The USA PATRIOT Act: An example of the impact of national security legislation on libraries

Barbara M. Jones

Wesleyan University, Middletown, CT 06107
Bjones01@wesleyan.edu

Terrorism, often called “non-state transnational security threats”, has become a key instrument for political change in the 21st century. It contrasts with the more traditional diplomatic methods used by national governments. The growth of international terrorist acts has understandably led many countries to adopt national security legislation. The burning issue arising from the implementation of such legislation is how to balance laws protecting national security with laws protecting civil liberties.

Libraries have become an inevitable site for this delicate balancing act to be played out. They must follow the law but, at the same time, promote professional ethics and constitutional rights in regard to people’s right of access to information and freedom of expression.

This paper examines the USA PATRIOT Act’s impact on United States libraries. It describes the legislation, its effect on libraries in particular, and the response from the US library profession. It places the US experience within the broader context of national security legislation, so that librarians from any country might find this experience useful for their particular situation.

This report urges librarians to gain the skills necessary to play a role in the political arena when legislation affecting libraries is being developed, or when laws have a particular impact on library operations or professional ethics. The USA is not the only country with national security legislation that affects libraries, and more countries are likely to adopt such legislation in the future.

In the 2005 IFLA/FAIFE World Report, Marc Lampson wrote on “Libraries, liberty, and the USA PATRIOT Act”. This paper is an update to his excellent summary.

The USA PATRIOT Act legislation

The USA PATRIOT Act is the acronym for “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act”. Immediately after the terrorist events of 11 September 2001, US Attorney-General John Ashcroft (the chief US law enforcement officer and a Cabinet member in the executive branch) asked Congress for additional powers he deemed necessary to fight terrorism. The USA PATRIOT Act became law on 26 October 2001. It was passed with the passion and urgency felt deeply by many American citizens in the aftermath of the attack, so that the bill became law without the usual hearings or mark-up by a congressional committee. Indeed, only one senator opposed the Act (Feingold, 2001):

“Protecting the safety of the American people is a solemn duty of the Congress; we must work tirelessly to prevent more tragedies like the devastating attacks of September 11th. We must prevent more children from losing their mothers, more wives from losing their husbands, and more fire-fighters from losing their heroic colleagues. But the Congress will fulfil its duty only when it protects both the American people and the freedoms at the foundation of American society. So let us preserve our heritage of basic rights. Let us practise as well as preach that liberty. And let us fight to maintain that freedom that we call America.”

The best source of information on the USA PATRIOT Act and libraries comes from the website of the American Library Association (ALA) Office for Intellectual Freedom (http://www.al.org/ala/oif/ifissues) and the ALA Washington Office (http://www.ala.org/ala/washoff).¹ There one can find the text of the actual legislation, hearings and other information related to the library profession’s response to the Act. This paper later discusses the crucial role of local, state and national library associations in responding to national security legislation – better yet, to proposed legislation that is still open for comment and change before becoming the law of the land.

In brief, the USA PATRIOT Act amends over 15 federal statutes that cover such areas as criminal procedure, computer fraud, domestic and foreign intelligence, wiretapping, immigration, and (important for higher education and school librarians) privacy of student records. The Federal Bureau of Investigation (FBI), which directs domestic intelligence operations, in concert with other law enforcement officials, was given

¹ I am indebted to ALA’s websites in preparing this paper.
extended access to business, medical, educational and library records, both paper-based and electronic. It expanded existing laws concerning telephonic wiretapping to include Internet communications.

The USA PATRIOT Act was reauthorised in March 2006 and contains some of the changes sought by the US library community. Nonetheless, the library community is still working to reform the legislation and educate citizens about its implications. There is consensus within the library community that the balance between civil liberties and national security interests is still unequal and a threat to library users’ rights.

The impact of the USA PATRIOT Act on traditional US library policy and practice

The direct impact on libraries in the USA has been dramatic and complex:

- **Changes in library confidentiality policies.** Of the 50 states, 48 have long-established library records confidentiality statutes. Many of these directly conflict with the USA PATRIOT Act. When two laws conflict, the federal law usually trumps the state law. This means that most librarians must not prefer the state confidentiality legislation they fought for so passionately, but instead must follow the federal Act, which deeply compromises library patron privacy. For example, this author’s state of Connecticut library confidentiality statute says that “personally identifiable information contained in circulation records of all public libraries shall be confidential” (Connecticut General Statutes, 11-25). If a librarian goes to Connecticut State Library Web Junction, he or she will discover how the USA PATRIOT Act might conflict with this statute (http://ct.webjunction.org).

- **Changes in due process.** In the US legal context, “due process” means that an individual’s legal rights to life, liberty and property must be respected by the government. Further, legislators cannot limit due process; a court of law must determine when and if these rights can be abridged. Until the USA PATRIOT Act was passed, most libraries had specific policies on how to work with law enforcement authorities who sometimes approach libraries with search warrants for patron circulation records. For example, if a local sheriff is investigating a suspect for building an illegal methamphetamine laboratory in his basement, the sheriff might want to see if that suspect checked out books on how to concoct drugs.

Librarians might well question whether law enforcement should equate reading habits with specific criminal actions. Nonetheless, if a sheriff presented a properly obtained “court-ordered subpoena”, signed by a judge or other official, the librarian would probably comply with the request after consulting with the library attorney. The librarian and library attorney would trust the judge had determined that law enforcement had demonstrated “probable cause” that the confidential library records were relevant to an ongoing investigation.

In contrast, the USA PATRIOT Act offers law enforcement agencies another option with different standards. They can present a librarian with a “national security letter” (NSL), which is issued by a Foreign Intelligence Surveillance Act (FISA) court. Such an order to disclose information is called a Section 215 order. National security letters contain a “gag order”, which prohibits a librarian from disclosing to the person or institution being searched that such a warrant has been issued.

The original USA PATRIOT Act did not require the demonstration of “probable cause”. The reauthorised Act does require that the FBI must show “reasonable grounds” that the library records are relevant to their investigation. Thus, there is a somewhat higher level of responsibility placed on the FBI than previously, and there are specific criteria that the FBI must cite in order to gain access to these library records. An FBI request must be more specific; they cannot over-request massive amounts of data and go on a “fishing expedition”.

The reauthorised law specifies certain federal officials who must sign off on the request. It also allows the recipient of a national security letter to consult an attorney and to disclose the search warrant to certain other officials. For example, a librarian can now probably contact the campus attorney and his or her immediate supervisor, and the recipient can challenge a Section 215 order. However, this challenge process is still shrouded in a certain amount of secrecy and uncertainty. Importantly, the Department of Justice must now disclose to Congress the number of applications of search orders made, and the final disposition of such orders.

The “fallout” from the USA PATRIOT Act is a good example of the problems with hastily passed legislation, with no opportunity for citizen input. It is possible that if the ALA had more time to mobilise its network and lobby Congress about the implications of the USA PATRIOT Act for libraries, the legislation might
have been written differently. Indeed, some Congress people have subsequently told librarians that they had not considered the impact on confidentiality of library records. In fact, many legislators did not have time to read or digest the entire bill before it was passed. Unfortunately, once a law has been passed, it is very hard to change or nullify it, as librarians have discovered.

The library connection case as a model for contesting the USA PATRIOT Act

It was clear from the beginning that many librarians and their state and national associations were opposed to certain provisions of the USA PATRIOT Act. However, the gag order provision made it impossible for the public or librarians to know whether the FBI was indeed targeting libraries for obtaining information about library patrons. Finally a case came forward. It is documented here in detail because it demonstrates the power that one small part of the US library community can wield. It could not have come at a better time. Prior to this case, Attorney-General John Ashcroft had condescendingly blamed the library community for being “hysterical” about the threat of national security letters to libraries.

The Library Connection, legally a “corporation” located in the state of Connecticut, is a cooperative of 27 libraries. In 2005, their Executive Director, George Christian, received a national security letter from the FBI, accompanied by a gag order, demanding that he turn over certain electronic library records from the cooperative. This author urges all readers to consult Mr Christian’s written testimony before the US Senate Judiciary Subcommittee on the Constitution on 11 April 2007, to be found on the ALA Washington Office website.

The US library community is fortunate that after Mr Christian had received the national security letter, he possessed extraordinary courage and will to challenge this order. He also had a great deal of professional background about the USA PATRIOT Act, his responsibility to his corporation, and his commitment to library professional ethics, as espoused by the Connecticut Library Association and the ALA. In turn, Mr Christian was fortunate to have an enlightened and courageous executive committee of member librarians. When he met with them and their attorney, they decided to resist complying with the request.

They engaged the American Civil Liberties Union (ACLU), a civil liberties organisation with substantial experience in such cases. The Library Connection made a clear, courageous decision to make their experience a part of the national debate over the renewal of the USA PATRIOT Act, and also to stand up for the rights of library users in the USA. After all, Mr Christian had no court order and there was no evidence of probable cause for the FBI to need these records for an investigation. The Library Connection also protested because the order was overly broad and required that they hand over massive amounts of electronic data – enough to call it a “fishing expedition”. They also contested the constitutionality of the gag order. In the end, the case John Doe v. Gonzales was filed, but a federal district court judge declared the gag order unconstitutional.

Mr Christian’s testimony demonstrates the personal difficulty experienced by a librarian subjected to a gag order (Christian, 2007):

“Being gagged was also frustrating on other professional and personal levels. I felt compromised since I could not reveal the problem to the full board or to our member libraries, or my own staff that had seen the FBI arrive, announce themselves and hand me a letter. No one could bring up the topic at Library Connection Board meetings, nor at meetings of the full membership. I knew that all the board members and all the member library directors knew of the case, and I suspected the Executive Committee and I had their approval. However, I had no idea whether the approval was unanimous, or whether there was a significant dissenting opinion. I felt terrible I could not let anyone know that the struggle was not depleting our capital reserves and putting the corporation at risk … Let me re-emphasise: we did not want to aid terrorists or criminals. One of us, Janet Nocek, had actually lost a friend on one of the planes that crashed into the World Trade Centre. All four of us were deeply affected by the September 11 attacks, and none of us wanted any further harm to come to our country or its citizens. But we did not feel we would be helping the country or making anyone safer by throwing out the Constitution either.”

What must librarians learn from the USA PATRIOT Act and the US library community’s response?

The vast majority of US librarians, like their fellow citizens, were horrified by the events of 9/11. Many in this author’s region of the country lost loved ones in Washington DC, Shanksville, Pennsylvania or New York City; so the impact was direct and painful. In addition, many commentators exercised their First Amendment rights in expressing their beliefs that the USA deserved this attack on account of its foreign policy. In fact, most
of our librarians have defended the rights of commentators to speak and print such opinions about 9/11. This author’s library, like most other public and academic libraries, contains books, journal articles and Internet access with a myriad of points of view in regard to international terrorism and US foreign policy.

Further, US librarians have been free to express their dismay over the USA PATRIOT Act, in print and in speaking engagements – including in such overseas forums as IFLA. While many are alarmed at what many view as a low point in the US tradition of deliberative democracy and First Amendment rights, there is still a basic foundation of civil liberties law that US librarians can cite in the struggle to re-establish its primacy.

There is also enough transparency in government deliberation so that the Library Connection experience is now public – though many believe it took far too long. And, most importantly, the US library community is built on basic principles of freedom of access, so that the profession began the struggle with “common ground” in working towards change.

Importantly, US librarians have been trained in how to advocate in the political arena. In travelling around the world, this author has found that not all librarians have had the necessary advocacy training, although they are in a position to effect change with their governments. IFLA and national library associations should assess advocacy training as a potentially high priority for the professional development agenda. Here are this author’s suggestions on how librarians can become engaged in the challenge of national security legislation in their countries:

- **Librarians need a regional or national association to keep track of pending legislation that might affect libraries.** One need only google the term “anti-terrorism legislation” to find the current status of national security legislation in all parts of the world. This author has highlighted the USA PATRIOT Act because it is the one she is most familiar with, but such legislation is either pending or instituted in many countries. The international library community would do well to continue to monitor the status of such legislation and work to shape it, or resist it on behalf of libraries.

- **Librarians need to be trained in library advocacy in the political arena.** Advocacy in the political environment is difficult for those librarians who have never envisioned themselves in this role, or whose national culture has never offered such avenues of participation. In those countries open to such library activity, however, the national and international library associations can make advocacy training available. It is crucial to acquire such training so that the library profession does not become embroiled in partisan politics. Librarians in the USA, for example, are strategically better off to promote or oppose specific legislation based on the ALA Code of Professional Ethics or policies as developed in the *Intellectual Freedom Manual*. On many civil liberties issues, both conservatives and liberals in the USA can find common ground. The ALA and the Association for Research Libraries both have legislative advocacy programmes to help librarians become equipped with the necessary skills to do this work without falling into the trap of being labelled as partisan.

This advocacy model could be replicated and adapted in many parts of the world. Certain strategies have proven to be more effective than others, and advocacy institutes give librarians an opportunity to share their experiences. For example, the ALA has found it most effective to work with Congress only on those parts of the USA PATRIOT Act that affect libraries. It is likely true that many ALA members would like to see the Act completely revamped or nullified. However, experience has shown that focus on the area of expertise – in this case, the privacy of library patrons – tends to work best, even if it means that change is incremental and slow.

- **Libraries need to be guided by professional ethical principles.** The IFLA/FAIFE website contains an updated list of all national library associations that have adopted codes of ethics. It is essential for librarians to have a principled stance when working in the political arena. National security legislation in any country is very likely to conflict with the library profession’s ethical principles about the privacy of library users. At the same time librarians must learn the skill of promoting library values, which are often couched in flowing, idealistic rhetoric, without sounding too vague or ungrounded in day-to-day library work. It is very easy to write a resolution; it is harder to apply that idealistic stance to the daily life in a library. We will earn respect and credibility from stakeholders and fellow library staff “in the trenches” only if we learn this skill.

- **Libraries need to be guided by written policies, not only for idealistic principles, but also for daily operations.** The ALA has just published its seventh edition of the *Intellectual Freedom Manual*, which
contains numerous policies related to the USA PATRIOT Act. Some are specific, like the ALA’s Resolution on the USA PATRIOT Act Reauthorisation (passed by the ALA Council on 25 January 2006). Some are general, like the ALA’s Policy concerning Confidentiality of Personally Identifiable Information about Library Users (adopted by the ALA Council on 2 July 1991). These policies must contain specific instructions for library personnel who are approached by officers of the law. In the USA, librarians have many rights when approached by law enforcement at a public service desk, but often the staff at the front desk are not well trained in these rights. A short list of procedures is invaluable, because it is understandable that staff become intimidated when confronted by an FBI agent.

- **Library associations need to focus more energy on the issues of patron privacy.** Most national security legislation threatens traditional assumptions about privacy of inquiry. The concept of privacy is culturally bound, and librarians collaborating in an international setting may disagree about what privacy means and how it affects libraries in their country. However, it is essential that this conversation should begin. Currently, national identity cards and similar practices are viewed as a convenience that compromises privacy in the interest of fighting corruption. As a profession, librarians need to hold conversations about these increasing intrusions into personal privacy and understand the historical experience of those colleagues in countries where national ID cards were used as a tool of oppression.

As a 2001 joint statement from three prominent international leaders reminds us (UNCHR, 2002: 1):

“... in pursuing the objective of eradicating terrorism, it is essential that states strictly adhere to their international obligations and commitments to uphold human rights and fundamental freedoms. While we recognise that the threat of terrorism may require specific measures, we call on all governments to refrain from any excessive steps, which would violate fundamental freedoms and undermine legitimate dissent ... The purpose of anti-terrorism measures is to protect human rights and democracy, not to undermine these fundamental values of our societies.”

**References**

