“Any Tangible Thing”: Library Records, Information Privacy, and Section 215 of the USA PATRIOT Act

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“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, bookstores, and homes of the land” – William O. Douglas.

“There is no conflict between liberty and safety. We will have both or neither” – Ramsey Clark.

“It is seldom that liberty of any kind is lost all at once” – David Hume.

As part of the USA PATRIOT Act—the wide-ranging statute rushed into law in the weeks following the September 11 terrorist attacks—Section 215 amends and expands the reach of the Foreign Intelligence Surveillance Act of 1978 (FISA) by broadening federal agents’ power to (without subpoena) review business records as part of foreign intelligence investigations to include access to “any tangible thing” (H.R. 3162, 2001)—including, as has received much attention, bookstore and library records. Additionally, those served with orders citing Section 215 are forbidden from communicating the fact “to any other person” (H.R. 3162, 2001)—including, for instance, the library patron(s) whose records are being compromised. There is no opportunity for independent judicial review of Section 215 orders. Though defenders of the provision insist that it has been fashioned to address the unique difficulties of investigating and pre-empting terrorist suspects, the section does not require that searches be limited to individuals suspected of terrorist collusion. The provision does make an obligatory gesture to the First Amendment,
but critics fear that it unashamedly dismantles constitutional protections surrounding First Amendment activities.

The classified nature of so much of the material surrounding the PATRIOT Act makes getting a handle on the provision and fully ascertaining its effects all the more difficult. Still, as Section 215 is one of three PATRIOT Act provisions scheduled to sunset in the coming months, and is thus being reviewed for reauthorization, now is as opportune a time as any to examine what exactly is at stake in debates over 215. The concerns of librarians, specifically as expressed by the American Library Association (ALA), seem warranted, but may at times be overstated. Defenders of the provision, notably the members of Congress and Senators sitting on committees overseeing the PATRIOT Act, often seem unsure as to whether to reassure opponents that Section 215 is effectively harmless or insist that it is effective and necessary. Their claim that the provision is aimed at other forms of records (travel, banking, accommodation) seems entirely plausible, but given how ineffectual it would be at dealing with library records, I suspect that it would not only be in the interest of citizens’ constitutional protections to have libraries and booksellers somehow excluded from the provision, but it would also be in the interest of law enforcement officials to direct their resources elsewhere. That said, the Senate has in recent weeks balked at adding privacy protections to Section 215 for fear of jeopardizing “ongoing” terror investigations (Savage, 2009). As such, the task of acting as reasoned mediator will probably fall to the courts, which might delineate a clearer path for librarians, lawmakers, and judges alike to make sense of a provision fraught with contradictions and ambiguities.

While innumerable groups, notably the American Civil Liberties Union (ACLU) and freedom of expression group PEN American Center, have voiced their unequivocal opposition to Section 215, perhaps the most prominent opponent of the provision has been the ALA. In their most recent resolution concerning the PATRIOT Act, the organization renewed its commitment to oppose “any use of governmental power to suppress the free and open exchange of knowledge and information” (ALA, 2009)—of which, it claims, Section 215 is a shining example—and urged Congress to allow the provision to sunset. Fearing that the Act undermines their professional ethical standards of strict confidentiality with regards to their patrons’ reading and research habits, librarians’ concerns have largely focused upon the section’s reduction of the level of judicial oversight as pertaining to requests for searches and seizures, as well as its nondisclosure requirements—all of which together may have a chilling effect on users’ reading habits. As Lisa Graves, Executive Director of the Center for Media and Democracy, expressed in a recent interview with Democracy Now!’s Amy Goodman, the focus of the ALA’s discontent is that the provisions enable powers that “allow the government to obtain literally any tangible thing held by a third party about you with a secret court order, and that court order does not have to be based on any wrongdoing on your part or
any suspicion that you've done anything wrong” (Graves, 2009). That the provision is also, in fact, not rigidly circumscribed by its terms is another issue of grave concern to the ALA. Expressly, Section 215 investigations are to be conducted “under guidelines approved by the Attorney General under Executive Order 12333” (H.R. 3162, 2001)—guidelines which, once established, are not subject to review. Overall, according to the ALA, the PATRIOT Act serves to heavily undermine the traditional role of libraries as “neutral, private places to investigate the full range of ideas necessary to be an informed citizen of a democracy” (Mart, 2004, p. 449).

The ALA asserts that the existing means available to law enforcement officials for obtaining library records are perfectly adequate. Prior to the enactment of the PATRIOT Act, officials looking to obtain such records were obligated to follow the strictures of the subpoena process, which necessitates the demonstration of “probable cause” (U.S. Const., amend. IV, § 1), demands advanced notification that the records are being sought, and allows for judicial review before the order is carried out. Though advocates of Section 215 retort that such processes are overly burdensome for law enforcement agencies dealing with matters of national security, there are numerous instances of PATRIOT Act provisions being wielded in much less pressing (and non-terrorism related) circumstances (Mart, 2004; Graves, 2009), making such a defence nothing if not disingenuous.

As Anne Klinefelter (2004) observes, librarians are already so well-connected “through professional organizations and email mailing lists” (p. 223) that they are ideally situated to mount an organized campaign in opposition to Section 215. Though their role in opposing the provision has largely been one of political advocacy and public awareness, there have been instances of librarians showing their teeth in legal challenges to the PATRIOT Act. In one such case in 2005, George Christian and three colleagues at Library Connection (a non-profit cooperative that provides central Connecticut libraries with their online cataloguing and circulation systems) filed a federal lawsuit challenging the receipt of a National Security Letter (NSLs are another product of the Act, employable in conjunction with Section 215 orders) that demanded access to patrons’ library records. The Library Connection workers successfully had the gag order struck down and the NSL request dropped (Graves, 2009). Nonetheless, librarians’ concerns regarding the provision have been widely challenged by its supporters in both government and the media.

In early 2004, as the impact of the PATRIOT Act upon libraries and their users was quickly gaining political currency among candidates and voters alike in the lead up to the Democratic primaries and caucuses, conservative commentator Joseph Bottum (2004) opined in The Weekly Standard that the characterization of the Act as a McCarthyist threat to the essential liberties of libraries and their users was, in fact, demonstrably false, “a
deliberate and cold-blooded fabrication,” little more than partisan shorthand for “everything that's wrong in President Bush's America” (¶ 2, 5). Though Bottum's rhetoric implicitly carries its own form of partisan political shorthand—the “Bush-basher” label has, of course, been indiscriminately thrown around to discredit even the most legitimate and articulate of American dissidents (Shribman, 2006)—his claims largely echo those of lawmakers who have expressed support for Section 215. As such support has, from the outset, crossed party lines—arguably more so now that the Obama administration has moved to reauthorize the provision (Savage, 2009)—there is evidently more at stake for the Act's supporters than political point-scoring.

Bottum's (2004) insistence that “the brouhaha should have been put to rest by the revelation . . . that Section 215 has never been used” (¶ 9) has ranked among the most common pieces of rhetoric wielded by the provision's defenders ever since former Attorney General John Ashcroft reluctantly declassified the relevant information (Matz, 2008, p. 77). That no Section 215 orders have been issued to date has been widely disputed by librarians across the United States: in response to a University of Illinois survey, a number of libraries reported having received court orders invoking Section 215 or prohibiting them from notifying patrons that authorities had requested information, and still others indicated that they had refrained from answering some of the survey’s questions because they believed they were legally prohibited from doing so (Mart, 2004, p. 464). Furthermore, the gag order imposed by the provision (any violation of which is punishable as a felony) and the classified nature of most any information concerning instances of enforcement of the PATRIOT Act make the verifiability of such a claim elusive at best.

Still, even when accepted at face value, what remains most perplexing about such an argument is the suggestion that a law “concededly inimical to constitutional freedoms that is used in secret and produces classified results” (O'Donnell, 2004, p. 67) is somehow rendered unproblematic simply by the government's insistence that it has not yet been used. This is surely profoundly naïve, if not logically incoherent—why then, one is inclined to respond, keep the law on the books at all? (Indeed, elsewhere, Bottum seizes upon Section 215's impending expiration as justification for thinking it harmless; obviously, that, nearly six years on, the provision faces a strong prospect of yet another renewal makes that already unconvincing objection wholly impotent). The argument that the bill targets other kinds of records, again, seems more or less authentic, but this has not been borne out by adequate legislative support for propositions restoring constitutional protections for libraries and booksellers.

Of course, ultimately, the case for 215 rests squarely on proponents' assertions that it serves a crucial government interest (fighting terrorism) by equipping officials with the tools and procedures necessary to undertake aggressively pre-emptive law enforcement, and that the need to maintain the (allegedly few) civil
liberties thereby compromised does not outweigh this interest. The need for law enforcement officials to investigate crime is inevitably compelling, as “utilitarian balancing between individual rights and the common good rarely favors individual rights” (Solove, 2007, p. 751), but surely government's role reaches well beyond that of facilitating the operations of law enforcement. Crucial to the above argument, then, is specifically the “usefulness of obtaining suspects' reading records in fighting terrorism, not merely the importance of the fight itself” (O'Donnell, 2004, p. 64). As an effective tool for fighting terrorism, Section 215 does not seem to hold up to further scrutiny. By legal scholar Michael O'Donnell's (2004) measure, it is as “breathtakingly overinclusive” as it is “underinclusive” (pp. 64-65). In the case of the former, he cites an FBI bulletin warning law enforcement officials that “almanacs may represent a particularly useful tool for terrorist operatives to use in selecting targets” (O'Donnell, 2004, p. 64). Indeed, if manifested in a Section 215 order for sales and borrowing records pertaining to almanacs (and, given the gag order, who knows if it has been?), the records collected would implicate thousands of individuals. When cross-checked against other potentially incriminating informational records, there is a chance that the resulting leads (if any) might eventually prove to be of some value to officials—but the likelihood of such an outcome seems undoubtedly slim and, even then, the role of library records would be minimal at best.

As for its necessary underinclusivity, attempting to intercept terrorist activity by monitoring reading habits is invariably “reactive and ex post” (O'Donnell, 2004, p. 65). That is to say, as a means of executing a form of law enforcement that aims to be predictive and preemptive, relying almost exclusively on materials already denoted as suspicious is hardly efficacious. One could then widen the net by attempting to anticipate materials that could be sources of potentially dangerous information, but clearly such an endeavour would be a Sisyphean task: given the example of the almanac, where would a list of suspect reading materials even stop? In light of this assessment, combined with the alleged moral urgency of “fighting terrorism,” squandering law enforcement resources and energies on such methods as those facilitated by Section 215—the effectiveness of which appears considerably dubious—would be nothing if not unconscionable.

As it stands now, it is all but certain that Section 215 will survive yet another renewal process. Indeed, if the provision is to receive a sufficiently judicious and nuanced review, it will in all likelihood come not from the political arena, but from the courts. Ever since the PATRIOT Act was hastily legislated in late 2001, judges have tried desperately to delineate its scope and (especially) its constitutionality (O'Donnell, 2004). Librarians have, for the most part, been curiously absent from the numerous legal challenges to the PATRIOT Act. Furthermore, because the added safeguards to the confidentiality of library records sought by librarians in recent decades were almost exclusively established at the state level, such
protections are superseded by the PATRIOT Act. Though the case law has yet to reflect a clear judicial consensus—and by some accounts, may not even be "overwhelmingly supportive" (Klinefelter, 2004, p. 225) of constitutional challenges to such provisions as Section 215—it may still suggest the contours of a way forward for those judges attempting to navigate the Act in future legal proceedings.

Most commonly, litigants have argued against the constitutionality of Section 215 by invoking the First and Fourth Amendments: the former prohibits the establishment of laws “abridging the freedom of speech” (U.S. Const., amend. I, § 1), while the latter guards against “unreasonable searches and seizures” (U.S. Const., amend. IV, § 1) and necessitates the establishment of “probable cause” (U.S. Const., amend. IV, § 1) in the issuance of such warrants. The results of cases mounted on these grounds have ranged from unsuccessful to inconclusive. As Daniel Solove (2007) observes, PATRIOT Act or no, from the very outset, “the lack of Fourth Amendment protection of third party records results in the government's ability to access an extensive amount of personal information with minimal limitation or oversight” (p. 765). Perhaps addressing the provision more directly as a privacy issue would yield a clearer precedent. After all, at the heart of any Section 215 challenge lies the matter of whether library users can, in fact, reasonably expect their borrowing records to remain private. Though the ALA may object that their own professional standards and procedures require the immediate erasure of patrons' library records upon timely return of materials, the legal argument could, one suspects, easily be made that users voluntarily convey such information and, as such, have no legitimate expectation of privacy. Undeterred, O'Donnell suggests challenging Section 215 as a violation of the Fifth and Fourteenth Amendments, which together protect against government abuse of authority in legal procedures and guarantee “due process” (U.S. Const., amend. V, § 1) rights—namely, that certain procedures must be followed before a person's “life, liberty, or property” (U.S. Const., amend. V, § 1) be taken away.

O'Donnell (2004) points to two crucial Supreme Court cases, Whalen v. Roe and Nixon v. Administrator of General Services, as having affirmed, by way of these Amendments, a constitutional right to information privacy (and enunciated a distinction between informational and decisional privacy, the latter being most often invoked in cases concerning pregnancy and abortion) (p. 48). Numerous subsequent cases in lower federal courts, citing one or both of the above cases, have successfully outlined a reasonably expansive definition of the kinds of information that fall under constitutional protection. However, what has undoubtedly proven to be a major obstacle in making juridical sense of Section 215 by means of these legal precedents is that while Whalen describes the right to privacy as an “interest in avoiding disclosure of personal matters” (O'Donnell, 2004, p. 49), Section 215 authorizes government collection of information. In dealing with plaintiffs' privacy claims, where should courts
make the legal distinction between collection and disclosure? Is such a demarcation even possible?

As judicial decisions embracing the constitutional right to informational privacy have variously included both cases of collection and of disclosure, the distinction seems murky, if not irrelevant. Moreover, as O'Donnell (2004) adds, “it is a short distance to travel between governmental collection of information and dissemination of the same” (p. 61), and this is all the more true in the case of the PATRIOT Act, which drastically diminishes traditional legal obstacles to the sharing of intelligence among numerous law enforcement agencies. Since library users are presumably less concerned with the public disclosure of their library records than with their indiscriminate dissemination to other intelligence agencies (which would surely increase one's possibility of being inordinately tagged as a terror suspect), it would hardly be inappropriate for courts, in future decisions surrounding Section 215, to reaffirm the irrelevance of any purported differentiation between collection and disclosure. As for the matter of informational and decisional privacy, that too is a distinction that could very well be problematic: “Since decision-making about pregnancy and abortion is protected under the Due Process Clauses of the Fifth and Fourteenth Amendments, information about pregnancy, the argument goes, deserves protection under the constitutional right to information privacy” (O'Donnell, 2004, p. 58). Given proper judicial consideration, this could serve as the foundation of a reestablishment of the constitutional protection of information privacy ceded by 215.

Clearly, challenges to Section 215 concern not only matters of freedom of speech (and the conditions of intellectual freedom that predicate speech) and unlawful search and seizure, but also an informational privacy of a particular kind, reflecting “the problem of privacy and surveillance in terms of discrimination, which is the end result of the social construction of difference in the pursuit of . . . social control” (Gandy, 1995, p. 37). Though librarians' characterization of the dangers of the provision may sometimes slip into hyperbole, the concerns of the ALA seem more or less legitimate and deserve to be properly addressed.

Many of Section 215's supporters have suggested that libraries and their patrons need not worry, because the provision is actually aimed at hotel, airline, and bank records. If this is indeed the case, then surely something like the Freedom to Read Protection Act, introduced (in vain) by Rep. Bernard Sanders of Vermont in 2003 to exempt libraries and bookstores from the reach of 215, would not be unwelcome, and could be put forward as a qualifier to the provision before it is reauthorized. Unfortunately, the Freedom to Read Protection Act is but one of many similar propositions—notably, the Security and Freedom Ensured (SAFE) Act and the Library, Bookseller, and Personal Records Privacy Act—that have all suffered the same fate in recent years. Consequently, while the ALA has done an admirable job of spreading awareness and
galvanizing concern among citizens and media alike, the most effective pressure for political change will more than likely have to come from the courts. Navigating the nuances and contradictions of the existing case law may be no walk in the park, but there is some reason to believe that a constitutional challenge to Section 215 could result in a decision that would necessitate significant modifications to the provision, and might even lead—though it is perhaps a long shot—to its being struck down altogether.
References


U.S. Constitution, amendment I, § 1.

U.S. Constitution, amendment IV, § 1.

U.S. Constitution, amendment V, § 1.