtaining FISC surveillance orders

16. 50 U.S.C. § 1803 (2000 & Supp.I 2001). One term expires each year so that there are always six judges with some experience at any given time. For a 2004 list of judges and their terms, see FOREIGN INTELLIGENCE SURVEILLANCE COURT, 2004 MEMBERSHIP, at <http://www.fas.org/irp/agency/doj/fisa/court2003.html> (last visited Oct. 24, 2004).
17. See Interview with Kevin J. O’Connor, *supra* note 7, which includes the following exchange between U.S. Attorneys O’Connor and Danaher:
 O’Connor: “And I don’t think they’d agree to serve either if they had absolutely no, if all they were doing is just . . . [being a] rubber-stamp. And I know you [Danaher] and I have talked about this that some critics presume that with their skepticism and integrity they would never issue one of these. Why do they presume that these judges wouldn’t be equally as skeptical?”
 Danaher: “That’s the interesting point. Because somebody goes through the legal profession and they are appointed a judge and then all their abilities and skills and education they obtained to reach that point dissipates when they are appointed to the FISA court?”
18. “The present seven members of the Court have reviewed and approved several thousand FISA applications, including many hundreds of surveillances and searches of U.S. persons. The members bring their specialized knowledge to the issue at hand, mindful of the FISA’s preeminent role in preserving our national security, not only in the present national emergency, but for the long term as a constitutional democracy under the rule of law.” *In re* All Matters Submitted to the Foreign Intelligence Surveillance Court, 218 F. Supp. 2d 611, 615 (Foreign Intell. Surveill. Ct. 2002).
19. The Court of Review convened for the first time in the history of FISA in September 2002 to hear the appeal of the Department of Justice from a FISC order. *In re* Sealed Case, 310 F.3d 717, 719 (Foreign Intell. Surveill. Ct. Rev. 2002).

and for how the information obtained could be used by the Department of Justice in terrorist and criminal investigations.²⁰ The Department of Justice appealed the decision to the Court of Review, which then reversed and remanded the order to the FISC for revisions compliant with the Court of Review's opinion.²¹ Although the United States government is the only party that has standing in the FISC, the Court of Review allowed amici curiae briefs from the American Civil Liberties Union and the National Association of Criminal Defense Lawyers.²²

¶12 The decision of the Court of Review brings some much needed clarification to the surveillance order application process which had developed in a piecemeal fashion over the years to create a "wall" between FBI agents and U.S. attorneys investigating foreign intelligence and agents and attorneys prosecuting domestic crimes. Peter Swire presents a longer and thorough history of FISA,²³ but, in a very abridged fashion, the background is as follows.

¶13 The enactment of FISA in 1978 was in response to investigatory abuses of the late 1960s and early 1970s involving wiretaps. FISA was enacted to provide privacy protections for U.S. citizens while at the same time balancing the necessity of national security from foreign threats. FISA surveillance orders could be issued where the primary purpose of the investigation was for foreign intelligence. This "primary purpose" language created a perceived "wall" between the FBI and the Criminal Division of the Department of Justice because if the FISC determined that there was any criminal prosecutorial intent in the surveillance order application, the application would fail. It is believed that the origins of the wall between foreign intelligence investigations and criminal investigations began in the 1980s with a Fourth Circuit case.²⁴ In 1995, the attorney general adopted "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations" to "ensure that advice intended to preserve the option of a criminal prosecution does not inadvertently result in either the fact or the appearance of the Criminal Division's directing or controlling the FI [foreign intelligence] or FCI [foreign counterintelligence] investigation toward law enforcement objectives."²⁵ In August 2001, the 1995 procedures were expanded but not replaced by a memorandum of the Deputy Attorney General.²⁶ In October 2001, the USA PATRIOT Act "amended FISA to change 'the

20. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 611.

21. *In re Sealed Case*, 310 F.3d at 717.

22. *Id.* at 719.

23. Peter Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004).

24. *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980). See *In re Sealed Case*, 310 F.3d at 725-27.

25. Memorandum from Attorney General Janet Reno to Assistant Attorney General, Criminal Division et al. on Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations 2, ¶ A.6 (July 19, 1995), available at <http://www.fas.org/irp/agency/doj/fisa/1995procs.html>, quoted in *In re Sealed Case*, 310 F.3d at 727-28.

26. *In re Sealed Case*, 310 F.3d at 728.

purpose’ language in [50 U.S.C. § 1804(a)(7)(B) to ‘a significant purpose,’”²⁷ allowing an investigation to have more than a single purpose.

¶14 It is on the basis of this change in *purpose* language that the Department of Justice brought its May 2002 motion to replace the “wall” procedures that hampered sharing among law enforcement agencies of information gathered from evidence secured by means of FISC surveillance orders.

¶15 The FISC adhered to the 1995 procedures, as expanded by the August 2001 memorandum, not wanting to give up the *bright line* these procedures provided for the FISC and for law enforcement in applying for and granting surveillance orders. The FISC allowed the Department of Justice’s motion but with modifications preserving the wall. The FISC also created a new Rule 11 for Criminal Investigations in FISA Cases requiring that

[a]ll FISA applications shall include informative descriptions of any ongoing criminal investigations of FISA targets, as well as the substance of any consultations between the FBI and criminal prosecutions at the Department of Justice or a United States Attorney’s Office.²⁸

¶16 The Court of Review overruled the decision of the FISC and eliminated the wall, but not without explaining the protections that are in place with respect to the statutory framework. The basis of the Court of Review’s reversal is that FISA does not permit or mandate that the FISC control the operations of the Department of Justice. This is not to say that the FISC cannot hold the Department of Justice to a high standard of providing all the relevant information the FISC needs to rule on a surveillance order.

[I]f the FISA court has reason to doubt that the government has any real non-prosecutorial purpose in seeking foreign intelligence information it can demand further inquiry into the certifying officer’s purpose—or perhaps even the Attorney General’s or Deputy Attorney General’s reasons for approval. The important point is that the relevant purpose is that of those senior officials in the Executive Branch who have the responsibility of appraising the government’s national security needs.²⁹

¶17 The level of detail required by the court allows it to make a reasoned decision whether the order is strictly for foreign intelligence surveillance, which is within its jurisdiction, or is more properly a part of a criminal investigation, which is outside its jurisdiction, that would require proceeding under title III standards. Reasoned decisions supported by substantiated facts are not “rubber stamps.”

¶18 That Sheketoff’s description of the process as a “rubber stamp” is misleading and too simplistic can be seen in the following statement:

Well, the law says that an FBI agent can go to the FISA court and say, “I need this information,” and the court gives them a FISA court warrant. . . . They don’t have to have a

27. *Id.* at 728–29.

28. *In re All Matters Submitted to the Foreign Intelligence Surveillance Court*, 218 F. Supp. 2d at 627.

29. *In re Sealed Case*, 310 F.3d at 736.

because. . . They have to say, "I need it because I'm doing an investigation." But it doesn't have to say, "I'm doing an investigation of a possible bombing," "I'm doing an investigation of a possible cell." There's no specificity required. And that's what's so dangerous. And that's the difference. Before . . . [t]hey go to a judge, but they have to have a reason. They have to say, "We have an expectation that if you give us a warrant to look into this person's reading records, it's going to give us the information that can prove a case or can lead us to what we're trying to find. But there's no requirement of that now."³⁰

¶19 The process of obtaining a FISC surveillance order is much more involved and specificity is required.³¹ As described by U.S. Attorney O'Connor, the FBI has limited authority to go directly to the FISC and must be represented by an attorney from the Department of Justice.³²

[T]he FISA court is a very cumbersome process. It takes a long time . . . it is easier to go to a grand jury . . . but the FISA court is three federal judges, not laypersons like the grand jury. You have to go in and demonstrate that this is related to a terrorism investigation. The standard is still pretty severe. And you have to go down to Washington. You have to get Main Justice's approval. I don't need the approval of Washington to go to a grand jury sitting in Connecticut to get a subpoena. But to get a FISA warrant, under 215, I have to go down, get Main Justice to approve, then we have to walk over to the FISA court. And you can't just do that on a day's notice; it takes months. And go into the FISA court and get three judges to agree that this is necessary and related to a terrorism investigation. . . . [Y]ou have to demonstrate to the judge that the subject of this is an agent of a foreign power or foreign government. So it's usually a non-U.S. citizen. So there are a lot of standards that make it very cumbersome. So it's not like I can just call today and tomorrow get a FISA warrant.³³

30. Telephone Interview with Emily Sheketoff, *supra* note 14. Sheketoff's views are mirrored in publications by the ALA. See, e.g., *Expanded FBI Powers Threaten Library Privacy Protection*, AM. LIBR. ONLINE (June 3, 2002), at http://www.ala.org/al_onlineTemplate.cfm?Section=june20021 (describing the ability of the FBI "to initiate inquiries at libraries and other public places without a warrant or even the need to show that a crime was committed" without once mentioning the FISA application process or the safeguards it might provide to protect the civil liberties of United States citizens). Sheketoff is quoted in this article as saying: "There could be agents in the library looking at what people are reading, looking over someone's shoulder while they're on the Internet." *Id.*

31. A very succinct explanation of the probable cause requirement for a FISC surveillance order may be found in Memorandum from the Deputy Assistant Judge Advocate General (National Security Litigation and Intelligence Law) to Judge Advocates (Sept. 4, 2003) (on file with author), available at <http://www.fas.org/irp/agency/doj/fisa/navy0903.pdf>.

32. O'Connor made a written clarification of his statement about an FBI agent's authority to directly obtain court warrants as follows:

I was mistaken in saying that prosecutors are 'the only ones' who can take a search warrant to a judge. In fact, an [FBI] agent is permitted to request a search warrant from a judge on his or her own. In practice, however, this does not happen as we require agents to first run warrants by us and we are unaware of any instance where they have not done so before presenting the warrant to a judge.

Letter from Kevin J. O'Connor, United States Attorney for the District of Connecticut, to Katherine K. Coolidge, Law Librarian, Bulkley, Richardson and Gelinas, LLP (Mar. 23, 2004) (on file with author).

33. Interview with Kevin J. O'Connor, *supra* note 7.

¶20 With respect to the “gag order” provision of section 215, John Danaher reports that “the only difference is if [a U.S. attorney] get[s] a subpoena from the grand jury, [the person served] can walk outside and tell everybody [he or she has] been served. As a practical matter, when we do investigations, 99% of the time people don’t do that,”³⁴ suggesting that what matters most to people is cooperating with law enforcement to solve crimes, not the type of warrant served or the restriction on disclosure that a warrant has been served. “[I]nformation solves cases, not only solves crimes once they’ve been committed, but keeps crimes from being committed.”³⁵ A Gallup poll published on September 9, 2003, revealed conflicting results on people’s concern about the provisions of the USA PATRIOT Act that might affect civil liberties. While 67% of the respondents said that the federal government should not take steps against terrorism if civil liberties would be violated, 55% believe the Bush administration is not restricting their civil liberties. About half the respondents considered themselves to be very or somewhat familiar with the USA PATRIOT Act. Of those, 70% were not worried that the USA PATRIOT Act threatens their civil liberties.³⁶

¶21 Clearly there are legitimate concerns for Fourth Amendment rights. But checks and balances are in place. Returning to the decision of the Court of Review may prove instructive for and provide reassurance to librarians and others concerned about civil liberties. After setting out the three elements of the Fourth Amendment, the Court of Review explains that “both Title III and FISA require prior judicial scrutiny [by a] ‘neutral and detached magistrate.’”³⁷ Table 1 sets out some of the other comparisons made by the court.³⁸

¶22 The Court of Review correctly points out that

[t]he main purpose of ordinary criminal law is twofold: to punish the wrongdoer and to deter other persons in society from embarking on the same course. The government’s concern with respect to foreign intelligence crimes, on the other hand, is overwhelmingly to stop or frustrate the immediate criminal activity. . . . [T]he criminal process is often used as a part of an integrated effort to counter the malign efforts of a foreign power. Punishment of the terrorist or espionage agent is really a secondary objective; indeed, punishment of a terrorist is often a moot point.³⁹

¶23 It is undisputed that the USA PATRIOT Act is an enormous piece of legislation that made sweeping changes to the federal criminal code bringing it up to date technologically. But Congress did not enact it without some forethought or provisions for review. Within title II of the Act, the title that includes section 215,

34. *Id.*

35. *Id.*

36. David W. Moore, *Public Little Concerned about Patriot Act*, GALLUP ORG. (Sept. 9, 2003) (copy on file with author).

37. *In re Sealed Case*, 310 F.3d 717, 738 (Foreign Intell. Surveill. Ct. Rev. 2002) (footnote omitted).

38. *Id.* at 738–41.

39. *Id.* at 744–45.

Table 1

Comparison between Title III and FISA Requirements

Title III	FISA
Title III requires probable cause to believe that particular communications concerning the specified crime will be obtained through the interception.	FISA . . . requires an official to designate the type of foreign intelligence information being sought, and to certify that the information sought is foreign intelligence information. . . . The certification must be made by a national security officer—typically the FBI Director—and must be approved by the Attorney General or the Attorney General's Deputy.
Title III generally requires probable cause to believe that the facilities subject to surveillance are being used or about to be used in connection with the commission of a crime or are leased to, listed in the name of, or used by the individual committing the crime.	FISA requires probable cause to believe that each of the facilities or places at which the surveillance is directed is being used, or is about to be used, by a foreign power or agent.
Title III has a "necessity" provision which requires the court to find that the information sought is not available through normal investigative procedures.	FISA has a "necessity" provision which requires the court to find that the information sought is not available through normal investigative procedures.
Title III requires minimization of what is acquired for U.S. persons.	FISA requires minimization of what is acquired, retained, and disseminated [from information gained through the surveillance].

section 214⁴⁰ prohibits targeting citizens solely on the basis of any conduct protected by the First Amendment. Section 216⁴¹ requires specified records to be kept on pen register or trap-and-trace devices. Only the source, not the contents of the communication may be identified. Section 223 amends the federal criminal code to require administrative disciplinary actions against any federal officer or employee who discloses information in an unauthorized manner,⁴² and adds a provision that gives citizens a civil right of action against the United States for damages caused by the unauthorized disclosure of information.⁴³ Section 224 terminates title II at the end of 2005.⁴⁴ Additionally, the attorney general must report to both the Senate and the House of Representatives and committees within each branch of Congress on a regular basis or whenever requested by these legislative bodies. While these

40. USA PATRIOT Act, Pub. L. No. 107-56, § 214, 115 Stat. 272, 286–87 (amending 50 U.S.C. § 1842 (2000)).

41. § 216, 115 Stat. at 288–90 (amending 18 U.S.C. §§ 3121(c), 3123(a), 3123(b)(1), 3123(d)(2), 3124(b), (3124(d), 3127(1)–(4) (2000)).

42. § 223(a)–(b), 115 Stat. at 293–94 (amending 18 U.S.C. §§ 2520, 2707 (2000)).

43. § 223(c)(1), 115 Stat. at 294–95 (codified at 18 U.S.C. § 2712 (Supp. 2001)).

44. § 224(a), 115 Stat. at 295 (codified at 18 U.S.C. § 2510 nt. (Supp. 2001)).

safeguards may not satisfy everyone, they are a far cry from unfettered law enforcement running rampant over civil liberties and privacy rights.

¶24 As an example of this conclusion, on January 23, 2004, Federal District Court Judge Audrey B. Collins entered a decision in the matter of *Humanitarian Law Project v. Ashcroft*⁴⁵ in which, among other things, the plaintiffs challenged the constitutionality of section 805(a)(2)(B) of the USA PATRIOT Act,⁴⁶ in particular the language that “prohibit[s] the provision of material support including ‘expert advice or assistance’ to designated foreign terrorist organizations.”⁴⁷ This decision was touted in the press as the first court decision to strike down part of the USA PATRIOT Act.⁴⁸ While the challenged section of the USA PATRIOT Act is not the same section that is at issue in this article, the reasoning of the judge is instructive.

¶25 The plaintiffs had moved for summary judgment, and the Department of Justice had cross-moved to dismiss. Neither side came away with everything it sought.

¶26 The court denied the Department of Justice’s motion to dismiss, finding that the plaintiffs had demonstrated that (1) they had a concrete plan to violate the law if there were no fear of criminal prosecution, (2) there was a real threat of prosecution by the defendants, and (3) there was a history of enforcement of the USA PATRIOT Act by the defendants with respect to the subject sections.⁴⁹

¶27 The court went on to grant in part the plaintiffs’ motion for summary judgment because the defendants failed to show that the term “expert advice or assistance” is not impermissibly vague.⁵⁰ The court enjoined the defendants from enforcing the subject sections of the laws against the plaintiffs, but would not go so far as to declare the statute overly broad or to grant a nationwide injunction against enforcing it.⁵¹

¶28 Although the media picked up primarily on the First Amendment free speech victory, it is noteworthy that the judge restricted her decision to the specific facts and parties and found there is no risk of prosecution of “moral innocents” for permitted free speech activities.⁵² The court also found that the Department of Justice does not have “unreviewable authority to designate groups as terrorist organizations.”⁵³ This result suggests that the system of checks and balances among our executive, legislative, and judicial branches of our democratic government is working.

45. 309 F. Supp. 2d 1185 (C.D. Cal. 2004). The decision was amended on Mar. 17, 2004. The decision as amended is discussed here.

46. § 805(a)(2)(B), 115 Stat. at 377 (codified at 18 U.S.C. § 2339A(b) (Supp 2001)).

47. *Humanitarian Law Project*, 209 F. Supp. 2d at 1187.

48. *See, e.g.*, Eric Lichtblau, *Citing Free Speech, Judge Voids Part of Antiterror Act*, N.Y. TIMES, Jan. 27, 2004, at A16.

49. *Humanitarian Law Project*, 209 F. Supp. 2d at 1197–98.

50. *Id.* at 1200.

51. *Id.* at 1202–04.

52. *Id.* at 1203.

53. *Id.* at 1203–04.

The Controversy

¶29 In his speech to the National Restaurant Association⁵⁴ in Washington, D.C., on September 15, 2003, Attorney General Ashcroft labeled members of the American Library Association “hysterics” who had been “convinced” by “some in Washington” that “the FBI is not fighting terrorism. Instead, agents are checking how far you have gotten on the latest Tom Clancy novel.”⁵⁵ The National Restaurant Association did not place any emphasis on this language but reported that:

Ashcroft dismissed critics’ fears that the nation’s recently enacted anti-terror law—the “Patriot Act” of 2001—will encourage law enforcement agents to track private business records and even people’s reading habits at public libraries. “Tracking reading records would violate the First Amendment, not to mention be a waste of government resources,” he noted. “The goal of the federal government is to preserve the lives, and to protect the liberties of all Americans,” he said.⁵⁶

¶30 Although the National Restaurant Association gave little credence to the remarks that demeaned librarians, the news media quickly picked up on the story. A headline in the *New York Times* read: “Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law.”⁵⁷

¶31 The response of the American Library Association to Ashcroft’s September 15 speech was to issue a press release raising questions regarding the language of the USA PATRIOT Act, chastising the Department of Justice for refusing to respond to the ALA’s requests for information regarding the use of the Act in libraries, admonishing the attorney general for being “openly contemptuous of those who seek to defend our Constitution,” and lobbying for support of legisla-

54. While it seems odd that the National Restaurant Association (NRA) would choose the attorney general as a keynote speaker, consider that the NRA’s Web site described the association’s 2003 Public Affairs Conference as one attended by “600 restaurateurs and foodservice operators . . . in Washington . . . to learn about restaurant-industry issues and promote the industry’s legislative messages on Capitol Hill.” In particular, the association was promoting H.R. 339 which aimed to “prohibit frivolous obesity-related class action lawsuits against the restaurant industry.” Nat’l Restaurant Ass’n, *2003 Public Affairs Conference*, at <http://web.archive.org/web/20031203000500/http://www.restaurant.org/paconference/index.cfm> (last visited Oct. 24, 2004). So the attorney general, who has expressed his dislike for class action attorneys, would be a logical choice as a speaker. See *infra* ¶ 36.

The NRA may have been especially interested in Ashcroft’s message about security, lower crime rate, and antiterrorism activities. The restaurant industry was hit very hard in the months after September 11, 2001, as dining out dropped off with the ensuing anxiety generated by the terrorist attacks. In the week after the attacks, the NRA retained the Smith & Harroff agency and launched a public relations campaign to promote “dining out as a simple way Americans could reassert a sense of community and ‘fight back.’” Smith & Harroff, *Case Studies—Client: National Restaurant Association*, at http://www.smithharroff.com/cs_nra.htm (last visited Oct. 24, 2004).

55. John Ashcroft, *The Proven Tactics in the Fight against Crime*, Address Before the National Restaurant Association (Sept. 15, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/091503nationalrestaurant.htm>.

56. Nat’l Restaurant Ass’n, *Ashcroft Pledges to Protect Lives, Liberties: Attorney General Discusses Security at NRA’s Public Affairs Conference* (Sept. 18, 2003), at <http://www.restaurant.org/news/story.cfm?ID=141>.

57. Eric Lichtblau, *Ashcroft Mocks Librarians and Others Who Oppose Parts of Counterterrorism Law*, N.Y. TIMES, Sept. 16, 2003, at A23.

tion “to restore the historical protection of library records.”⁵⁸ While the press release was not picked up in its entirety by any of the major newspapers, the media coverage was sufficient to cause the attorney general to respond. On September 17, Ashcroft telephoned Carla Hayden, president of the ALA, promising to release the information regarding the use of the USA PATRIOT Act to obtain library records. In a subsequent ALA press release, Hayden is quoted as saying, “This is an important first step toward having the information needed for meaningful public oversight and accountability. We hope this symbolizes a significant commitment to ongoing reporting to the American public and the U.S. Congress.”⁵⁹

¶32 After instructing the FBI and the Department of Justice on September 17 to declassify the records concerning use of the USA PATRIOT Act for obtaining library records, the attorney general concluded that it had never been used. According to Emily Sheketoff of the ALA Washington Office, this information was selectively leaked to ten reporters the night before being announced internally at the Department of Justice on September 18, 2003. A staff writer at the *Washington Post* reported that information was received “in the memo, which was obtained by the *Washington Post*.”⁶⁰ Fourteen hours after it was made public, it was released to the ALA.⁶¹

¶33 Ashcroft’s rhetoric became more overtly sarcastic on September 18, 2003, as he addressed law enforcement officials in Memphis, Tennessee, generating

58. Press Release, American Library Association, American Library Association Responds to Attorney General Remarks on Librarians and USA PATRIOT Act: A Statement by ALA President Carla Hayden (Sept. 16, 2003) (on file with author), available at http://www.ala.org/PrinterTemplate.cfm?Section=Press_Releases&template=/contentmanagement/contentdisplay.cfm&ContentID=44012.

59. Press Release, American Library Association, ALA President Welcomes Call, Commitment from U.S. Attorney General to Declassify Some PATRIOT Act Reports (Sept. 17, 2003) (on file with author), available at http://www.ala.org/Template.cfm?Section=Press_Releases&template=/contentmanagement/contentdisplay.cfm&ContentID=44121.

Despite Hayden’s characterization of Ashcroft’s statement as a “first step,” accountability and oversight by Congress are already mandated by provisions of the Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 583 (1978) (codified as amended at 50 U.S.C. §§ 1801–1862 (2000 & Supp. I 2001)). Under § 1807, the attorney general is required to report annually in April the number of FISA surveillance order applications made and the number granted, modified, or denied. Under §§ 1808, 1826, 1846, and 1862, the attorney general must report semiannually to the House Permanent Select Committee on Intelligence and to the Senate Select Committee on Intelligence all requests made under FISA for electronic surveillance, physical searches, pen registers and trap traces, and business records/tangible things requests (respectively), including all information that has been shared with law enforcement in any criminal investigation. Each committee is then required to report to its respective legislative body on the same. Subsequent sections of FISA provide for criminal and civil sanctions for abuse by employees of the Department of Justice for using the information obtained for other than foreign intelligence investigations. The attorney general has no obligation to report to the public on these matters, but only has an obligation to report to the select committees on intelligence. These committees as well as Congress could elect to make information available to the public if they felt it would not jeopardize national security.

60. Dan Eggen, *Ashcroft: Patriot Act Provision Unused*, WASH. POST, Sept. 18, 2003, at A13, available at <http://www.washingtonpost.com/ac2/wp-dyn/A27137-2003Sep17?language=printer>. The URL date of Sept. 17 validates Sheketoff’s statement that the information was leaked to the press before the formal announcement.

61. Telephone Interview with Emily Sheketoff, *supra* note 14.

visual images unsupported by any reference to a source for the information. The following passage is particularly colorful:

If you were to pay too much attention to some in Washington you might conjure up harrowing images of agents working around the clock. Like in the X-Files, they are raincoated [sic], dark suited, and sporting sunglasses. But unlike the X-Files, their subjects aren't treacherous space aliens but readers and librarians. And no one escapes their grinding interrogation. In a dull Joe Friday monotone, they ask: "Why were you at the library? What were you reading? Did you see anything suspicious? Just the facts, ma'am. Just the facts."

This image is fanciful, but the hysteria behind it is very real. The fact is, with just 11,000 FBI agents and over a billion visitors to America's libraries each year, the Department of Justice has neither the staffing, the time nor the inclination to monitor the reading habits of Americans. No offense to the American Library Association, but we just don't care.⁶²

¶34 Rather than simply reporting the facts about the use of the Act with respect to library records, as he had with all the facts regarding the successes of antiterrorism efforts, Ashcroft continued to ridicule his opponents.⁶³ His speech on September 18 went on to say: "And wouldn't you know it. So prying are we, so overheated is our passion to know the reading habits of Americans that we have used this authority exactly . . . never. . . . And so the charges of the hysterics are revealed for what they are: castles in the air. Built on misrepresentation. Supported by unfounded fear. Held aloft by hysteria."⁶⁴

¶35 Roughly a week later, Ashcroft's vehemence had subsided. In his speech to law enforcement officials in Milwaukee, Wisconsin, on September 22, he devoted only two short paragraphs to the "hysteria" created by "some in Washington" regarding America's reading habits.⁶⁵ His speeches, available at the Department of Justice Web site (www.usdoj.gov/ag/speeches2003.html), also began to carry a caveat that the "Attorney General Often Deviates From Prepared Remarks." Perhaps this disclaimer was a recognition that concerned citizens might be reading his speeches or perhaps it was an effort to avoid accountability for what may have actually been expressed at any of the events. Since participation in the events sched-

62. John Ashcroft, Protecting Life and Liberty, Address Before Law Enforcement Officers of Memphis, Tenn. (Sept. 18, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/091803memphisremarks.htm>.

63. U.S. Attorney Kevin J. O'Connor agreed generally that "the discourse should be more civil" but explained that "this attorney general has been, really been, attacked savagely by people opposed to the PATRIOT Act." He points out that the Act was approved overwhelmingly in both the House and the Senate and Ashcroft's job is to enforce the law as enacted. He suggested that those opposed to the Act should be working with their legislators to repeal it, not attacking the attorney general or misinforming the public as to how the Act is being applied. Interview with Kevin J. O'Connor, *supra* note 7. Sheketoff attributes the animosity of the attorney general to "his frustration on [the twenty-city] tour. Every city he went to, he was met by demonstrators protesting the PATRIOT Act." She concluded that the attorney general was frustrated because his message was being "drowned out by [the librarians'] message." Telephone Interview with Emily Sheketoff, *supra* note 14.

64. Ashcroft, *supra* note 62.

65. John Ashcroft, Address to Law Enforcement Officers in Milwaukee, Wis. (Sept. 22, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/092203milwaukee.htm>.

uled for the twenty-city tour was by invitation only, and Ashcroft appears to have tailored his remarks for these selected audiences, it is unlikely we will know what was actually said. The fact that the sarcasm and ridicule were scripted is, however, disturbing and beneath the professional conduct one would expect of the attorney general of the United States.

¶36 After September 22, 2003, the attorney general no longer attacked librarians and he stopped using references to the “hysteria of some in Washington.” He picked another, presumably less sympathetic, target: class action attorneys. In his speech to the Defense Research Institute in Washington, D.C., he declared a victory for justice in the fight on terrorism and announced that “[n]ow, the justice we have achieved in terrorism and criminal cases must be extended to civil cases.” Ticking off a litany of problems with the current legal system, he culminated his remarks with: “And there is definitely something wrong with a legal system when class action awards and settlements give lawyers lotto-size payouts, leaving pennies for real victims.”⁶⁶ It is outside the scope of this article to follow the response of the American Bar Association and other professional organizations of attorneys, but it is apparent that sarcasm, ridicule, and stereotyping appear to be Ashcroft’s style with certain targets.

¶37 Even after Ashcroft declassified the information about the use of the USA PATRIOT Act in libraries, skepticism remained about the veracity of the report that the Act had never been used in libraries to obtain records.⁶⁷ Some of this skepticism may be due in part from news reports about testimony by the attorney general before the House Judiciary Committee in June 2003, defending the Department of Justice’s right to obtain library records through use of the Act. It was reported by a news weekly that Ashcroft told the committee that “the FBI received a search warrant for a single [library] computer under suspicion of terrorist-related activity.”⁶⁸ However, the transcript of the hearing does not include this language. In response to a question from Representative Green of Wisconsin, Ashcroft answered, after explaining the difference between a warrant issued pursuant to a grand jury subpoena in a criminal investigation and a surveillance order issued pursuant to application to the FISC in an international terrorism investigation:

Well, as a matter of fact, the FBI obtained a single search warrant to copy the hard drive of a specific computer that had been used to hack into a business computer system

66. John Ashcroft, Address at the Defense Research Institute (Oct. 16, 2003), available at <http://www.usdoj.gov/ag/speeches/2003/101603remarksdriconference.htm>.

67. “He made a statement which does not even reflect the law. The law for section 215 says that you can go to the FISA court and get a court order for any tangible thing. He said they had not used section 215 of the PATRIOT Act for business records. . . . [S]o if every other part of that statement reflected the law, is there some difference between business records and any tangible thing? Any tangible thing, we know because the FBI has told us, includes hard drives, electronic information, sign-up sheets, all sorts of things. Is business records considered the same thing?” Telephone Interview with Emily Sheketoff, *supra* note 14.

68. Sara Michael, *Ashcroft Defends Search of Library Records*, FCW.COM, June 5, 2003, at <http://www.fcw.com/fcw/articles/2003/0602/web-fisa-06-05-03.asp>.

in California for criminal purposes. That is totally different than the FISA situation. No software was installed on that computer.⁶⁹

Had the news report made the distinction between FISA surveillance orders and criminal warrants, the general public might have had a better understanding of the incident.

¶38 Turning back to the speeches and events of September 2003, it is understandable that the provocative remarks of the attorney general generated substantial media coverage. While much of the reporting was heated at first⁷⁰ and carried in both liberal and conservative organizations' publications, it is remarkable that the speeches and events resulted in a front-page story in the *Wall Street Journal* roughly six weeks later.⁷¹ If the concerns for civil liberties and privacy of library records were merely part of some hysterical, liberal rant, one surely would not expect a major business publication like the *Wall Street Journal* to devote forty-nine column inches to the subject (including 16½ inches on the front page). Clearly, the issue has touched the nerves of a broad spectrum of the population of the United States. The USA PATRIOT Act has caused both liberals and conservatives to be concerned about the same thing—civil rights under the Fourth Amendment—suggesting that the Act, which was passed in great haste, may be unnecessarily overbroad in its scope.

¶39 This conclusion is borne out by the fact that “190 communities in 34 states” have passed laws outlawing voluntary compliance with the USA PATRIOT Act.⁷² According to Senator Leahy, the Department of Justice has stereotyped these communities as college towns and rural Vermont villages, and “the usual enclaves where you might see nuclear free zones or they probably passed resolutions against the war in Iraq.”⁷³ Ashcroft and his subordinates do not seem to be

69. *DOJ Hearing*, *supra* note 11, at 22 (statement of United States Attorney General John Ashcroft), available at <http://www.house.gov/judiciary/87536.PDF#xml>.

70. A search of major newspaper sources in LexisNexis Universe delivered the following results searching on the terms **Ashcroft AND librar!**:

Week	Number of News Stories
Sept. 15–22, 2003	45
Sept. 23–30, 2003	24
Oct. 1–7, 2003	11
Oct. 8–15, 2003	6
Oct. 16–23, 2003	5
Oct. 24–31, 2003	8
Nov. 1–7, 2003	3
Nov. 8–15, 2003	6

71. June Kronholz, *Patriot Act Riles An Unlikely Group: Nation's Librarians*, WALL ST. J., Oct. 28, 2003, at A1.

72. *Protecting Our National Security from Terrorist Attacks: A Review of Criminal Terrorism Investigations and Prosecutions*, Hearing Before the Senate Comm. on the Judiciary, 108th Cong. (2003) [¶ 4] (Statement of Sen. Patrick Leahy), available at http://judiciary.senate.gov/member_statement.cfm?id=965&wit_id=2629.

73. *Id.* [¶ 5].

able to refrain from using sarcasm, ridicule, and stereotyping no matter how it might offend many who believe themselves to be both patriotic and concerned for the privacy and civil rights of all Americans. Ashcroft’s defense of the Act is not grounded in legal argument, but rather in the belittling of his opponents.⁷⁴ This practice has not garnered support from many, if any, communities and may have instead “focused opposition to the Patriot Act—not just from librarians but also from conservative and liberal groups that seldom find themselves on the same side of an issue.”⁷⁵

¶40 Librarians, as well as many other concerned citizens, conducted demonstrations in every city where Ashcroft delivered his speeches in support of the Act. More than 1200 people outside Faneuil Hall in Boston, Massachusetts, held one such demonstration a week before Ashcroft made his statement to the National Restaurant Association that was so offensive to librarians. The demonstrators were described in a *Boston Globe* editorial as “ordinary people from across Massachusetts: businesspeople, grandmothers, students, and elected officials. They came from Amnesty International, the Massachusetts Library Association, the Jewish Alliance for Law and Social Justice, Centro Presente, the American Arab Anti-Discrimination Committee, the Bill of Rights Defense Committee, the ACLU, and a range of community groups.”⁷⁶ While the demonstrators were protesting, the editorial reports that Ashcroft was speaking to 150 invited law enforcement officials behind “guarded doors.” The press was not invited to hear Ashcroft’s message, so there are no media reports of what was said. However, O’Connor disputes this representation that members of the media were prevented from attending the events. He recalls sitting next to Peter Jennings of ABC News during Ashcroft’s address to law enforcement officials in New York City.⁷⁷ The Department of Justice’s Web site does not carry the text of Ashcroft’s speech at Faneuil Hall, but Paula Meara, Springfield, Massachusetts, chief of police, who attended the speech, believes the message was similar to those given in other cities.

¶41 Chief Meara describes the attendees as “primarily chiefs of police and other high ranking law enforcement officials.” She believes the purpose of the event was “to promote understanding, and to achieve a greater level of support amongst people who are working in the intelligence field.” She also believes Ashcroft’s message was “very well received.”⁷⁸ She made no remarks about any demonstration outside the hall. O’Connor believes the number of protesters in New York City, which was reported to be several thousand, was overstated. He

74. See *supra* note 63 and accompanying text.

75. Kronholz, *supra* note 71.

76. Carol Rose, *Ashcroft Bars the Doors to Democracy*, BOSTON GLOBE, Sept. 16, 2003, at A19.

77. Interview with Kevin J. O’Connor, *supra* note 7.

78. Interview with Paula Meara, Chief of Police, Springfield Police Department, in Springfield, Massachusetts (Nov. 4, 2003).

reports being able to walk through the protest without difficulty to enter the site of the event.⁷⁹

¶42 By contrast, Emily Sheketoff believes that it was just such demonstrations by a broad range of community members, many of whom were informed of the issue by the organized efforts of the ALA, that persuaded the attorney general to back down on his refusal to disclose any information about how many times the Act had been used to obtain library records. Sheketoff describes Ashcroft's twenty-city tour as a complete failure. "He spoke not to any local media and not to the general public, but he only spoke to invitation-only audiences. And these were people who were already supporting what he had to say. . . . [H]e was not willing to speak to those people who had questions about the PATRIOT Act."⁸⁰ O'Connor notes that "the reality is you're never going to, through open meetings, get the message out as effectively as you will through the mass media. So in all of these press conferences, statements, and speeches, it was really intended not so much for the people in the room, but to get the message out through the media that attended."⁸¹

¶43 Sheketoff believes it was the efforts of librarians that made legislators aware of the issue and caused them to begin to craft amendments to the Act. "The first piece of legislation that was going to try to amend the PATRIOT Act was based completely on our issue, on section 215, and that came because librarians in Vermont went to their Congressman, Bernie Sanders, and educated him about the dangers in section 215, about the potential invasion of privacy and that it wasn't necessary."⁸² While the ALA supports fifteen bills that would amend various parts of the Act,⁸³ there are at least five bills that proposed amendments to section 215 of the Act.⁸⁴

79. Interview with Kevin J. O'Connor, *supra* note 7.

80. Telephone Interview with Emily Sheketoff, *supra* note 14.

81. Interview with Kevin J. O'Connor, *supra* note 7.

82. Telephone Interview with Emily Sheketoff, *supra* note 14.

83. *Id.*

84. At the time of the interview with Sheketoff on Nov. 11, 2003, bills introduced into the 108th Congress included S. 1507, "To protect privacy by limiting the access of the government to library, bookseller, and other personal records for foreign intelligence and counterintelligence purposes"; S. 1552, "To amend title 18, United States Code, and the Foreign Intelligence Surveillance Act of 1978 to strengthen protections of civil liberties in the exercise of the foreign intelligence surveillance authorities under Federal law, and for other purposes"; S. 1709, "To amend the USA PATRIOT ACT to place reasonable limitations on the use of surveillance and the issuance of search warrants, and for other purposes"; H.R. 1157, "To amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes"; and H.R. 3352, "To amend the Foreign Intelligence Surveillance Act of 1978 and title 18, United States Code, to strengthen protections of civil liberties in the exercise of the foreign intelligence surveillance authorities under Federal law, and for other purposes."

At the time this article was revised for publication (Sept. 2004), S. 1507 and S. 1552 were still in the Senate Judiciary Committee, having been referred there on July 31, 2003. S. 1709 was referred to the Judiciary Committee on Oct. 2, 2003, and introductory remarks were delivered in the Senate on Apr. 7, 2004. No further action appears to have been taken on these bills. H.R. 1157 and

¶44 O’Connor applauds the efforts of the ALA to participate in the legislative process as they “play an important role as a check on government power.” However, he believes “[t]here have unfortunately been statements made about what we are doing that, in fact, are simply not true. . . . [Librarians] also have an obligation when they are really criticizing government to also disclose to the public that [the serving of FISC surveillance orders for library records is] not happening to them.”⁸⁵ The USA PATRIOT Act prevents librarians from disclosing whether a FISC surveillance order has been served, but it does not prevent disclosure of the fact that a FISC surveillance order has not been served. A survey of public libraries conducted by the Library Research Center of the Graduate School of Library and Information Science at the University of Illinois in October 2002 indicates that the FBI, Immigration and Naturalization Service, police, and Secret Service have requested information about patrons from public libraries pursuant to verbal or written requests for voluntary cooperation, subpoenas, and court orders.⁸⁶ A little more than 10.5% of the respondents indicated that such information had been requested from their libraries and of those approximately half the libraries cooperated by voluntarily providing the information.⁸⁷ However, no explanation is given as to whether the subpoenas or court orders were pursuant to FISC applications, title III applications, or grand jury applications.

¶45 The primary objective of legislation proposed to amend the USA PATRIOT Act is to require more accountability of law enforcement when seeking a FISC surveillance order and to raise the burden of proof for issuing the order to that of probable cause. It is the Department of Justice’s position that there is sufficient accountability vested in the three FISC judges. As explained earlier, while

H.R. 3352 were referred to the House Committee on the Judiciary and to its Subcommittee on Crime, Terrorism and Homeland Security and also to the House Intelligence (Permanent Select) Committee; the former on Mar. 6, 2003, and the latter on Oct. 21, 2003. Introductory remarks on H.R. 1157 were delivered in the House on Mar. 12, 2003 and on July 8, 2004, on the latter date as an amendment [H. AMDT. 652] sponsored by Rep. Bernie Sanders to H.R. 4754, “Making appropriations for the Departments of Commerce, Justice, and State, the Judiciary, and related agencies for the fiscal year ending September 30, 2005, and for other purposes.” The amendment was defeated by a tie vote (210–210 with 1 answering “Present” and 13 not voting). 150 CONG. REC. H5373–74 (daily ed. July 8, 2004).

85. Interview with Kevin J. O’Connor, *supra* note 7.

86. Library Research Ctr., Univ. of Ill. at Urbana-Champaign, Public Libraries and Civil Liberties: A Profession Divided, at <http://lrc.lis.uiuc.edu/web/PLCL.html> (last visited Oct. 30, 2004).

87. Library Research Ctr., Univ. of Ill. at Urbana-Champaign, Public Libraries’ Response to the Events of 9/11/2001: One Year Later [2–3] (reporting results of survey with 906 libraries responding), *available at* <http://alexia.lis.uiuc.edu/gslis/research/finalresults.pdf> (last visited Oct. 30, 2004). The questionnaire did not distinguish among the types of requests for patron information and it also carried a warning that the respondent might want to consult counsel on the applicability of the USA PATRIOT Act’s secrecy restrictions. These two weaknesses in the methodology make the results suspect and inconclusive. The conflicting results of the poll were briefly discussed by Kronholz who noted that “some librarians . . . didn’t answer all of Ms. Estabrook’s questions because of legal prohibitions.” Kronholz, *supra* note 71. Kronholz further reported that Mark Corallo, spokesperson for the Department of Justice, dismissed Estabrook’s conclusions as “scurrilous.” *Id.*

the FISC courtroom remains sequestered, the judges are federal judges who rotate through each term of service in the FISC, thereby reducing the probability of corruption or abuse by the bench. O'Connor points out that the decision to issue a FISC surveillance order is not vested in a single judge and the combination of judges is always changing.⁸⁸ Additionally, while the burden of proof does not rise to the level required in a criminal investigation of a U.S. citizen, O'Connor claims that the judges apply more than the "rubber stamp"⁸⁹ asserted by Sheketoff⁹⁰ when making a determination whether to issue a FISC surveillance order. Law enforcement must still provide evidence that there is a relationship to foreign intelligence gathering in order for the FISC to assert its jurisdiction.

¶46 Both Sheketoff and O'Connor agree that the tension between protecting security and civil liberties is not a new one. Sheketoff referenced the FBI's Library Awareness Program,⁹¹ while O'Connor acknowledged that "there are people out there who have a reason, from personal experience, not to trust government in general."⁹² Other times when national security has taken precedence over civil liberties have included both World Wars, the Palmer raids in the 1920s, the McCarthy hearings in the 1950s, and throughout the Cold War.⁹³ Interestingly, both Sheketoff⁹⁴ and O'Connor⁹⁵ feel that the ongoing relations between librarians and law enforcement officials are good, but that they may never agree on the necessity of the USA PATRIOT Act.

Conclusion

¶47 On June 5, 2003, Attorney General John Ashcroft testified before the Committee on the Judiciary in the United States House of Representatives as to,

88. Interview with Kevin J. O'Connor, *supra* note 7.

89. *See supra* note 17.

90. *See supra* note 15.

91. Telephone Interview with Emily Sheketoff, *supra* note 14. The Library Awareness Program was an anti-Soviet initiative conducted by the Federal Bureau of Investigation to obtain information from library records and librarians regarding the use of unclassified scientific information by Soviet and East European nationals. Librarians' responses to this program are documented in HERBERT N. FORESTEL, *SURVEILLANCE IN THE STACKS: THE FBI'S LIBRARY AWARENESS PROGRAM* (1991).

92. Interview with Kevin J. O'Connor, *supra* note 7.

93. *See* Martin Kady, *Two Years After 9/11, Are We Safer?* 13 CQ RESEARCHER 749, 758-60 (2003).

94. "We have had a very fruitful and positive relationship with the FBI and local law enforcement. And we have done everything here in the Washington Office to assist local librarians so that they can continue having positive relationships with their local law enforcement. And that has included when the Act first passed, we met with people from the FBI so that librarians were more confident that if they were approached by law enforcement that they could respond appropriately." Telephone Interview with Emily Sheketoff, *supra* note 14.

95. "We have a very good relationship with librarians. I mean, we may not necessarily see eye-to-eye on how the PATRIOT Act is being applied, how it could be applied. But look, I respect their role, they have a right to be very aggressive in the protection of the privacy of their citizens; and frankly, the use of public libraries does come with an expectation of privacy of what books you check out, particularly so that Joe Q. Public can't walk in and find out what books you took out. And, I think, any threat to that, they are well intended and should vigorously protect it." Interview with Kevin J. O'Connor, *supra* note 7.

among other things, the operation of section 215 of the USA PATRIOT Act with respect to library records. The 120-page transcript reveals that this was a nearly five-hour-long hearing with only a thirty-minute break. Ashcroft was questioned extensively on the library records issue by Representative Green of Wisconsin,⁹⁶ Representative Watt of North Carolina,⁹⁷ Representative Baldwin of Wisconsin,⁹⁸ and Representative Jackson-Lee of Texas.⁹⁹ It may have been this inquisition that caused the attorney general to initiate the twenty-city tour to, as O’Connor says, “[take] it upon himself, as the chief law enforcement officer in the country, to present [the Department of Justice’s] side of the debate.”¹⁰⁰ But, as O’Connor recognizes, “debates tend to be framed by the extremes,”¹⁰¹ and both the ALA and the attorney general are guilty of taking the argument to the extreme.

¶48 As offensive as the attorney general’s “baseless hysteria” comment is, so too is the video being circulated pursuant to a Mellon Grant to promote interest in librarianship as a career choice, in part, by engaging undergraduate students in a discussion about the USA PATRIOT Act.¹⁰² The videotape shows clips of Ashcroft’s testimony from the June 5, 2003, hearing before the House Judiciary Committee. Also on the videotape are clips of Representative Bernie Sanders’ keynote address at the joint meeting of the ALA and the Canadian Library Association on June 21, 2003.¹⁰³ While Representative Sanders is portrayed as a champion of the library cause as he is applauded by the ALA/CLA membership for his support of amendments to the USA PATRIOT Act, the attorney general is portrayed as incompetent as he frequently turns to his aides for answers to the committee members’ questions about the application of the Act to library records. A reading of the transcript of the hearing suggests otherwise. This biased portrayal of the attorney general at the committee hearing suggests that U.S. Attorney O’Connor’s concern that the attorney

96. *DOJ Hearing*, *supra* note 11, at 20–22, available at <http://www.house.gov/judiciary/87536.PDF#xml>.

97. *Id.* at 32–36.

98. *Id.* at 44–47.

99. *Id.* at 50–52.

100. Interview with Kevin J. O’Connor, *supra* note 7.

101. *Id.*

102. The purpose of the Mellon Grant is to promote interest in librarianship as a career that undergraduates might pursue in the hopes of increasing the number and diversity of students pursuing advanced degrees in library and information science. *Mellon-Funded Librarian Recruitment Program Includes Mount Holyoke*, COLL. STREET J., Sept. 19, 2003, at 2 (describing purpose of grant and Mount Holyoke’s participation in the project), available at <http://www.mtholyoke.edu/offices/comm/cs/j/091903/mellon.shtml>.

The author attended the presentation at Mount Holyoke College on the evening of Oct. 30, 2003. While it was not expressly stated that the ALA was connected with the Mellon Grant project, ALA materials, such as the *Code of Ethics of the American Library Association*, in AM. LIBRARY ASS’N, INTELLECTUAL FREEDOM MANUAL 407–08 (2002), among others, were distributed at the meeting.

103. The request for the bibliographic information about the videotape was declined by the producers who suggested that the two events (the House Judiciary Committee hearing and the ALA/CLA keynote address) be cited rather than citing the videotape as a separate work. E-mail from Kathleen Norton, Librarian, Mount Holyoke College Library, to Katherine K. Coolidge, Law Librarian, Bulkley, Richardson and Gelinias, LLP (Nov. 14, 2003) (on file with author).

general has unfairly become a target and a lightning rod on this issue is not unfounded.¹⁰⁴ It is unfortunate that the videotape is so clearly biased, because it only serves to further misinform and polarize the positions of the ALA and Department of Justice. That said, it is also unfortunate that the attorney general brings this criticism on himself by his unprofessional and sarcastic remarks directed at specific groups who disagree with him. His unwillingness to engage in open and honest communication serves to fuel the flames of suspicion and distrust of the Department of Justice, and inspires librarians to develop policies of destroying library records to prevent their discovery in any criminal or foreign intelligence investigation.¹⁰⁵ The American public deserves better from both the attorney general and the ALA.

¶49 In review, the attorney general's twenty-city tour appears to have been ineffective in advancing support for the USA PATRIOT Act. The Victory Bill has made no progress, and the ALA has been able to garner more support for its legislative initiatives. By the same token, these measures to amend the USA PATRIOT Act have also not made significant progress in Congress. What is important is that the tour sparked a debate that caused U.S. citizens to think about, if even for a brief time, the role of librarians in protecting access to information. It is unfortunate that the debate between the attorney general and Carla Hayden was so narrowly focused on the struggle of the ALA to wrest information from the government about the use of the USA PATRIOT Act in libraries. Managed in a less reactionary manner, the debate could have been an opportunity to have a broader discussion about how, in this age of rapidly changing technology, librarians are not book babysitters but rather information managers in institutions that have become information centers for their communities. The discussion could have been an opportunity for law enforcement to educate librarians on the process of criminal and foreign intelligence investigations, and for both librarians and law enforcement officials to find ways to work together for mutual safety and the protection of civil rights. Simply put, this failure to communicate facts and ideas instead of emotional barbs precluded the exchange of meaningful information.

¶50 As the debate continues, it must be based in fact. Misinformation is destructive and undermines the security of everyone. At some point and on some level most Americans trust that the majority of people in this country are trying to do the right thing to protect and defend both our security and our civil liberties. By destroying library records, librarians may assist, albeit unknowingly, individuals who use the anonymity of the library to commit or conspire to commit crime or

104. Interview with Kevin J. O'Connor, *supra* note 7.

105. The ALA has urged "all libraries to adopt and implement patron privacy and record retention policies that affirm that 'the collection of personally identifiable information should only be a matter of routine or policy when necessary for the fulfillment of the mission of the library.'" Am. Library Ass'n, Resolution on the USA PATRIOT Act and Related Measures that Infringe on the Rights of Library Users (Jan. 29, 2003), available at http://www.ala.org/Template.cfm?Section=IF_Resolutions&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11891.

terrorism. While a wholesale abdication of civil rights without question would be absurd, so too is an alarmist misrepresentation of information about the operation of the USA PATRIOT Act and the FISC process. It is unlikely that the official positions of the American Library Association and the Department of Justice will ever be identical about the necessity of the USA PATRIOT Act, but the lack of consensus should not be allowed to contribute to making Americans feel less secure by promoting stereotypical representations of each other and imparting less than complete information. Both sides must act professionally during the debate to give those who seek to educate themselves on the issues the opportunity to strike a reasonable balance. "Just as opposing government intrusions on private lives is not unpatriotic, support for effective law enforcement and enhanced security isn't necessarily a sign of being right wing or reactionary."¹⁰⁶ The library community would be better served by using its combined intelligence to develop policies that protect the privacy as well as the safety of its patrons.

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106. Adam Clymer, *Threats and Responses: Privacy; Librarians Get Advice on Handling Government Requests for Information on Readers*, N.Y. TIMES, Dec. 12, 2002, at A30 (quoting Thomas M. Susman, a Washington lawyer who handles library issues and a former aide to Sen. Edward M. Kennedy of Massachusetts).