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This paper analyzes the legal aspects related to privacy and library records. Although the United States Congress has yet to declare library records confidential, the U.S. Supreme Court has recognized a general right to privacy in the penumbra surrounding the First, Fourth, Fifth, and Fourteenth Amendments. This paper includes a review of the relevant cases and legislation. Particular attention is paid to the USA PATRIOT Act and the proposed 2005 amendments to the Act and how they affect the confidentiality of library records. Finally, it attempts to formulate an argument for establishing a constitutional right to read and use libraries anonymously.

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AN ANALYSIS OF PRIVACY LAW AS IT RELATES TO THE CONFIDENTIALITY
OF LIBRARY PATRON RECORDS

by
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I. Introduction

Public libraries hold an important place in any democracy as they provide equal access to information for all citizens. It is therefore of the utmost importance that our legal system provide protection for privacy in libraries. Neither the federal government nor the United States Supreme Court has explicitly guaranteed the protection of confidentiality of library records. Instead, the federal government has a history of impinging on the private and anonymous use of libraries, with the most recent example being the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act). However, courts have long recognized that several amendments to the U.S. Constitution provide the bases for a right to confidentiality in personal matters. This paper will analyze the possibility of establishing a constitutional right to read and use libraries anonymously. Section II of the paper will discuss the current federal and state laws concerning library records. Next, Section III examines the different privacy interests recognized by the U.S. Supreme Court. Section IV analyzes the provisions of the PATRIOT Act that are relevant to library records, while Section V addresses recently proposed amendments to the Act. Finally, Section VI attempts to predict how the Court would handle a constitutional challenge to a government action that impinges upon the confidentiality of library patron records.

II. Federal and State Laws Concerning Library Records

Despite the esteemed place libraries hold in American society, there has never been a federal law protecting library records. However, the U.S. Congress has considered the matter of whether the confidentiality of library records should be afforded special protection (Torrans 31). In 1988, Congress passed the Video Privacy Protection Act in response to a newspaper publishing a list of videotapes that Judge Robert Bork and his family had rented at a local video store as part of its coverage of his nomination proceedings to the U.S. Supreme Court (Madrinan 821). The bill, as originally written, prohibited the disclosure of library borrower records, as well as video rental records, “except to the person, to another with the person’s consent, or under court order” (134 Cong. Rec. S5399 (daily ed. May 10, 1988) (statement of Sen. Leahy)). The “court order” portion of the bill essentially provided that law enforcement personnel would need to demonstrate probable cause to a judge before a court would issue an order authorizing a video store or library to turn over customer or patron records (Madrinan 821). This is similar to the Fourth Amendment requirement of a showing of probable cause before a search warrant may be issued in a criminal investigation. Probable cause is defined as “more than a bare suspicion but less than evidence that would justify a conviction” (“Probable Cause”).

Regrettably, by the time the bill emerged from committee, the library portion of the bill had been amended out (Madrinan 821). The Senate Committee of the Judiciary’s report does not reveal the exact reasons for the change, but it does note that the bill originally “included...a protection for library borrower records, recognizing that there is a close tie between what one views and what one reads...[h]owever, the committee was

unable to resolve questions regarding the application of such a provision for law enforcement” (S. Rep. No. 100-599, at 8 (1988), *reprinted in* 1988 U.S.C.C.A.N. 4342-1 to –8). The Federal Bureau of Investigation (FBI) was opposed to protecting library records in the bill and tried to introduce a national security letter exemption. The clash between the FBI and proponents of library privacy protection resulted in simply deleting the library portion from the bill altogether (Foerstel 125-133).

Although Congress chose not to protect library records, forty-eight states and the District of Columbia have passed statutes protecting the confidentiality of records of what library users read and do in libraries (Klinefelter 224). Some statutes, such as Indiana’s, merely declare that library records are confidential (Burns Ind. Code Ann. § 5-14-3-4 (2005)). Other states, such as North Carolina, declare that library records are confidential and specify the circumstances under which records may be disclosed (N.C. Gen. Stat. § 125-19 (2005)). The North Carolina law provides that library records may be disclosed “(1) When necessary for the reasonable operation of the library; (2) Upon written consent of the user; or (3) Pursuant to subpoena, court order, or where otherwise required by law” (N.C. Gen. Stat. § 125-19(b) (2005)). The remaining two states, Hawaii and Kentucky, do not have statutes protecting library records, but do have attorney generals’ opinions declaring library records confidential (90 Op. Attorney Gen. 30 (Hi. 1990)); 81 Op. Attorney Gen. 159 (Ky. 2002)).

The passage of state laws protecting the confidentiality of library records and library use was largely the result of work by librarians and library associations acting in response to a FBI surveillance effort called the “Library Awareness Program” (Klinefelter 224). The Cold War-era program was established to track Soviet use of

technology information available in American public libraries. The program included the recruitment of library staff as FBI agents, as well as requests for records of library use (Foerstel).

III. Constitutional Protection of Privacy Interests

Although Congress has declined to pass a law expressly protecting the confidentiality of library records, support for such protection can be found in the penumbra surrounding the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments (Torrans 36). For the purposes of this paper, I will focus my analysis on cases decided using the First, Fourth, Fifth, and Fourteenth Amendments that support constitutional protection for the confidentiality of library records.

The U.S. Supreme Court has long recognized the right to anonymity in a variety of First Amendment contexts, dating back to Talley v. California in 1960 (362 U.S. 60 (1960)). In that case, the petitioner was arrested and fined for distributing unsigned handbills urging a boycott against merchants who were noncompliant with equal employment opportunity requirements. The Court invalidated a Los Angeles city ordinance that required handbills to include the names and addresses of persons who prepared, distributed, or sponsored them, stating that such a law “would tend to restrict freedom to distribute information and thereby freedom of expression” (Talley 64). In doing so, the Court recognized that the First Amendment protection of free speech also extended to publishing and distributing information.

The Court upheld the Talley decision thirty-five years later, in McIntyre v. Ohio Elections Committee, holding that an Ohio statute requiring pamphlets to be signed was unconstitutional (514 U.S. 334 (1995)). The Court held that choosing to publish reading

materials anonymously was itself expression that should be protected by the First Amendment. As Justice Stevens contended: “[A]n author’s decision to remain anonymous...is an aspect of the freedom of speech protected by the First Amendment” (McIntyre 342). Since the Court found that that law requiring author identification was “a direct regulation of the content of speech,” it applied an “exacting scrutiny test” and invalidated the statute because it was not “narrowly tailored to serve an overriding state interest” (McIntyre 345). The Court has expanded upon this right to anonymity in two recent cases, recognizing the right to circulate petitions anonymously in Buckley v. American Constitutional Law Foundation (525 U.S. 182 (1999)) and to canvass door-to-door anonymously in Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton (536 U.S. 150 (2002)). The Court has not explicitly adopted a standard of review to use in anonymity cases, but weighed the value of anonymous speech against the interests of the government in each of these cases.

Another U.S. Supreme Court case providing support for a First Amendment right to read anonymously is NAACP v. Alabama ex rel. Patterson (357 U.S. 449 (1958)). In NAACP, the State of Alabama sought to compel disclosure of rank-and-file membership lists of the NAACP (451). This opinion marked the Court’s first announcement of the individual right of associational freedom, holding that the members of the NAACP had a right to privacy in their association with the organization (NAACP at 462-463). In reaching its decision, the Court considered that previous disclosures of the identities of NAACP members had exposed those individuals to economic reprisal, loss of employment, and threats of physical violence that would likely deter people from joining

and associating with the NAACP to advocate social and political views they had a First Amendment right to espouse (NAACP 462).

The Court applied a strict scrutiny standard of review to conclude that the government's action was unconstitutional because it may have the effect of curtailing the fundamental freedom to associate, (NAACP 460-461). In constitutional law, strict scrutiny is the standard of review applied in cases involving a fundamental right such as privacy in due-process analysis ("Strict Scrutiny"). Under strict scrutiny, the government must establish that it has a compelling interest that outweighs the individual's constitutional right to be free of the law ("Strict Scrutiny"). In NAACP, the Court found that the state's stated interest of determining whether the NAACP was operating in Alabama without complying with the state statutory registration requirement for foreign corporations was not sufficient to outweigh the members' First Amendment protection from disclosure. Forcing the disclosure of the list without a state showing that there were no less restrictive means of achieving the state's purpose would violate the Fourteenth Amendment due process rights of the members of the NAACP (NAACP 466).

Julie Cohen argues that if interpersonal association and group affiliation are expressive behavior protected by the First Amendment, then the right to read anonymously should be, as well (1014). If the Court recognizes the dangers of being labeled by one's choice of associates, it should also acknowledge the dangers of being labeled by one's choice of reading material. To put it succinctly: "Reading is intellectual association, pure and simple" (Cohen 1014). Just as the rank-and-file members in NAACP feared the consequences of their membership being disclosed, library patrons

fear being subject to investigation by the government or ostracizing from their community as a result of being associated with certain reading materials.

The most direct support for a right to read or receive reading material anonymously comes from the U.S. Supreme Court cases Lamont v. Postmaster General (381 U.S. 301 (1965)) and Stanley v. Georgia (394 U.S. 557 (1969)). In Lamont, the Court invalidated a postal regulation that authorized the interception of mail classified as communist propaganda and required recipients to specially notify the postal service of their desire to receive the material. The Court focused its analysis on the government surveillance of the materials, rather than a more general right of anonymity; however, the Court's reasoning gives support to the notion of a right to read anonymously. Writing for the majority, Justice Clark explained how the disclosure of an individual's reading preferences would result in a "chilling effect," stating that the regulation was "almost certain to have a deterrent effect" on individuals' ability to receive reading materials of their choice (Lamont 307). He concluded that the postal regulation was "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are contemplated by the First Amendment" (Lamont 307).

In Stanley v. Georgia, the Court held that a state could not criminalize the private possession of "obscene" materials, even though it may choose to regulate commercial distribution of such materials. The Court's opinion contains language that supports a First Amendment right to read anonymously, noting that the statute's intent was "wholly inconsistent with the philosophy of the First Amendment" and impinged on "the right to be free from state inquiry into the contents of [one's] library" (Stanley 565-66). Although the Court's opinion specifically mentions a personal library, the logical inference is that

the nature of materials a person chooses to read should be private and not regulated by the state, regardless of whether they were purchased or checked out from a public library.

The potential for a “chilling effect,” as discussed in Lamont and Stanley, is a consideration that often arises when dealing with rights protected by the First Amendment. A chilling effect “occurs when individuals seeking to engage in lawful activity are deterred from doing so by a governmental regulation not specifically directed at that activity” (Horn 749). The U.S. Supreme Court first made reference to a “chilling effect” in the 1952 case Wieman v. Updegraff, where the Court invalidated an Oklahoma state law requiring teachers to take an oath that they were not then, nor had they been for the past five years, part of any organization listed by the government as “subversive” (344 U.S. 183 (1952)). Although decided before NAACP, Justice Tom C. Clark, writing for the majority, argued that since it was “the fact of association alone” that would determine whether a teacher was found to be disloyal, the oath inhibited individual freedom and was thus unconstitutional (Wieman 219). Justice Felix Frankfurter, in his concurrence described the potential chilling effect: “Such unwarranted inhibition upon the free speech of teachers...has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers” (Wieman 195).

The First Amendment right to privacy arose again in a public school context in Board of Education v. Pico, in which students in junior and senior high school sought to establish a constitutional right to receive information through their public school library (457 U.S. 853 (1982)). The students brought a constitutional challenge to the school board’s decision to remove certain books from the school library. In a complex plurality

opinion, the Court used a balancing test to weigh the well-established right of local school boards to exercise broad discretion in the management of school affairs against the students' First Amendment right to receive information (Pico). The Court ultimately decided that the school board had the right to remove books from the library in this case, as long as it did not remove the books in order to restrict the students' access to information of which the board disapproved. Although the plurality notes the interests it balanced, it does not articulate the standard of review it applied. Based on the use of strict scrutiny in McIntyre and NAACP, the standard for reviewing state action that infringes on the right to receive information from public libraries arguably should entail a more stringent standard of review, perhaps even strict scrutiny (Hinz 549).

Although the Court upheld the board's right to remove the books, the opinion's language still gives strong support to the notion of a right to read and use libraries anonymously. The Court articulated the right to receive information as logically following from a sender's explicit textual First Amendment right to send information, stating that "the right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom" (Pico 67) (emphasis in original). When removed from the context of a public school, where the principle of *in loco parentis* governs, an adult's right to receive information from a public library is arguably much stronger than the students' rights in Pico.

The Supreme Court has also considered the chilling effect of government action in the context of domestic intelligence gathering. In the 1972 decision Laird v. Tatum (408 U.S. 1 (1972)), four individuals and nine associations challenged the constitutionality of the United States Army's surveillance of their lawful civilian political

activities. The Army gathered its information through articles published in the news media and other publications in general circulation. Other information came from local law enforcement and also from Army Intelligence agents who had attended meetings that were open to the public (Laird 6). The Court found that the plaintiffs had not suffered any direct harm as a result of the Army's actions and that the chilling effect alleged was not sufficient to establish injury-in-fact (Laird 2-3). The Court's holding turned on whether there was an "objective" or "subjective" chill as a result of the government's actions, but Chief Justice Burger's opinion also distinguished Laird from earlier chilling effect cases by noting that the challenged exercise of governmental power in those cases has been "regulatory, proscriptive, or compulsory in nature" (Laird 11). By contrast, in Laird, the government was not restricting any political activities, but merely observing them.

Although the Court in Laird decided the case under the First Amendment, it seemed to place great importance on the fact that information that was gathered by the Army was from either published material or meetings that were open to the public. The Court used a similar analysis in a later case Socialist Workers Party v. Attorney General, in which it upheld the monitoring and infiltration of the Socialist Workers Party's convention as constitutional (419 U.S. 1314 (1974)). The Court emphasized that the convention was open to the public and the press and found that the use of government agents to gather information "would not appear to increase appreciably the 'chill' on the free debate at the convention" (Social Workers Party 1317).

Since Laird and Socialist Workers Party both involve intelligence gathering, they implicate the Fourth Amendment, as its purpose is to protect citizens from unreasonable searches and seizures (U.S. Const. Amend. IV). It provides:

The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Courts have held that the Fourth Amendment requires a showing of “probable cause” for any search warrant and that the government specifically describes what they expect to recover in the warrant (Martin 292). These requirements are to ensure that the government does not use subpoenas or warrants to harass people and that law enforcement agents do not invade individuals’ privacy unnecessarily. Using general subpoenas, law enforcement officials have generally been able to demand library records in criminal investigations, including two famous recent cases: the Unabomber, who wrote meticulous academic treatises to accompany his string of bombing over the course of two decades, and the “Zodiac Killer,” who had cited the works of an obscure cult poet (Lichtblau A11).

The line of privacy cases beginning with the 1967 case Katz v. United States established that the Fourth Amendment protects only those things in which a person has “a reasonable expectation of privacy” and likewise, that one does not have a “reasonable” expectation of privacy in anything that one exposes to the public (389 U.S. 347 (1967)). What is private and therefore protected from searches under the Fourth Amendment varies by situation, since it involves determining in each instance whether one’s expectation of privacy is “reasonable.” This requires the court to use a balancing test weighing the potential gain to the community against the harm of intruding on one’s privacy (Martin 293). For example, in U.S. v. White, the Court held that an individual’s conversation with a third party was not protected by the Fourth Amendment, since he

voluntarily exposed his words to the public (401 U.S. 745 (1971)). Therefore, a cooperating witness was allowed to tape a conversation without obtaining a subpoena or warrant beforehand (White).

As domestic intelligence gathering cases like Laird and Socialist Workers Party illustrate, the privacy issues involved in determining the confidentiality of library records implicate both the First and Fourth Amendments. In Tattered Cover, Inc. v. City of Thornton, the Colorado Supreme Court discussed both amendments in acknowledging a right to privacy in reading records (44 P.3d 1044 (Colo. 2002)). The case involved law enforcement officials serving a Colorado bookseller with a search warrant seeking to discover which customers had purchased two books detailing how to set up secret laboratories for the production of illegal drugs (Tattered Cover). The court held that a search warrant seeking information about a customer's bookstore purchases was invalid under the Colorado State Constitution, which provides broader protection for First Amendment rights than the U.S. Constitution (Tattered Cover). The court explicitly held that both the U.S. Constitution and the Colorado Constitution "protect an individual's fundamental right to purchase books anonymously, free from governmental interference" (Tattered Cover 1047).

The court in Tattered Cover specifically cited the U.S. Supreme Court case Zurcher v. Stanford Daily as a case where the Court may have extended heightened protection of expressive materials in requiring "scrupulous exactitude" in compliance with particularity requirements of the Fourth Amendment (436 U.S. 547, 564 (1978)). However, the court in Tattered Cover found that even this heightened protection of expressive materials was insufficient for at least Colorado state constitutional purposes

and instead applied strict scrutiny in examining the warrant (Tattered Cover 1055-58). In using this standard of review, the court held that the warrant was invalid, as the stated governmental interest was not so compelling as to outweigh the importance of reader privacy for the unrestrained exercise of First Amendment rights (Tattered Cover).

The U.S. District Court for the District of Columbia also applied strict scrutiny as the standard of review in a case involving a demand for book purchase records in In re Grand Jury Subpoena to Kramerbooks & Afterwords, Inc. (26 Med. L. Rptr. 1599 (D.D.C. 1998)). Independent Prosecutor Kenneth Starr subpoenaed Monica Lewinsky's book purchase records for the period 1995 to 1998, and both Lewinsky and the bookstores involved moved to quash the subpoena (Kramerbooks 1599). Although the case was ultimately settled out of court, the court announced that the request would have to overcome strict scrutiny review because it would chill the exercise of First Amendment freedoms (Kramerbooks). The U.S. Supreme Court has not yet made such a clear pronouncement about the right to read anonymously, but Tattered Cover and Kramerbooks both support the proposition that book purchase records should be given strong protection under the First Amendment. It follows logically that such protection should also be extended to library patron records.

Michael J. O'Donnell argues that reading records may also be protected under the Fifth and Fourteenth Amendment right to information privacy, first articulated by the U.S. Supreme Court in Whalen v. Roe (429 U.S. 589 (1977)) and affirmed in Nixon v. Administrator of General Services (433 U.S. 425 (1977)). In Whalen, the Court upheld a New York state statute that required that the state department of health retain all prescription records for dangerous drugs with legitimate purposes, such as opium,

cocaine, and amphetamines (592-93). In so holding, the Court stated that the “privacy” cases the Court had considered “involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is independence in making certain kinds of important decisions” (Whalen 599-600). The former involves a “genuine concern that the information will become publicly known and that it will adversely affect their reputations,” i.e., a chilling effect (Whalen 600) The latter interest in decisional privacy implicates the ability to make important decisions independently and is exemplified by the Court’s opinion in the abortion cases Roe v. Wade (410 U.S. 113 (1973)) and Griswold v. Connecticut (381 U.S. 479 (1965)). Justice Stevens distinguished the privacy issue in Whalen from the recently decided decisional privacy cases, finding that the statute in question did threaten to impair the plaintiffs’ “interest in the nondisclosure of private information,” but found that the security provisions in place to prevent such disclosures were sufficient (600).

The issue of information privacy arose again in Nixon v. Administrator of General Services, in which the Court allowed the use of a federal statute to authorize seizure of President Nixon’s presidential papers, but not his purely private communications (433 U.S. 425 (1977)). Although the Court found that the privacy interest asserted by Nixon was “weaker than that found wanting in the recent decision of Whalen v. Roe” (Nixon 458), it concluded that “when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected rights in matters of personal life unrelated to any acts done by them in their personal capacity” (Nixon 457). As it expressly cites Whalen, this passage is viewed by many courts and scholars as an affirmation of the constitutional right to information

privacy enunciated in Whalen and is the last time the Court has directly addressed the issue (O'Donnell 49).

IV. USA PATRIOT Act and Library Records

None of the privacy cases discussed above directly addressed the PATRIOT Act, which was passed in 2001 and drastically changed the legal landscape in the area of privacy law. Only six weeks after the September 11 terrorist attacks on New York City and Washington, D.C., Congress passed the 131-page PATRIOT Act by a vote of 357 to 66 in the House of Representatives and a vote of 98 to 1 in the Senate (Sandell-Weiss 10). There were no hearings, and little legislative history exists (Sandell-Weiss 10). The act modified various sections of the United States Code, including the Foreign Intelligence Surveillance Act of 1978 (FISA), which deals with international terrorism and foreign intelligence investigations (Pub. L. No. 95-511, 92 Stat. 1783 (1978)). Section 501 of FISA originally allowed the FBI to obtain “business records” from a limited group of public or private businesses including vehicle rental companies and storage facilities, but the PATRIOT Act amends FISA to expand the category of “business records” to include “any tangible thing,” including library circulation records, subscription lists, and lists of Web site visitors (PATRIOT Act, Section 215(a)(1)).

In order to investigate an individual using the PATRIOT Act, a request must be made to a member of the Foreign Intelligence Surveillance Court (FISC), which is comprised of U.S. Magistrate Judges appointed by the Chief Justice of the United States (PATRIOT Act, Section 215(b)(1)(A)). When this court was first established, its purpose was to investigate foreign powers, not U.S. citizens. Section 215 amended FISA to allow the FBI to apply to the FISC for an order without showing any suspicion that the target of

the investigation is involved in terrorism or proof that the requested items show any involvement in terrorist activity. The standard is merely that the records must be “sought for” a foreign intelligence or terrorism investigation (PATRIOT Act, Section 215(b)(2)). This standard marked a stark contrast from the law prior to the passage of the PATRIOT Act, which required law enforcement agents to show “probable cause” of illegal activity in a criminal court to obtain a subpoena or search warrant. Section 215 also imposes a gag order prohibiting all individuals, including those who receive section 215 requests, e.g. librarians, from disclosing the fact that a request has been made “to any other person” (PATRIOT Act, Section 215(d)).

Section 505 is the other portion of the PATRIOT Act that directly affects the confidentiality of library records. It amended the existing power to issue National Security Letters (NSLs) (PATRIOT Act, Section 505). An NSL is an administrative subpoena used by the FBI to obtain several types of records. The use of NSLs marks a sharp departure from the typical use of grand jury subpoenas in criminal investigations. First, grand juries, by their nature, have a narrower focus than NSLs because they investigate past criminal conduct, while NSLs are issued to investigate the possibility of unknown future attacks (Gellman A1). Also, there is no gag rule with most grand jury subpoenas, and recipients are generally free to discuss the subpoenas publicly. Furthermore, there are strict limits in place on sharing grand jury information with government agencies, which is very different from the case with NSLs (Gellman A1). The judicial review involved in acquiring an NSL is also much less strict. In order to get a subpoena, an attorney must demonstrate probable cause to a judge, but Section 505 has broadened the authority to sign NSLs to more than five dozen officials, including special

agents in charge of field offices, the deputies in New York, Los Angeles, and Washington, as well as a few senior headquarters officials (Gellman A1). That standard is “so basic, it is hard to come up with a plausible way to fail” (Gellman A1).

Two years after the passage of the PATRIOT Act, then Attorney General John Ashcroft rescinded a 1995 guideline directing that information obtained through an NSL about a U.S. citizen or resident “shall be destroyed by the FBI and not further disseminated” if it proves to be “not relevant to the purposes for which it was collected” (Gellman A1). Ashcroft’s new order provided that “the FBI shall retain” all records it collects and “may disseminate” them freely among federal agencies (Gellman A1). The order also directed the FBI to develop data mining technology to search for connections among all of the people surveilled by the government (Gellman A1). The effect of this change is that once someone’s files are obtained using an NSL, her records may be scrutinized repeatedly without the FBI ever being required to again establish relevance. Alarming, according to recently revealed government sources, the FBI now issues more than 30,000 NSLs a year, a hundredfold increase over historic norms (Gellman A1).

It is unclear how often the PATRIOT Act has been used to search library records. In the spring of 2003, the American Civil Liberties Union (ACLU) sued the Department of Justice (DOJ) under the Freedom of Information Act (FOIA) in an attempt to discover how frequently and in what manner the DOJ had used its new powers granted by the PATRIOT Act (265 F. Supp. 2d 20 (D.D.C. 2003)). The ACLU sought the disclosure of statistical information detailing how often the DOJ had used specific provisions of the Act, including “demands for production of tangible things under section 215” (25). The DOJ invoked exemptions from FOIA that protect the secrecy of information pertaining to

national defense and foreign policy. As a result, the district court ruled in favor of the DOJ, denying the ACLU's motion to compel, since the court was satisfied that the DOJ had met its burden in "describing the material withheld and the reasons that it fits within one or more of the exemptions" (ACLU 27).

However, later that year, due in part to pressure from the American Library Association (ALA), Ashcroft de-classified information showing that the DOJ had never utilized Section 215 to obtain library records (Sandell-Weiss 12) and mockingly announced: "Do we at the Justice Department really care what you are reading? No." (Anderson 5). Current Attorney General Alberto Gonzalez continues to maintain that officials have yet to expressly use their power under the PATRIOT Act to demand records from libraries or bookstores ("Fishing in the Card Catalogs" A20). Yet, according to a \$300,000 study commissioned by the ALA, law enforcement officials have made at least 200 formal and informal inquiries to libraries for information on borrowing records and other internal matters since October 2001 ("Fishing in the Card Catalogs" A20). The study does not show whether the law enforcement officials used the PATRIOT Act or other means to conduct their searches, since Section 215 expressly provides that any librarian who reports that she has received a demand for records made under the PATRIOT Act faces criminal sanctions for challenging the order or notifying anyone of the demand (PATRIOT Act, Section 215(d)).

The ALA survey's results provide support for the organization's claim that the PATRIOT Act has had a "chilling effect" on the public's use of libraries, as there has been a demonstrated concern about the government's powers. Nearly 40 percent of the libraries responding reported that patrons had asked about changes in library practices as

a result of the PATRIOT Act, and approximately 5 percent of the respondents claimed they had altered their professional activities (Lichtblau A11). Such changes made by libraries include posting notices informing patrons about the PATRIOT Act, employee education programs, and the purging of library records (Phillips 38). An article in the library science periodical *Alki* advocates:

Libraries should follow a records retention schedule—checkout records, for instance, are ephemeral. Follow a destruction schedule carefully, and shred unneeded paperwork, especially application forms. Do not keep names if you just need statistics. Shred meeting room sign-ups. Though libraries generally keep ILL [Interlibrary Loan] statistics for several years, we need not keep borrowers' names attached. (McClean 10)

The public's anxiety about the government's powers has also been noted by the politicians currently considering extending certain provisions of the PATRIOT Act. A recent newspaper report quoted Senate Judiciary Committee Chairman Arlen Specter as saying: "You can't open up the paper or turn on the TV without hearing (about) public concern about the Patriot Act" (Kellman).

To date, there have been only a few cases that have contested the constitutionality of portions of the PATRIOT Act. In 2003, the ACLU filed suit in the case Muslim Community Association of Ann Arbor et. al. v. John Ashcroft, challenging the constitutionality of section 215 under both the First and Fourth Amendments (No. 03-72913 (E.D. Mich. filed July 30, 2003)). The ACLU argued that section 215 violates the Fourth Amendment because it implicates an individual's reasonable expectation of privacy and does not require probable cause and because it lacks procedural safeguards (Muslim Cmty. Ass'n.). Its First Amendment claim is based on the contention that section 215 impinges on free speech activity without providing a compelling state interest

or a narrowly tailored program (Muslim Cmty. Ass'n.). The district court has not yet decided this case.

In the case of Humanitarian Law Project v. Ashcroft, the plaintiffs challenged the constitutionality of section 805(a)(2)(B) of the PATRIOT Act, specifically the language that “prohibit[s] the provision of material support including ‘expert advice or assistance’ to designated foreign terrorist organizations” (309 F. Supp. 2d 1184 (C.D. Cal. 2004)). Although the decision did not address the constitutionality of section 215 of the PATRIOT Act, a future plaintiff challenging section 215 may rely on the reasoning of the court in Humanitarian Law Project in making her case. The court granted in part the plaintiffs’ motion for summary judgment because the Department of Justice was unable to show that the term “expert advice or assistance” is not impermissibly vague (Humanitarian Law Project 1200). As a result, the DOJ was enjoined from enforcing the subject sections of the laws against the plaintiffs, but the court would not go so far as to declare the statute overly broad or to grant a nationwide injunction enforcing it (Humanitarian Law Project 1202-04). The court appears to have used a constitutional analysis based in the Fourth Amendment and clearly not the First Amendment, as the judge specifically states that she found no risk of prosecution for permitted free speech activities (Humanitarian Law Project 1203).

In an article published in the spring of 2004, Anne Klinefelter speculated about a hypothetical case where a librarian would “violate nondisclosure as an act of civil disobedience,” stating that such a party would “overcome the problem of standing that normally prevents challenges to searches that are required to be kept secret” (226). In one of two cases currently before the U.S. Court of Appeals for the Second Circuit, John Doe

v. Gonzalez, the plaintiff did not violate the gag rule, but the ACLU has challenged the constitutionality of the application of the gag rule on behalf of an anonymous client (CT Civil Action No. 3:05-cv-1256 (2005)). The Washington Post has since discovered that “John Doe” is a Connecticut based organization called Library Connection, Inc., which possesses sensitive information about library patron borrowing and Internet usage (Gellman A1). In September 2005, U.S. District Court Judge Janet C. Hall ruled that the FBI gag order violates Library Connection’s First Amendment rights and issued a preliminary injunction that would have allowed Library Connection to reveal its identity and testify about its experience dealing with the NSL it received (CT Civil Action No. 3:05-cv-1256 (2005)).

However, since the government appealed the ruling, the gag order will remain in place until the case is conclusively adjudicated. The ACLU filed an emergency appeal with the U.S. Supreme Court arguing that the Court should lift the gag order on Library Connection, so that they may enter into the public debate over the proposed amendments to the PATRIOT Act that were soon to be debated by Congress. However, Justice Ruth Bader Ginsburg denied the appeal, explaining that the Court of Appeals should be given more time to decide the case (546 U.S. ____ (2005)). A three-judge panel of the U.S. Court of Appeals for the Second Circuit recently conducted oral arguments on both Doe and a New York case that is the only other case filed challenging the constitutionality of an NSL (Neumeister).

The New York case was brought on behalf of an unidentified internet access firm that received an NSL. Government lawyers opposed the entry of the case into the public docket of a New York federal judge and have since tried to censor nearly all the contents

of the exhibits and briefs (Neumeister). U.S. District Judge Victor Marrero held that that law authorizing NSLs violates both the First and Fourth Amendments (334 F. Supp. 2d 471 (S.D.N.Y., 2004)). The court held that the PATRIOT Act's NSL provision may "violate a subscriber's First Amendment privacy rights, as well as other legal rights, if judicial review is not readily available to an ISP that receives an NSL" (Doe 506). The court also cited the Act's lack of judicial review in finding that it violated the Fourth Amendment because "it effectively bars or substantially deters any judicial challenge to the propriety of an NSL request" (Doe 475).

V. 2005 Amendments to the USA PATRIOT Act

Beginning in 2003, numerous amendments to the USA PATRIOT Act have been introduced in Congress with the intention of restricting the government's powers, particularly those granted in Section 215 (Klinefelter 221). Examples of this legislation include the Freedom to Read Act (H.R. 1157), which would have restricted the government's ability to procure FISA orders to obtain library or bookseller records; the Library and Bookseller Protection Act (S. 1158), which would have exempted libraries and bookstores from Section 215 orders; and the Security and Freedom Ensured (SAFE) Act (H.R. 3352; S. 1709), which would require individualized suspicion for searches of libraries and bookstores and would remove the ability to procure FISA orders to enact such searches. None of these bills were ultimately passed, but portions of them were included in the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005, which was passed in the House of Representatives (H.R. 3199) and Senate (S. 1389) in July of 2005. Congress chose to finally act to reform the PATRIOT Act this year, as certain sections are due to expire on December 31, 2005, including Section 215.

A conference committee comprised of members of both houses began meeting on November 10, 2005, to reconcile the House and Senate bills. The Washington Post reported that congressional staff had worked out a tentative deal that the legislation would adhere closely to Senate bill S. 1389, which was passed the Senate on July 13, 2005 (Eggen A03). The agreement is a result of two months of work done by senior House and Senate aides, but the bill must still be approved by a panel of lawmakers from both houses and then by the full House and Senate (Kellman). The current status of the USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 is an Engrossed Amendment as Agreed to by Senate, meaning that it is the final copy of the House bill that has been certified by the Secretary of the Senate and includes the amendments to the text from floor action. It is the most recent version of the bill available. That amendment includes many of the safeguards that had been sought by library and civil liberties activists. It reauthorizes Section 215, which were due to expire at the end of 2005, until 2009 (H.R. 3199 EAS, Sec. 9(a)).

The amended Act also requires government agents to provide a “statement of facts showing that there are reasonable grounds to believe that the records or other things sought” are “relevant to” a counter-terrorism or counter-espionage investigation and that items “pertain to” a foreign power, an agent of a foreign power, or a person in contact with a suspected agent (H.R. 3199 EAS, Sec. 7(a)(2)). There is also a requirement that records or other things to be described with “sufficient particularity” to allow them to be identified, which reduces the danger that that the FBI will engage in “fishing expeditions” in library or bookstore records (H.R. 3199 EAS, Sec. 7(b)(1)(A)). The amendment also provides:

No application shall be made under this section for an order requiring the production of library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, or medical records containing personally identifiable information without the prior written approval of the Director of the Federal Bureau of Investigation. The Director may delegate authority to approve such an application to the Deputy Director of the Federal Bureau of Investigation, but such authority may not be further delegated (H.R. 3199 EAS, Sec. 7(c)(3)).

This is one of two new sections of the Act that specifically mention library records.

The amended Act also allows greater opportunity for the recipient of a Section 215 request to challenge the order. First, it loosens the gag rule to allow the recipient to disclose that she has received an order to “those persons to whom such disclosure is necessary to comply with such order;” an attorney; or “other persons as permitted by the Director of the Federal Bureau of Investigation or the designee of the Director” (H.R. 3199 EAS Sec. 7(d)(1)). It also grants the recipient of the order the right to challenge both the order itself as well as the gag order in the FISA Court (H.R. 3199 EAS Sec. 7(e)).

The amendment also improves the reporting by requiring that the DOJ report annually on the total number of applications made for Section 215 orders approving requests for the production of tangible things, and the total number of orders either granted, modified, or denied, when the application or order involved the production of tangible things from a library or the production of tangible things from a person or entity primarily engaged in the sale, rental, or delivery of books, journals, magazines, or other similar forms of communication whether in print or digitally, as well as records related to the purchase of a firearm, health information, or taxpayer return information (H.R. 3199 EAS Sec. 7(f)(3)). According to a Republican aide, the tentative deal also includes a

provision that “the FBI would be required to destroy or return records obtained with secret intelligence warrants if the subjects turn out not to be connected to terrorism or some other crime” (Effen A03).

Under section 505 as amended by the House bill, judges would be given the authority to reject NSLs: “The court may modify or set aside the request if compliance would be unreasonable or oppressive or would violate any constitutional or other legal right or privilege of the petitioner” (H.R. 3199 EAS, Sec. 8). It also allows a challenge to the gag order in a U.S. District Court. The court can set it aside unless doing so would harm national security, interfere with an investigation, interfere with diplomatic relations, or endanger life or physical safety (H.R. 3199 EAS, Sec. 8(b)). If the government certifies this would result, certification must be treated as “conclusive” (H.R. 3199 EAS, Sec. 8(b)). The amendment also allows the government to go to a U.S. District Court to seek enforcement of the NSL (H.R. 3199 EAS, Sec. 8(c)).

VI. Establishing Constitutional Protection for Library Records

Although the proposed changes to the PATRIOT Act put in place many protections for the confidentiality of library records, the U.S. Supreme Court has yet to explicitly recognize an individual’s right to use libraries anonymously. A plaintiff challenging the constitutionality of any law that impinged on such a right would have viable claims under the penumbra of the First, Fourth, Fifth, and Fourteenth amendments. As with most constitutional law issues, the outcome would rely in large part on what standard of review the Court chose to apply. Since the confidentiality of library records implicates the First Amendment rights to anonymity and association, the standard of review applied in such a case should be strict scrutiny, as it was applied by the Colorado

Supreme Court in Kramerbooks (267 Med. L. Repr. 1599 (D.D.C. 1998)) and in NAACP by the U.S. Supreme Court (357 U.S. 449 (1958)). Using strict scrutiny, the Court would need to weigh the stated governmental interest against the importance of reader privacy for the unrestrained exercise of First Amendment rights.

A hypothetical law that would affect the confidentiality of library records would most likely involve either a criminal or counter-terrorism or counter-espionage investigation. In either context, the government interest served would be unquestionably compelling. The Court's opinion would then turn on whether the challenged measure was narrowly tailored to serve a legitimate state interest. The government would face a difficult hurdle in showing that an individual's reading records were vital to proving that crime or terrorist act had been committed or planned. For example, evidence that a suspect possessed a book about airplanes is of limited probative value in proving that that person was planning to hijack an airplane and fly it into a building. While the value of one's library records to the government is minor, the potential harm to the individual's First Amendment rights is considerable.

When applied to the confidentiality of library records, any law that even appears to impinge on the right to read anonymously may deter individuals from checking out controversial material for fear that they will be subject to a federal investigation. The First Amendment is implicated because of "the societal loss which results when the exercise of the freedoms guaranteed by the First Amendment is inhibited" (Horn 749-750). In describing the "chilling effect" that is likely to result from the PATRIOT Act provisions affecting the privacy of library users, ACLU staff attorney Jameel Jaffer stated: "If the government monitors the Web sites that people visit and the books that

they read, people will stop visiting disfavored Web sites and stop reading disfavored books” (Gellman A1).

A challenge seeking to invalidate a law because it violates the Fifth and Fourteenth Amendment right to information privacy would focus on the likelihood that the government would disclose the information it gathered from library patron records. If the Court found that the security provisions in place were not sufficient to prevent the public disclosure of confidential information, it would then turn to a balancing test similar to the one used in the First Amendment analysis. Courts have not settled on the appropriate standard of review for analyzing a governmental infringement of the information privacy interest under Whalen, but most courts have followed the approach in Nixon, calling it intermediate scrutiny or a balancing standard. But, some courts have been more rigorous and applied strict scrutiny to require the government to show a compelling state interest that is narrowly tailored to achieve that end (O’Donnell 63).

Turning to the Fourth Amendment analysis, the Court would need to balance the individual privacy of the library patron against the potential gain to the community resulting from the search. The government could analogize to White that since a library patron voluntarily provides information to a third party, e.g. the library, she no has no reasonable expectation that that information will be kept private. However, unlike in White, the exchange of information itself is confidential and not observable by other parties. Furthermore, every state in the union has officially declared protection for the confidentiality of library records (Klinefelter 224), and privacy and confidentiality are well-established principles of professional ethics among librarians. Article III of the American Library Association’s Code of Ethics provides: “We protect each library user’s

right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted” (“Code of Ethics”). Such evidence would support an argument that a library patron does have a reasonable expectation that any information she exposes to the library will be kept private.

Although the amendments to the PATRIOT Act currently being considered by Congress will likely include safeguards for the protection of the confidentiality of library records, library records will continue to be vulnerable to government overreaching. The federal government has a well-documented history of wanting to search library records from the Library Awareness Program during the Cold War to not including library records in the Video Privacy Protection Act to, most recently, Section 215 of the PATRIOT Act. For this reason, it is doubtful that Congress will ever pass a statute protecting the confidentiality of library records. The best hope of library and civil liberties advocates is that the U.S. Supreme Court will finally explicitly protect the right to read and use libraries anonymously. It is time for the Court to recognize the importance of libraries to the free expression of ideas.

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