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What is Johnny Doing in the Library - Libraries, the U.S.A. Patriot Act, and Its Amendments

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WHAT IS JOHNNY DOING IN THE LIBRARY? LIBRARIES, THE U.S.A. PATRIOT ACT, AND ITS AMENDMENTS

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A cornerstone of democracy in the United States is the freedom to think whatever we wish to think. Actions, of course, are a different matter, but any thought that can be thought is just fine: under the First Amendment we may not be prosecuted for what we are thinking.[1] The First Amendment guarantees several other freedoms, among them the freedoms of speech and association.[2] To enjoy the freedom of thought to which we are constitutionally entitled we must be able freely to explore the world of ideas to cultivate thoughts and other, possibly new, ideas. Reading and communicating with others helps this process. A necessary corollary to the freedoms guaranteed by the First Amendment, then, is the right to privacy —we cannot exercise these freedoms unless we are entitled to privacy in reading, conversing, and thinking, without the intrusion of government.

Another freedom enjoyed in the United States, guaranteed under the Fourth Amendment, is that of freedom from unreasonable searches and seizures—that our material possessions are not subject to the whim and caprice of government intrusion, absent a good reason.[3] Such a freedom protects the privacy needed for the learning and thought processes.

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1. *See* U.S. CONST. amend. I.
2. *Id.*
3. *See* U.S. CONST. amend. IV.

Libraries, and the librarians who work in them, have an unusual relationship with those who use libraries. Because libraries typically operate for the public good (public libraries for the public at large and college and university libraries for their students and faculty) and because they share precious public resources such as books, magazines and, lately, computers, with the public, they must have some method of keeping track of what they own and who, at the time, has it. With books and magazines this method generates something generally called a circulation record.[4] The same concept applies to the general use of computers housed within the library, though this recordkeeping is more generally a simple sign up sheet allocating a specific computer to a specific person for a certain period of time.[5]

The use of a library, thus, generates a record which could indicate to another party what the person reading the book was thinking about or a line of study. While such a record and its release to a third party sounds fairly innocuous, it certainly has the potential to be highly invasive of a person's privacy. Take, for example, the individual researching a contagious social disease such as mononucleosis or a sexually transmitted disease such as genital herpes. The research could be for a report, for a school project, *or* it could be research about a personal problem. In either case, the person doing the research may not wish to explain why or what they are researching to anyone else.

Because libraries retain these circulation records for the purposes of collection management, and their disclosure to third parties could result in a violation of this right to privacy, libraries become inadvertent guarantors of their users' First and Fourth amendment rights.[6] Librarians have recognized this need for privacy and consider these sorts of records to be relatively inviolate to those outside the library's need for collection control,

4. JOAN M. REITZ, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE (ODLIS) (2006), http://lu.com/odlis/odlis_p.cfm. While the circulation in libraries was in years past a mechanical card system, today's library uses automated circulation systems which retain the records of transactions and user files electronically. *Id.* As with most electronic files these are capable of alteration and manipulation and may be kept for many years, thus retaining user information and user reading habits for long periods of time. *See generally id.*

5. *See* JOAN M. REITZ, ONLINE DICTIONARY FOR LIBRARY AND INFORMATION SCIENCE (ODLIS) (2006), http://lu.com/odlis/odlis_c.cfm. In more technical environments this allocation may be done by a computer program associated with a user's identification number and tied into the circulation system. *Id.*

6. Libraries must also retain these records in case an item needs to be recalled from a borrower for the use of another borrower as well as issuing demands for payment of fines pertaining to items that have been held longer than the allotted period of use or, in more exigent circumstances whenever a user loses an item, to issue a demand for payment for the lost item. *See id.*

though they will divulge them in the proper circumstances pursuant to a proper judicial order.

I. LIBRARIANS AND CONSTITUTIONAL FREEDOMS

Why such resistance to governmental inquiries into the reading habits or library use by the library patrons? The post-World War II years were rife with hunts for Communists, Bolsheviks, and infiltrators, and many incursions were made against the constitutional freedoms guaranteed under the Bill of Rights. These were seemingly small incursions, such as loyalty oaths, or the removal of materials from libraries which were considered subversive. Nonetheless, such actions nibbled away the constitutional rights of the individual to think his or her own private thoughts and to consider political ideas outside the mainstream.

Thus, in 1948 the membership of the American Library Association passed, as policy, the *Library Bill of Rights*.[7] The first tenet of this policy is that "[b]ooks and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves. Materials should not be excluded because of the origin, background, or views of those contributing to their creation."[8] The Association states, and the Supreme Court agrees, that the First Amendment gives citizens the right to receive and read information unfettered by partisan censorship, in a publicly funded library.[9] The Bill of Rights also gives citizens certain rights to privacy,[10] particularly when it

7. AMERICAN LIBRARY ASSOCIATION, LIBRARY BILL OF RIGHTS (1948), http://www.ala.org/ala/ourassociation/governingdocs/policymanual/intellectual.htm [hereinafter LIBRARY BILL OF RIGHTS]. The largest professional association of librarians, mostly academic and public librarians, is the American Library Association. *See* American Library Association Home Page, http://www.ala.org. The ALA membership has several policy documents pertaining to the rights of citizens to privacy in their library records, as well as their rights to read what they wish. *Id.* One of these documents is the *ALA Policy Manual,* specifically position and public policy statement 53 titled "Intellectual Freedom," which contains the *Library Bill of Rights* adopted by the association in 1948. *See* AMERICAN LIBRARY ASSOCIATION, ALA POLICY MANUAL (1948), http://www.ala.org/ala/ourassociation/governingdocs/policymanual /policymanual.htm [hereinafter ALA POLICY MANUAL]. The other document is the *Freedom to Read Statement,* which speaks of the right of library users to be free to read whatever they wish in the pursuit of knowledge. *See* AMERICAN LIBRARY ASSOCIATION, FREEDOM TO READ STATEMENT (1953), http://www.ala.org/ala/oif/statementspols/ftrstatement/freedom readstatement.pdf [hereinafter FREEDOM TO READ STATEMENT].

8. LIBRARY BILL OF RIGHTS, *supra* note 7 ¶ 1.

9. *See* Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853, 868-69 (1982) (holding censorship in a school library may not be exercised in a narrowly partisan or political manner, noting that the school library is "the principal locus" of freedoms to inquire, to study and to evaluate and gain new maturity and understanding).

10. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (discussing the various

comes to their interests in reading, and the library has a duty to keep the interests of the citizens confidential from others.

The loyalty oaths were quite pernicious, invading all levels of government. Librarians were not immune and the topic created great debate within the American Library Association, with members taking sides almost equally for and against.[11] In fact, the first loyalty oath case to reach the United States Supreme Court involved a librarian in the Los Angeles County Library system, a Miss Julia Steiner, who, along with twenty-four county employees from other offices within the county, refused to sign a "loyalty affidavit" required by the Board of Supervisors of the County of Los Angeles.[12] The "loyalty affidavit" demanded the signatory to "reveal whether [you] have ever been a member of, or supporter of, any of the 144 organizations that the California Un-American Activities Committee had characterized as 'subversive.'"[13] Miss Steiner and the others refused and the case wended its way through the court system until the United States Supreme Court declined to decide the case "because [the] constitutional questions which brought these cases here are not ripe for decision. . . ."[14]

In 1953, U.S. government libraries in foreign countries, being run under the auspices of the U.S. Department of State, were directed to remove certain books and magazines as being subversive materials.[15] The American Library Association responded by adopting, in conjunction with the American Book Publishing Council, the *Freedom to Read Statement.* The Statement speaks of the need for a free and open expression of ideas as a cornerstone of democracy, observes that threats of censorship are antithetical to free and open expression of ideas, and points out that "no group has the right to take the law into its own hands, and to impose its own concept of politics or morality upon other members of a democratic

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"penumbras" of privacy guaranteed by the Bill of Rights). While the right to be private in your use of a library is not mentioned specifically, it follows from the general discussion about personal privacy. *See id.*

11. *See* DENNIS THOMISON, A HISTORY OF THE AMERICAN LIBRARY ASSOCIATION: 1876-1972, 184-85 (American Library Association, Chicago, 1978) [hereinafter ALA HISTORY].

12. Parker v. County of Los Angeles, 338 U.S. 327, 328 (1949).

13. ALA HISTORY, *supra* note 11, at 186.

14. Parker, 338 U.S. at 333. The appendix to this case contains the affidavit as well as the list of the 144 suspect organizations. *Id.* at 334. The loyalty oaths seemed to have a life of their own. When I started working for the Texas State Library in 1974 I had to sign a similar oath swearing loyalty to the United States. Even though the state statute requiring the oath, TEX. REV. CIV. STAT. ANN. art. 6252-7, was implicitly held unconstitutional in 1967 by Gilmore v. James, 274 F.Supp. 75 (D.C. 1967), *aff'd,* 389 U.S. 572 (1968), it was not repealed and removed from the Texas statutes until years later by 1993 TEX. GEN. LAWS ch. 268 § 46.

15. ALA HISTORY, *supra* note 11, at 188.

society. Freedom is no freedom if it is accorded only to the accepted and the inoffensive."[16]

But many books have been banned by public libraries and school boards that have also been considered great literature.[17] And although First Amendment rights are abridged in a certain sense for school age children due to their sensitive natures, in general, children enjoy the same rights to free inquiry amongst the published literature as do adults: the freedom to inquire as to political systems and to share that knowledge with others without fear of governmental intrusion.

There have been a few cases where government agents have sought the records of libraries, due to some suspicion that the reading habits of some of its patrons were indicative of some subversive activity, but these sorts of inquiries have seldom come to the court system. Librarians adhering to the *Freedom to Read Statement*[18] have, in general, turned such direct requests away, absent some court order, believing that such inquiries by government agents are an unwarranted infringement of the constitutional rights of citizens, particularly the patrons of the library, including rights guaranteed under both the First and Fourth Amendments. In addition, most of the states have statutes requiring that the registration and circulation records are confidential and may only be obtained by using a valid court order.[19]

Law enforcement agents, upon occasion, will have constitutionally legitimate needs to inquire into the circulation records of libraries for purposes of crime control as society will always have its malcontents who abuse public services to their own twisted ends.[20] Typically, law enforcement agents have resorted to three types of inquiries in order to obtain records of library users from a third-party holder, such as a library.

16. FREEDOM TO READ STATEMENT, *supra* note 7.

17. The American Library Association maintains a list of challenged and banned books, which is instructive and available on its web site. *See* AMERICAN LIBRARY ASSOCIATION, CHALLENGED AND BANNED BOOKS, http://www.ala.org/ala/oif/bannedbooksweek/challenged banned/challengedbanned.htm.

18. FREEDOM TO READ STATEMENT, *supra* note 7. The American Library Association has posted the statement with a list of endorsers. *See id.*

19. The American Library Association maintains a list of these statutes on its web site. *See* AMERICAN LIBRARY ASSOCIATION, STATE PRIVACY LAWS REGARDING LIBRARY RECORDS, http://www.ala.org/Template.cfm?Section=stateifcinaction&Template=/ContentManagement/Con tentDisplay.cfm&ContentID=14773 (stating that forty-eight of the fifty states have such laws on the books).

20. *See e.g.*, LJ News, *Library Files Used in Unabomber Case*, 121 LIBR. J. 14, 14-16 (1996) [hereinafter *Unabomber*]. The investigation into Theodore Kaczynski, known as the Unabomber, was aided by a grand jury subpoena of library circulation records from the Lewis & Clark Public Library, among others. *Id.*

First, using the direct question method, the law enforcement agent approaches a library staff member, explains why the records are wanted, and asks the staff member to provide them.[21] This method often works if the library staff member is unaware of any library policy regarding the release of the records and if the agent is persuasive.[22] The second and third methods require the law enforcement agent to cooperate with a local prosecutor to obtain either a court order or a grand jury subpoena.[23] The court order requires the adducement of more than mere persuasion as the order will only be issued by the court when probable cause for the issuance is shown, a requirement under the Fourth Amendment which is, at times, a very difficult task. The grand jury does not require probable cause, but presumably some connection between the records sought and the reason they are sought must be demonstrated by the public prosecutor, though this is not a requirement under the *Federal Rules of Criminal Procedure*.[24] The grand jury subpoena is subject to a motion to quash.[25]

Two more statutes available to law enforcement officers have been around for some time; however, with the USA PATRIOT Act[26] amendments (hereinafter "PATRIOT Act"), they have become of greater utility to law enforcement. As we shall see, the portions of concern to librarians in §§ 215 and 505 of the PATRIOT Act closely resemble the court order and the grand jury subpoena. Yet, in a nutshell, the court-ordered production in section 215 has no probable cause requirement, and the administrative subpoena under section 505, the so-called National

21. *See id.* at 14.

22. *See id.* at 14 (noting that in the Unabomber investigation, the tip that such records were available came from a volunteer library employee who violated library policy by disclosing the information and the state privacy laws); *see also Oversight of the USA PATRIOT Act: Hearings before the Comm. on the Judiciary of the S. Committee on the Judiciary*, 109th Cong. 46-47 (2005) (statement of Robert Mueller, Director of the Federal Bureau of Investigation in response to questions made by the Committee) [hereinafter *PATRIOT Act Hearings*]. Director Mueller, responding to a question about the use of the U.S. PATRIOT Act, noted that library records have been voluntarily given, though not under court order or statutory authorization. *Id.*

23. *See e.g., Unabomber, supra* note 20, at 14.

24. *See* FED. R. CRIM. P. 17; *see also United States v. Dionisio*, 410 U.S. 1 (1973) (noting the lack of Fourth Amendment showing for the issuance of a grand jury subpoena).

25. FED. R. CRIM. P. 17(c)(2).

26. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter PATRIOT Act]. Librarians are primarily concerned with two sections of the PATRIOT Act, sections 215 and 505, codified respectively at 50 U.S.C. § 1861 and 18 U.S.C. § 2709. Section 215 amended existing provisions of Title V of the Foreign Intelligence Surveillance Act of 1978, *see* 50 U.S.C. § 1861 *et seq.*, while section 505 amended existing provisions of the Electronic Services Privacy Act, *see 18* U.S.C. § 2701 *et seq.*, allowing the government to obtain telephone and telephone toll records for counterintelligence purposes.

Security Letter, or NSL section, does not have the grand jury interposed between the recipient and the law enforcement agency. This outcome is due to the fact that the NSL is directly issued by the law enforcement agency.

Shortly after the passage of the USA PATRIOT Act, a hue and cry rose from librarians across the country because records about the reading habits of their users[27] could now be easily compromised. This outcome could occur since "probable cause" had been stripped from the requirement for the release of the records.[28] As we have seen above, librarians, at least those adhering to the wisdom of the American Library Association, have been extremely solicitous of the privacy of their patrons, what they read and their freedom to read anything they wish. The Attorney General at the time, John Ashcroft,[29] dismissed librarians' concerns as "breathless reports and baseless hysteria" and suggested the American Library Association was concerned that "agents are checking how far you have gotten on the latest Tom Clancy novel."[30] His successor, Alberto Gonzales, stated that "[t]his Department [of Justice] and the government has no interest in the library reading habits of ordinary Americans."[31] In actuality, the Department of Justice does not have as much interest in what Johnny is reading as it does in what he is looking at or emailing or Instant Messaging on the Internet, particularly since there is suspicion that the 9/11 hijackers communicated through Internet terminals available in public libraries.[32]

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27. Library users are often called patrons. Patron and user are used interchangeably throughout this article. A patron is "a person who is a customer, client, or paying guest, esp. a regular one, of a store, hotel, or the like." DICTIONARY.COM, UNABRIDGED, http://dictionary.reference.com/browse/patron.

28. *See* Dean E. Murphy, *Some Librarians Use Shredder to Show Opposition to New F.B.I. Powers*, N.Y. TIMES, April 7, 2003, at A12 (Late Edition) (illustrating the general feeling pervading public and academic libraries after the passage of the PATRIOT Act).

29. John Ashcroft was the seventy-ninth Attorney General of the United States, serving from January 2001 to February 2005. His biography is available on the Department of Justice's website. *See* U.S. DEPARTMENT OF JUSTICE, ATTORNEYS GENERAL OF THE UNITED STATES, http://www.usdoj.gov/jmd/ls/agbiographies.htm#ashcroft.

30. John Ashcroft, U.S. Att'y Gen., Remarks at the National Restaurant Association's 18th Annual Public Affairs Conference: The Proven Tactics in the Fight against Crime (Sept. 15, 2003). The remarks are available at the U.S. Dep't of Justice website. *See* U.S. DEPARTMENT OF JUSTICE, SPEECHES, http://www.usdoj.gov/archive/ag/speeches/2003/091503nationalrestaurant htm.

31. *PATRIOT Act Hearings, supra* note 22 (statement by Alberto Gonzales, Attorney General, Department of Justice in response to questions from the Committee on the Judiciary). In his prepared statement, Attorney General Gonzales observed that section 215 had been used only thirty-five times as of March 2005. *Id; see also* Dept. of Justice Press Release, *Attorney General Alberto R. Gonzales Calls on Congress to Renew Vital Provisions of the USA Patriot Act* (April 5, 2005), http://justice.gov/opa/pr/2005/April/05_ag_161.htm.

32. *Implementation of the USA PATRIOT Act: Sections of the Act that Address the Foreign*

In part, to answer some of these fears as well as address other weaknesses, and to amend and extend the sunset provisions of the original PATRIOT Act, Congress passed amendments to the PATRIOT Act in 2006.[33] To see whether these changes ameliorated the fears of librarians, let us examine the original provisions of immediate concern to librarians,[34] and the recent 2006 amendments to ascertain whether these changes have alleviated these concerns.

There are two amendments at issue. The first is an amendment to the Foreign Intelligence Surveillance Act of 1978[35] about the court-ordered production of certain records or tangible items, which can be used to obtain, among other things, the circulation records of a library – what is typically called a section 215 request and which we might puckishly refer to as the "What is Johnny Reading?" statute. The second is an amendment to the Omnibus Crime Control and Safe Streets Act of 1968,[36] inserting a new chapter (titled "Stored Wire and Electronic Communications and Transactional Records Access") into title 18 of the United States Code. The amending act was the Electronic Communications Privacy Act of 1986 (hereinafter ECPA),[37] and the amendment is concerned with the interception of wire and electronic communications. This statute confers an administrative subpoena right on the F.B.I. and is often called section 505, after the section of the PATRIOT Act which amended the original

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Intelligence Surveillance Act (FISA), Hearing before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 109th Cong. 84-85 (2005) (statement of Kenneth L. Wanstein, interim U.S. Attorney, District of Columbia in response to questions from the Subcomittee). Wanstein noted that several of the 9/11 hijackers used computer terminals in the Delray Beach Public Library for unknown purposes, as well as computer terminals in an unnamed state college in New Jersey to purchase airplane tickets. *See id; see also* U.S. House of Rep. Comm. on the Judiciary News Advisory, *Sensenbrenner Statement Regarding Today's Revelation that 9/11 Hijackers Used U.S. Public Libraries Prior to 9/11: Hijackers Used Public Libraries in New Jersey and Florida* (April 28, 2005), http://judiciary.house.gov/media/pdfs/PAT911hijackerslibrarydisclosure42805.pdf.

33. *See generally, USA PATRIOT Improvement and Reauthorization Act of 2005*, Pub. L. 109-177 (2006) and *USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006*, Pub. L. 109-178 (2006), (hereinfter Reauthorization Act and Reauthorizing Amendments Act, respectively). Both reports extensively revise the USA PATRIOT Act throughout its entirety.

34. The two sections of the PATRIOT Act of interest are sections 215 and 505, codified respectively at 50 U.S.C. § 1861 and 18 U.S.C. § 2709.

35. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511 (codified as 18 U.S.C. § 1801 *et seq.*) [hereinafter FISA].

36. *See* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as 18 U.S.C. § 2510 *et seq.* (2006)).

37. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.). Chapter 121 was added to section 201, entitled "Stored Wire and Electronic Communications and Transactional Records Access." *See id.* (codified as amended at 18 U.S.C. §§ 2701-2710 (2006)).

statute. Because there is a "gag" clause in the statute, which prevents the recipient from communicating the receipt or existence of the administrative subpoena, and because it is issued in matters of National Security, it is called a National Security Letter or NSL. We may also call this the "What is Johnny Doing on the Internet?" statute.

II. THE "WHAT IS JOHNNY READING?" STATUTES

The statute which we refer to as section 215 existed prior to its PATRIOT Act amendments. In 1978 Congress passed the Foreign Intelligence Surveillance Act,[38] creating a special court to deal with the issuance of orders for electronic surveillance in matters concerning, for lack of a better term, national security. The newly created court, called the FISA court, was made up of seven existing U.S. District Court judges from seven different circuits, all appointed by the Chief Justice of the United States.[39] Several amendments were made to this statute in 1998.[40] We are primarily concerned about section 602 of the Act, which created 50 U.S.C. § 1862, "Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations."[41]

Pursuant to an investigation conducted by the F.B.I. to gather foreign intelligence, this section gave the F.B.I. Director and his designee, which designee could be no lower than an Assistant Special Agent in Charge, the ability to make an application for an order "authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or an investigation concerning international terrorism. . . ."[42] The application had to be made to either one of the FISA judges or a FISA magistrate,[43] had to specify that the investigation related to foreign intelligence or international terrorism, and that there were "specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a

38. *See* Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. § 1801 (2006)) [hereinafter FISA].

39. *See* 18 U.S.C. § 1803. The FISA Court's jurisdiction is nationwide, with a few limitations set forth in the statute. *See id.* Additionally, an appellate court was created in the same statute, with sitting judges being named by the Chief Justice, to act as the "court of review" for the FISA court. *Id.*

40. *See* Intelligence Authorization Act of 1999, Pub. L. No. 105-272, 112 Stat. 2396 (codified as amended in scattered sections of 50 U.S.C.).

41. *Id.* at 2410.

42. 50 U.S.C. § 1862(a) (2006).

43. § 1862(b)(1)(A)-(B).

foreign power."[44] If the judge found that the application satisfied the requirements of the statute, "[he] shall enter an *ex parte* order as requested, or as modified, approving the release of records."[45] In other words, if the application is properly worded, the judge has little discretion about the issuance of the order. Moreover, nothing in the legislative history indicates otherwise, other than the words "or as modified," which indicates merely the ability to modify the order, but not necessarily to deny it if properly documented. The order itself could not disclose the purpose of the investigation upon which it was based,[46] nor could the recipient disclose to any person, other than those necessary to fulfill the order, that the F.B.I. had served the order or what it was for.[47]

Section 215 of the PATRIOT Act, as originally passed,[48] restructured the original FISA provisions so that 18 U.S.C. § 1862 became 18 U.S.C. § 1861. As originally amended by section 215 of the PATRIOT Act, the section made no reference to libraries at all, but removed the specific types of entities subject to the court order formerly mentioned,[49] thus opening the application of the "secret" FISA orders to all types of businesses. The newly amended section left in place the level of authority necessary to make application for the court order (no lower than Assistant Special Agent in Charge) and the same judges (the FISA court judges or their magistrates), but changed what may be obtained by allowing the order to require "the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. . . ."[50] The newly amended section 215 also added a proviso that if the investigation is conducted against a United States person, it is not conducted "solely upon the basis of activities protected by the first amendment to the Constitution of the United States."[51]

Additionally, the investigation conducted under section 215 had to be under guidelines approved by the Attorney General[52] pursuant to Executive

44. 50 U.S.C.A. §1862(b)(2)(A) and (b)(2)(B) (2000).
45. § 1862(c)(1) (emphasis added).
46. §1862(c)(2).
47. 50 U.S.C. § 1862(d)(2) (2006).
48. *See* USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 287 (2001).
49. Those entities were common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities. *Compare* USA PATRIOT Act § 215, *with* § 1862(d)(2).
50. 50 U.S.C. §1861(a)(1) (2006); *see* § 1861(b)(1)(A)-(B).
51. § 1861(a)(1).
52. *See* U.S. DEPARTMENT OF JUSTICE OFFICE OF THE INSPECTOR GENERAL, FEDERAL BUREAU OF INVESTIGATION'S COMPLIANCE WITH THE ATTORNEY GENERAL'S INVESTIGATIVE

Order 12333, as did the original statute. However, it only needed to specify that the records were sought pursuant to a *bona fide* investigation to obtain records pursuant to an authorized investigation "to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities. . . ."[53] Again, it appears the judge still had little discretion about the granting of the order since the statute specified that "[u]pon an application made pursuant to this section," the judge "shall enter an *ex parte* order as requested, or as modified," approving the release of records "if the judge finds that the application meets the requirements" of this section.[54] The former requirements about non-disclosure (none allowed save to those required to fulfill the demand for production) remained in place, but two additional pieces were added[55] absolving the producer from liability (presumably to whomever the produced items referred) and providing that there was no waiver of any privilege in any other context or proceeding.[56]

In 2006, Congress, after an equally substantial number of hearings and introduced bills, passed two significant pieces of legislation modifying the PATRIOT Act, both of which modified section 215. The first, the "Reauthorization Act,"[57] requires a higher level of authority in the F.B.I. hierarchy for the origination of a request for the order of production when the request is made for "library circulation records, library patron lists, book sales records, book customer lists, firearms sales records, tax return records, educational records, or medical records. . . ."[58] The Reauthorization Act increases the level to the Director, the Deputy Director, or the newly created position of Executive Assistant Director for National Security (or any successor position).[59] This amendment lessens some of the concerns expressed, certainly by librarians, that demands for highly personal records were delegated to a level too low within the F.B.I. hierarchy, that of Assistant Special Agent in Charge in the original

GUIDELINES, http://www.usdoj.gov/oig/special/0509/appendices.pdf (containing the guidelines approved by the Attorney General as Appendix B of the report). The full report is available at http://www.usdoj.gov/oig/special/0509/final.pdf.

53. § 1861(b)(2)(A).

54. § 1861 (c)(1). Presumably, if the FBI agent is unable to meet the proper statutory requirements in the application he would not receive the order. *See id.*

55. *See* § 1861(e).

56. *Id.*

57. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended in scattered sections of 50 U.S.C.).

58. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 106(a)(2), 120 Stat. 192 (codified as amended at 50 U.S.C. § 1861(a)(3) (2006)).

59. *See* § 106(a)(3) (codified as amended as 50 U.S.C. § 1861(a)(3)).

PATRIOT Act. Other standard business records remain available to demands from the F.B.I. field office's Assistant Special Agent in Charge.

This act also alters the basis for the request, increasing the amount of information that must be provided to the FISA judge to include a statement of facts that shows reasonable grounds to believe that the tangible things sought are relevant, pursuant to an authorized investigation to obtain foreign intelligence information not concerning a United States person, or to protect against international terrorism or clandestine intelligence activities.[60] The intelligence and/or clandestine activities are presumed relevant to the investigation if the statement of facts notes that they pertain to a foreign power or agent of a foreign power, activities of a suspected agent of a foreign power who is the subject of an investigation, or an individual in contact with a suspected agent of a foreign power who is the subject of an investigation.[61] In addition, the statement of facts must address the Attorney General's adopted minimization procedures applicable to tangible things.[62] One presumes this would limit the acquisition of the tangibles sought to those that are strictly relevant only to the authorized investigation.

The Reauthorization Act also has a section labeled, "Clarification of Judicial Discretion,"[63] which amends 50 U.S.C. § 1861(c)(1) and states that "if the judge finds that the application meets the requirements of [the points noted above], the judge shall enter an *ex parte* order as requested, or as modified, approving the release of tangible things."[64] While one could consider this to do what the title states—clarify the discretion of the judges —the language of the section pertaining to the issuance of the order has really not changed.

In addition, the Reauthorization Act contains a section[65] making clear that the order issued should describe with some particularity the things to be produced. The description should include a reasonable date when the item must be provided and a clear and conspicuous notice concerning the non-disclosure provisions.[66] The order may only require the production of tangible things that a United States court may order to be produced.

60. § 106(b)(2)(A) (codified as amended as 50 U.S.C. § 1861(b)(2)(A)).
61. § 106(b)(2)(A)(i)-(iii) (codified as amended as 50 U.S.C. § 1861(b)(2)(i)-(iii)).
62. § 106(b)(2)(B) (codified as amended as 50 U.S.C. § 1861(b)(2)(B)).
63. *See* § 106(c) (codified as amended as 50 U.S.C. § 1861(c)).
64. USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 106(c)(1), 120 Stat. 192 (codified as amended at 50 U.S.C. § 1861(c)(1) (2006)) (emphasis added).
65. § 106(d)(2)(A) (codified as amended at 50 U.S.C. § 1861(d)(2)(A)).
66. § 106(d)(2)(C) (codified as amended at 50 U.S.C. § 1861(d)(2)(C)).

Finally, the act makes clear that the recipient of the demand shall not disclose the existence of the demand or the investigation to which it pertains, though the recipient may disclose to those producing the things or to an attorney to obtain legal advice or assistance or to others as permitted by the Director or his designee.[67] The recipient must notify the Director of persons to whom the disclosure is made, but the recipient does not have to notify beforehand of the intent to consult an attorney.[68]

While the language of the Reauthorization Act dealing with the fact that one need not notify the Attorney General that one intends to seek the consultation of an attorney seemed clear enough,[69] Congress passed a subsequent act, the "Reauthorizing Amendments Act,"[70] that among other things, re-amended the section. It seemingly left the same concept—that one need not tell the F.B.I. of intent to seek attorney consultation—but made it a bit less clear. The Reauthorization Act positively stated, prior to its 2006 Amendment, "but in no circumstance shall a person be required to inform the Director, or such designee that the person intends to consult an attorney."[71]

The Reauthorizing Amendments Act phrases this concept in the negative as: "any person making or intending to make a disclosure under subparagraph (A) or (C) of paragraph (1) shall identify to the Director or such designee the person to whom such disclosure will be made. . . ."[72] Note that the statutory language refers to subparagraphs (A) or (C), but leaves subparagraph (B) out. Subparagraph (B) in paragraph (1) of section 106(e) of the Act,[73] left out of the previous phrase relates to the right to consult with an attorney. In accordance with a rule of statutory construction suggesting a presumption Congress knows what it is amending,[74] and the fact that the Reauthorizing Amendments Act followed the Reauthorization Act, it appears Congress did not want to highlight that

67. § 106(e) (codified as amended at 50 U.S.C. § 1861(d)(1)(A)-(C)).

68. § 106(e) (codified as amended at 50 U.S.C. § 1861(d)(2)(B)).

69. § 106(e) (codified as amended at 50 U.S.C. § 1861(d)(2)(C)).

70. *See* USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178, 120 Stat. 278 (2006) (to be codified as amended at 50 U.S.C. § 1861(d)(2)(C)).

71. § 106(e) (codified as amended at 50 U.S.C. § 1861(d)(2)(C)). The language quoted above is no longer present in the amended version. *See* § 106(e).

72. USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178 § 4(a) (codified as amended at 50 U.S.C. § 1861(d)(2)(C)).

73. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 106(e) (codified as amended at 50 U.S.C. §1861 (d)(1)(B)).

74. NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 22.30 (5th ed. 1993). "The courts have declared that the mere fact that the legislature enacts an amendment indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one." *Id.*

an attorney could be consulted without notifying the Director or his designee.

In short, we find that section 215 has evolved from a "spy" tracking statute that secretly followed foreign agents and looked into how they got around, where they were staying, and what they were storing - all tracking done in total secrecy—to a statute, the PATRIOT Act, with broad powers to acquire business records and other "tangible" things from any establishment, once the requirements of the statutes are met. The further evolution from the PATRIOT Act to the Reauthorization Act, particularly concerning library records, certainly has changed, such that applications for an order demanding library records now must emanate from a fairly high level in the F.B.I. In addition, more information and evidence must be adduced to the FISA court than under the original PATRIOT Act: a fairly extensive statement of facts which notes, with some specificity, why, about whom and what is being sought in the application, much more so than under the original PATRIOT Act specifications though, arguably, not as much as was required before the PATRIOT Act amendments in 2001.[75] Even given the title of the section—clarification of judicial discretion—the signing of the order still seems more *pro forma* than it does discretionary. However, since the phrase "judicial discretion" is used in the statute, as well as the phrase "or as modified" (presumably modified by the court), then a serious argument could be made that the judge is less of a puppet than before where, under the original PATRIOT Act specifications, the signing was a rubber stamp if the application fulfilled the statutory minimums stated.[76]

III. WHY DO LIBRARIANS CARE ABOUT SECTION 215?

Is this important? Yes, to a certain extent. The Department of Justice has stated that no records have been sought from libraries under section 215.[77] However, a study conducted under a grant from the American Library Association indicates that a number of requests of some kind have been made to public and academic libraries since the passage of the PATRIOT Act. [78] Apparently, the government is engaging in informal

75. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 106(b) (codified as amended at 50 U.S.C. §1861 (b)(2)(A)(i)-(iii)).

76. § 106(c) (codified as amended at 50 U.S.C. § 1861(c)(1)).

77. *See PATRIOT Act Hearings, supra* note 22 (prepared statement of Alberto Gonzales, Attorney General).

78. *See* ABBY GOODRUM, IMPACT AND ANALYSIS OF LAW ENFORCEMENT ACTIVITY IN ACADEMIC AND PUBLIC LIBRARIES, 15, 26 (2005), http://ala.org/ala/washoff/contactwo/oitp/LawRptFinal.pdf [hereinafter GOODRUM'S IMPACT AND ANALYSIS]. Goodrum's study

requests or making requests through the more regular conduits of a grand jury subpoena or a non-FISA court order, rather than the section 215 order. This study acknowledges that some requests are not reported due to the nature of the governmental inquiry, which, under section 215, prohibits the recipient from disclosing that it has received or answered such an inquiry.

In summary, a demand for records from a library under section 215 has gone almost full circle, coming back to a point where the government agent must be fairly high ranked in the F.B.I. to make the application, must articulate with some specificity what those records are, and the purpose for which they are being sought. The records must pertain to an investigation of a foreign power, the agent of a foreign power or, in the case of a United States citizen, someone operating on behalf of or for a foreign power. The statute does not state that the FISA judge has some judicial discretion about issuing the order in response to an application that is correctly drawn. However, there is some language in the amending Act that does, although it is not carried into the compiled statute. What is not apparent, though, is exactly what that discretion is. The language of the statutes states the judge may issue the order or modify it. The true question is whether the judge may deny the order altogether, so this issue is not completely closed.

There is no requirement for probable cause on the face of the statute. Moreover, the standard for issuance of the order is substantially lower than that, resting solely on the articulation of the statement of the law enforcement entity. While the entirety of this procedure and the production are shrouded in secrecy, changes have been made which state that an attorney may be consulted without notifying the F.B.I. At least this form of investigatory order has the imprimatur of another branch of government in the application of the statute—the judiciary—even though that imprimatur bears a striking resemblance to a rubber stamp. This is not so with the second statute in question; rubber stamp would be too kind a reference.

IV. CONSTITUTIONAL RIGHTS AND COUNTERINTELLIGENCE: THE PROBLEM WITH INTELLIGENCE AND PATRIOT SUBPOENAS

A dichotomy exists between (1) the need for the government to acquire information regarding the daily work of terrorists, foreign agents,

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surveyed libraries for the period between the passage of the PATRIOT Act and April 2005. *Id.* Figure 18 in the study places the number of requests to public libraries at seventy-three, from both state and federal agencies. *Id.* at 15. Figure 37 in the study gives the number of contacts made with academic libraries as seventy-four. *Id.* at 26. A newspaper article summarizing the survey construes these results, in light of Administration statements, as indicative of "unofficial" inquiries. Eric Lichtblau, *Libraries Say Yes, Officials Do Quiz Them About Users*, N.Y. TIMES, June 20, 2005, at A11 (late edition).

and those who would do harm to our country, and (2) the constitutional guarantees of persons in the United States. On the one hand, government should be concerned with rights under the Constitution, such as the freedom of speech and its attendant right, the freedom to read, as well as the right against unreasonable searches and seizures.[79]

On the other hand, government is highly concerned, and rightly so, with finding out about and capturing those who would do harm to the United States. In its pursuit of criminals, the government will, out of necessity, safeguard the constitutional rights of those it seeks to capture or bear the consequences of violating those rights—the very real possibility that a criminal may go free. In intelligence and counterterrorism work, however, the very nature of the work requires a secrecy that is almost guaranteed to violate constitutional rights. In criminal matters the solution to this problem is institutionalized by requiring law enforcement to seek prior approval from another branch of government, typically the judiciary, before wire tapping or surveilling in such a manner as to abrogate constitutional rights. If done properly, such permissions allow law enforcement to do their job, apprehend the suspected party, and take them to trial, all without tainting the evidence.

In intelligence and counterterrorism work, however, the surveillance itself must be kept secret, it is believed, even from the judiciary. Why? In criminal work the governmental entity must adduce proof to the court for a warrant, or some form of proof to a grand jury before a subpoena may issue. If the government fails to convince a judge or a grand jury that it has sufficient proof, proof that will surmount the constitutional privilege of the suspect, then such warrant or subpoena will not issue. In intelligence work such proof is often incapable of being produced because counterintelligence operations are different from those of a criminal investigation. In the latter situation, the investigation proceeds with the goal of arresting and successfully prosecuting the criminals. In counterintelligence operations the purpose is to disrupt the hostiles' operation and interfere with their sources of information. The government, however, cannot monitor and interdict terrorist operations and those hostile to the United States if those same hostiles must be notified of such an investigation. Thus, quite often the fruit of the intelligence tree is tainted constitutionally such that it can never be used in a court of law against the suspected party, whether terrorist or foreign intelligence agent. However,

79. This latter right seems to have given way, somewhat, to the necessities of government. *See generally* SAMUEL DASH, THE INTRUDERS: UNREASONABLE SEARCHES AND SEIZURES FROM KING JOHN TO JOHN ASHCROFT (Rutgers University Press 2004).

this would not normally be a problem for the counterintelligence services as their mission is to foil the plans of the malfeasants, rather than to punish them.[80]

V. THE CURRENT "WHAT IS JOHNNY DOING ON THE INTERNET?" STATUTE: SECTION 505

In 1968, in a burst of law enforcement fervor, Congress passed the Omnibus Crime Control and Safe Streets Act,[81] which contained provisions concerning the electronic surveillance of aural communications—tapping and recording telephone conversations—and the legal places and ways this could be done. As the country moved on through the administration of Richard Nixon, the Watergate affair, and the Plumbers, it was discovered that certain agencies of the government were wiretapping in what was considered an unconstitutional manner, and that the statutes governing such investigations were vague. In addition, electronic communications had become much more sophisticated as cell phones and the beginnings of email came into more prevalent use.[82]

Congress worked on amendments to the statutes and in 1986 passed the Electronic Communications Privacy Act (ECPA).[83] Title II of ECPA created a new chapter 121 in title 18 U.S.C., dealing with "Stored Wire and Electronic Communications and Transactional Records Access,"[84] giving the F.B.I. the ability to obtain toll and telephone transactional records without going through a judge or magistrate. The F.B.I., thus, received the power of the administrative subpoena. But this administrative subpoena had a twist: the recipient could not "disclose to any person . . . that the Federal Bureau of Investigation has sought or obtained access to information or records under this section."[85] This type of administrative subpoena is one of the National Security Letters, more commonly referred

80. "Many counterintelligence investigations never reach the criminal stage but proceed for intelligence purposes or are handled in diplomatic channels." H. Conf. Rep. 104-427 at 35-36 (1995), reprinted in 1995 U.S.C.C.A.N. 983, 997-98, pursuant to the passage of the Intelligence Authorization Act of 1996, Pub. L. 104-93, 109 Stat 961 (1996), regarding the creation of the National Security Letter power for the F.B.I. to obtain information in consumer credit reports.

81. *See* Omnibus Crime Control & Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968), (codified, in part, as amended at 18 U.S.C. § 2510 *et seq.*).

82. *See* S. REP. NO. 99-541 (1986) (amending title 18 of the United States Code pursuant to S. 2575). "The bill amends the 1968 law [the Omnibus Crime Control Act] to update and clarify federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." *Id.*

83. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended at 18 U.S.C. §§ 2701-2712 (2006).

84. *Id.*

85. 18 U.S.C. § 2709(c) (2006).

to as an NSL.[86] There are five National Security Letters, all used in foreign intelligence investigations and all authorized by statute.[87] Just as section 215 forbids the recipient from telling anyone about the receipt and production of information under a court order of the FISA court, the NSL has restrictions on the disclosure of the subpoena, as do the other NSL provisions.[88]

The administrative subpoena has a long history, dating back to before the New Deal, giving federal administrative agencies an ability to obtain information in a civil setting that is quite similar to that given law enforcement agencies in a criminal setting through the use of a grand jury. The difference between the two is that in a grand jury setting there is an intercessor, the grand jury, between the law enforcement agency and the recipient of the subpoena. In the administrative agency situation, however, there is no intermediary or other branch of government. The large majority of the administrative subpoena statutes—and there are some 335 of them[89]—concern civil investigations.[90]

Generally speaking, in criminal matters the First, Fourth and Fifth Amendments place a barrier, usually a judge, between the law enforcement agency and the suspect because the suspect has rights provided by the Constitution. Those rights are lessened in a civil setting and, although the government needs to obtain information in much the same manner, civil

86. An excellent resource about all the National Security Letters and their statutory basis is Charles Doyle, *Administrative Subpoenas and National Security Letters in Criminal and Foreign Intelligence Investigations: Background and Proposed Adjustments* (2005), *available at* http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-6283 (CRS Report for Congress) [hereinafter *Doyle's Administrative Subpoenas*].

87. *See e.g.,* 18 U.S.C. §§ 1861; *see also* 12 U.S.C. § 3414 (2006). These other National Security Letter statutes provide administrative subpoena powers similar to that of 18 U.S.C. § 1861. *See generally* 12 U.S.C. § 3414 (pertaining to records held in banks and financial institutions); 15 U.S.C. § 1681u (names and addresses of financial institutions which are held by a consumer reporting agency); 15 U.S.C. § 1681v (reports on consumers from a consumer reporting agency); 50 U.S.C. § 436 (financial records held by any financial institution, holding company, or consumer reporting agency pertaining to government employees).

88. *See* 18 USC § 2709.

89. U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POLICY, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES, 5 (2002), *available at* http://www.usdoj.gov/olp/intro.pdf.

90. *See Tools to Fight Terrorism: Subpoena Authority and Pretrial Detention of Terrorists: Hearing before the Subcomm. on Terrorism, Tech.& Homeland Security of the S. Judiciary Comm.* 108th Cong. 5-6 (2004) (statement of Rachel Brand, Principal Deputy Ass't. Att'y Gen. Office of Legal Policy) [hereinafter *Tools to Fight Terrorism Hearings]*. Ms. Brand stated there are 335 administrative subpoena authorities existing and cites two as having a criminal basis, health care fraud and cases involving sexual abuse of minors, though there are others in the areas of controlled substances, inspectors general, and presidential protection. *See Doyle's Administrative Subpoenas, supra* note 86, at 13-18.

liberties are generally not at issue. The use of the administrative subpoena, as might be imagined, has been litigated with regard to the position of the government versus the rights of the subpoenaed entity.[91] The result has been that a greater and greater range of capabilities for intrusion has been given to the government such that almost any request for the production of information made, absent out-and-out fraud on the part of the government, must be obeyed by the recipient. The recipient of the normal civil administrative subpoena may contest the subpoena in court, though these are seldom overturned due to the deference the courts give administrative agencies.[92] The enforcement of an administrative subpoena may not be accomplished by the administrative agency itself; enforcement must be through the courts.[93]

The Department of Justice has been saying for several years that the grand jury method of obtaining information, for a number of reasons, does not work with the speed needed for law enforcement work.[94] The grand jury system, however, has been found to possess the requisite protections for constitutional rights because it is only the beginning phase of the

91. A lengthy examination of the administrative subpoena, particularly its position relative to the grand jury, is contained in Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573 (1994). This article reviews, in the main, the civil processes and a few of the criminal uses of the administrative and grand jury subpoenas. *See id.*

92. *See e.g.*, United States v. LaSalle Nat'l, 437 U.S. 298 (1978); United States v. Morton Salt Co., 338 U.S. 632, 642-43 (1950) (administrative agency subpoena has a general power of inquisition, not unlike that of a grand jury, and the agency may base its inquiry on suspicion alone); Oklahoma Press Publ. Co. v. Walling, 327 U.S. 186, 209 (1946) (the subpoena must be lawfully authorized, relevant to the inquiry and adequately specify the documents being sought); Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943) ("where the evidence sought is not plainly incompetent or irrelevant to any lawful purpose," the court should order the production of the evidence).

93. United States v. Security State Bank and Trust, 473 F.2d 638, 642 (5th Cir. 1973) ("the system of judicial enforcement is designed to provide a meaningful day in court for one resisting an administrative subpoena.")

94. *See Cyber Attack: Improving Prevention and Prosecution: Hearing before the Subcomm. on Tech., Terrorism & Gov't Info. of the S. Judiciary Comm.*, 106th Cong. 87-88 (2000) (statement by Guadalupe Gonzalez, Special Agent in Charge, Phoenix, F.B.I in response to questions by the Subcommittee, regarding the F.B.I.'s need to respond more quickly to follow leads that might not survive a probable cause hearing); *Cyber Attacks: Removing Roadblocks to Investigation and Information Sharing: Hearing before the Subcomm. on Tech., Terrorism & Gov't Info. of the S. Judiciary Comm.*, 106th Cong. 11-15 (2000) (statement by Louis Freeh, Director, F.B.I. in response to questions by the Subcommittee, concerning the use of the administrative subpoena in conjunction with the grand jury); *Fugitives: The Chronic Threat to Safety, Law, and Order: Hearing before the Subcomm. on Criminal Justice Oversight of the S. Judiciary Comm.*, 106th Cong. 6-8 (statement of John W. Marshall, Director, U.S. Marshals Service, concerning the necessity to have administrative subpoenas to apprehend fugitives when speed is of the essence).

investigation; the information obtained after that process is gathered constitutionally. However, the F.B.I. does have 18 U.S.C. § 2709, which allows it to collect some information.[95]

Section 505 of the PATRIOT Act had a life prior to the PATRIOT Act because it was enacted in 1986 as a part of the Electronic Communications Privacy Act.[96] The statute was originally passed with five sections labeled "a" through "e." Part "a" specified that an electronic communications provider had a duty to comply with a request for subscriber information and billing records or electronic communication transactional records if made under Part "b."[97] Part "b" specified that a certification from the F.B.I. is required for the release of the records, who could make that certification, and specified what that certification must contain.[98] Part "c" noted that the recipient of the request for records could not disclose to any other party that the records were sought or provided.[99] Part "d" dealt with the dissemination of the information obtained by the request and specified that it could only be disseminated pursuant to guidelines made by the Attorney General for foreign intelligence and counterintelligence investigations.[100] Finally, Part "e" noted that certain congressional bodies had to be informed of the requests made under Part "b."[101]

So we see that this original statute gave the F.B.I. a subpoena power that was not intermediated by any other branch of government. That is, the subpoena for information was generated by an agent of an Executive Branch organization, the F.B.I., and that subpoena was delivered by the same branch of government without any consultation with any other branch of government. Moreover, this was done in connection with an investigation by the same subpoena-issuing body.[102]

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95. *See* 18 U.S.C. § 2709(b) (2006).

96. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508 § 201, 100 Stat. 1848 (1986) (codified as amended at 18 U.S.C. § 2701-2710).

97. 18 U.S.C. § 2709(a) (1990).

98. § 2709(b).

99. § 2709(c).

100. § 2709(d).

101. § 2709(e).

102. There is, of course, an argument to be made that an investigation into matters concerning espionage or terrorism is substantially different than the merely criminal matter, since the safety of the nation is at stake and speed is of the essence. *See, e.g., Tools to Fight Terrorism Hearings,* supra note 90 (statement of Rachel Brand, principal Deputy Assistant Attorney General, Office of Legal Policy, Department of Justice). However, District Court Judge Marrero, in Doe v. Ashcroft, 334 F. Supp. 2d 471 (S.D.N.Y.), *vacated and remanded,* Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006) throughout the opinion, noted a number of constitutional deficiencies with the administrative subpoena, though the case was vacated and remanded due to Congressional

The 1993 amendments[103] to § 2709 significantly modified Part "b" of the original ECPA statute. In Part "b," the original statute required only that the Director of the F.B.I. specify a designee, who could presumably be at any level in the F.B.I. organization, from top to bottom. The 1993 amendments specified that the certification to the holder of the records must be in a position not lower than a Deputy Assistant Director.[104] Additionally, original Part "b" required the monitored party to be a foreign agent or foreign power.[105] The 1993 change to Part "b" specifies two different types of requests. First, Part "b(1)(A)" allows requests for the name, address, length of service and local and long distance billing records. However, this informational request must be "relevant to an authorized counterintelligence investigation"[106] and "there are specific and articulable facts giving reason to believe that the person or entity to whom the information sought pertains is a foreign power or an agent of a foreign power. . . ."[107] Second, Part "b(2)"[108] allows the request only of the name, address, and length of service (not the billing records), but here the information must be relevant to an authorized foreign counterintelligence investigation and there must be specific and articulable facts.[109] Additionally, the facts must state that the person in question has been in communication with someone engaged in international terrorism or clandestine intelligence activities in violation of the criminal statutes of the United States criminal law,[110] or is a foreign power or an agent of a foreign power in communication with someone engaged in international terrorism or clandestine intelligence activities in violation of the criminal statutes of the United States.[111] Again, because these sorts of requests were pursuant

amendments made by the Reauthorization Act and the Reauthorization Amendments Act.

103. Act of Nov. 17, 1993, Pub. L. No. 103-142, 107 Stat. 1491 (1993). There was one additional amendment to 18 U.S.C. § 2709, of little consequence to our analysis, Act of Oct. 11, 1996, Pub. L. No. 104-293, 110 Stat. 3461 (1996), which added the words "local and long distance" before "toll billing records," though such an addition would make a difference to F.B.I. agents on the trail of a spy.

104. 18 U.S.C. § 2709(b)(1) (1994).

105. § 2709(b)(2).

106. § 2709(b)(1)(A).

107. § 2709(b)(1)(B).

108. § 2709(b)(2).

109. § 2709(b)(2)(A)-(B).

110. 18 U.S.C. § 2709(b)(2)(B)(i)(1994).

111. § 2709(b)(2)(B)(ii). A House of Representatives' report explains that the change incorporating what would become 18 U.S.C. § 2709(b)(2)(B)(ii) would allow the F.B.I. to identify subscribers from (1) phone numbers in a terrorist's phone book; (2) all persons who call an embassy and ask to speak to a suspected intelligence officer; and (3) all callers to the home or apartment of a suspected intelligence officer or terrorist. *See* H. REP. No. 103-46, at 3 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1913, 1915. Foreign agent and foreign power were specifically

to investigations into terrorism and counterintelligence, the subpoena power remained unmediated by the courts.

The 2001 USA PATRIOT Act amendments[112] left the statute divided into five areas, but reduced the level of designee the Director of the F.B.I. could appoint to make the required certification to a records holder, lowering the level to that of Special Agent in Charge in a Bureau field office.[113] Members of the Department of Justice had been clamoring to Congress for additional investigative subpoena powers because of the time element.[114] Presumably, moving the level of request down to an F.B.I. field officer would decrease the time necessary to issue the subpoena to that of filling out the form and going to the holder of records.[115]

The 2001 PATRIOT Act amendments also lowered the requirements for the certification in Part "b." The amendments to Part "b(1)" required only that the information being sought be relevant to an authorized investigation to protect against terrorism or clandestine intelligence activities, while it also provided that the investigation of a U.S. citizen should not be conducted solely on the basis of activities protected by the First Amendment.[116] This change is crucial because the PATRIOT Act amendment deleted the necessity for the certification to include specific and articulable facts, leaving only the requirement that the certification name an "authorized investigation," essentially stating the suspicions of the field officer filling out the paperwork.[117] In addition, the amendments

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defined as being in a provision of the Foreign Intelligence Surveillance Act. 50 U.S.C. § 1801 (1994).

112. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56 § 505(a), 115 Stat. 272 (2001) (codified as amended at 18 U.S.C. § 2709(b) (2002)).

113. 18 U.S.C. § 2709(b) (2002).

114. Government agents are still complaining about the need to increase the speed of their investigations. *See Tools to Fight Terrorism Hearings,* supra note 90 (statement of Rachel Brand, Principal Deputy Assistant Att'y Gen. Office of Legal Policy, Dep't of Justice).

115. A detractor of the administrative subpoena put it this way:

> I think administrative subpoenas is [sic] one of the worst ideas that has been around for [thirty] years, which is how long it has been around for. This is a piece of paper signed by and FBI agent saying, "Give me everything you have," with not even the nominal oversight of a prosecutor that you have with the grand jury subpoena.

Oversight of the USA PATRIOT Act, Hearings Before the S. Comm. on the Judiciary, 109th Cong. 350 (2005) (statement of James X. Dempsey, Executive Dir., Ctr. for Democracy & Tech., in response to questions).

116. 18 U.S.C. § 2709(b)(1) (2002).

117. There is an absolutely hilarious question and answer session between a House Member and a representative of the Attorney General's office, where the Member poses a situation in a crowded mall eating area where she sits down, due to no other available seating, with a person under suspicion of terrorism, and carries the NSL powers to their outermost possible limits regarding what could be found out about her because of this happenstance and the power of an

delete the requirements that the investigation be related to foreign counterintelligence, a foreign power, or the agent of a foreign power. Now the investigation must only be an authorized investigation, not solely about First Amendment rights of a U.S. Citizen, and for protection against international terrorism or clandestine activities.[118]

VI. THE NON-DISCLOSURE PROVISION OF THE 2001 PATRIOT ACT

The non-disclosure provision located in Part "c" of the statute,[119] remains unchanged from its original version. As such, Part "c" requires the recipient of the NSL subpoena to remain completely silent with regard to the information disclosed to the F.B.I., or even the fact that the F.B.I. contacted the recipient.[120] In subsequent litigation, attorneys for the government have claimed that an administrative subpoena has always been subject to a motion to quash in a court proceeding.[121] While most likely true, it is unfortunate for most librarians that they do not have a legal education, as they will be the most likely recipients of the National Security Letter subpoena served on a library. Without the right to go to court to quash the subpoena spelled out for them, it is doubtful that most librarians would know what to do, other than turn over whatever is asked for, when

unmediated NSL subpoena in the hands of the investigator. *See Material Witness Provisions of the Criminal Code, and the Implementation of the USA PATRIOT Act: Section 505 that Addresses National Security Letters, and Section 804 that Addresses Jurisdiction Over Crimes Committed at U.S. Facilities Abroad: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 109th Cong. 66-68 (question and answer between Rep. Maxine Waters and Matthew Berry, Counselor to the Ass't Att'y Gen., Off. of Legal Policy).

118. Former Representative from Georgia, Bob Barr, also a former official with the C.I.A., noted that the removal of the connection between the statute and the phrase "with a foreign power" obviates the constitutional argument for the Fourth Amendment exception from the requirement for specific probable cause before the electronic monitoring may occur. *Anti-Terrorism Intelligence Tools Improvement Act of 2003: Hearings Before the SubComm. on Crime, Terrorism, and Homeland Security of the H. Judiciary Comm.*, 108th Cong. 12 (2004) (statement of Bob Barr, American Conservative Union).

119. *See* 18 U.S.C. § 2709 (c) (2002).

120. Section 2709(c)(1) (2002) states that no recipient of the request "shall disclose to any person . . . that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." § 2709(c)(1).

121. *See* Doe v. Ashcroft, 334 F. Supp. 2d 471, 494 (S.D.N.Y. 2004), *vacated on other grounds*, Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006) ("Doe I"). Judge Marrero noted the government position in this § 505 litigation. *Id.* Robert Mueller, Director of the Federal Bureau of Investigation, stated that objections may be made in court to an administrative subpoena, effectively noting that the F.B.I. was hiding the ball with its "do not disclose to anyone" notice on the face of the subpoena. *See PATRIOT Act* Hearings at 48-50 (2005) (statement of Robert Mueller, Dir. of the Federal Bureau of Investigation in response to questions from the Committee).

the FBI requests information from them and tells them they must remain silent.[122]

Libraries are also incorporated into the subpoena power of the F.B.I. through the PATRIOT Act in the "electronic communication service provider" subsection of the statute contained in both Parts "b(1)" and "b(2)." An electronic communication service is defined in 18 U.S.C. § 2510(15)[123] as "any service which provides to users thereof the ability to send or receive wire or electronic communications."[124] Since most public and academic libraries of any size have publicly available computers attached to an Internet connection, and since most email connections may be made through a web page, the library computer users are given the ability to send and receive electronic messages. Therefore, publicly available libraries offering this service could be considered as providers of an "electronic communication service" and thereby subject to the provisions of the administrative subpoena for those types of records. This brings into focus the conflict between the First Amendment right of privacy of the users of libraries to what they read and view on the Internet, as well as communications they may make, and the investigative efforts of law enforcement agencies.[125]

Also, the changes wrought by the latest revisions of the statute, the Reauthorization Act, changed some of the language of section 505, as did the Reauthorizing Amendments Act. The Reauthorization Act added a new section to the United States Code titled "Judicial Review of Requests for

122. *See* Doe v. Gonzales, 386 F. Supp. 2d 66 (D. Conn. 2005) ("Doe II"), *dism'd as moot,* 449 F.3d 415 (2nd Cir. 2006). Doe v. Gonzalez is a case involving an NSL filed on a Connecticut library. *Id.* A copy of the National Security Letter the F.B.I served on the library in Connecticut is attached to the complaint filed by the library. AMERICAN CIVIL LIBERTIES UNION, LETTER FROM MICHAEL J. WOLF, FBI TO KENNETH SUTTON, SYSTEMS AND TELECOMMUNICATION MANAGER OF LIBRARY CONNECTION, INC., *available* at http://action.aclu.org/nsl/legal/aclu_complaint_080905.pdf.

123. Paragraph 15 was added by the Electronic Communications and Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 1986 (codified as amended at 18 U.S.C. § 2510 (2006) (defining "electronic communication service" as any service which provides to users thereof the ability to send or receive wire or electronic communications).

124. 18 U.S.C. § 2510(15) (2006).

125. Indeed, the government has argued that libraries are "electronic service providers," as the legal basis noted in the National Security Letter subpoena served on the Library Connection in Connecticut seeking information regarding the use of a computer in the library and quoted § 2709(b) as its authority. *See* AMERICAN CIVIL LIBERTIES UNION, LETTER FROM MICHAEL J. WOLF, FBI TO KENNETH SUTTON, SYSTEMS AND TELECOMMUNICATION MANAGER OF LIBRARY CONNECTION, INC., *available at* http://action.aclu.org/nsl/legal/aclu_complaint_080905.pdf; *see also* 18 U.S.C. § 2709(b)(1)-(2) (2006) (as authority for the NSL provided to the Library Connection in Connecticut as its authority).

Information,"[126] which allows the recipient of any of the five NSL subpoenas, including section 505 requests, to petition a federal court in the district where the recipient does business or resides for an order setting aside the request if compliance would be unreasonable, oppressive or otherwise unlawful.[127] The recipient may also petition the same federal district court to modify or set aside the nondisclosure requirement imposed in such a request.[128] The government may contest this release from nondisclosure if it certifies that national security is at stake and, if it does so, the court must treat that certification as conclusive, unless the court finds there is bad faith in the certification.[129]

If the petition to set aside or modify the request is made within a year of the receipt of the request, there is a fairly high level of government administration capable of certifying that national security is at stake;[130] if the petition is filed after a year has elapsed, a lower level of government administration may remove the nondisclosure requirement or recertify it.[131] The government may recertify the necessity of secrecy and the recipient is held in abeyance for a year before re-petitioning. While there had been no sanctions in the prior statutes for failure to comply with a NSL,[132] these amendments give the government the power to go to the same federal district court to compel compliance with the request[133] and the court may hold the recipient of the request in contempt if it finds the request should be honored.[134]

The Reauthorization Act also made significant changes to section 505(c) pertaining to non-disclosure of the filing of the NSL. The 2001 PATRIOT Act section 505(c) was succinct—some two or three lines. The Reauthorization Act changes are four paragraphs, around thirty-four lines.

126. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, 120 Stat. 192 (2006) (codified as amended at 18 U.S.C. § 3511 (2006)).

127. 18 U.S.C. § 3511(a).

128. § 3511(b)(2).

129. *Id.* It would seem that in this instance the burden of proof of bad faith would fall on the recipient of the request, which would be an extraordinarily heavy burden of proof. *See id.*

130. *Id.*

131. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 115, 120 Stat. 192 (2006) (codified as amended at 18 U.S.C. § 3511(b)(3) (2006)).

132. *See* § 3511(c). It is difficult to believe that the government would not have done something if it really wanted the records sought through the NSL, but there was no statutory authority given.

133. USA Patriot Improvement and Reauthorization Act, § 115 (codified as amended at 18 U.S.C. § 3511(c). I suppose once the request is changed to a court compulsion it becomes a demand, rather than a request.

134. *Id.* This seems to be, if you will pardon the expression, a slam dunk for the F.B.I. since the only requirement for production is a certification by an F.B.I official.

Under the 2001 PATRIOT Act, the recipient could neither make a disclosure of the receipt of the request for records nor state that such disclosure has been made to any person.[135] Under the Reauthorization Act, the nondisclosure provisions prohibit disclosure to anyone save those assisting in the production, or an attorney from whom one obtains legal advice.[136] The request for records must notify the recipient of the nondisclosure provisions.[137] Any disclosure to those assisting in the production, or to an attorney, must be accompanied by a notice of the nondisclosure requirement.[138] Finally, any person making a disclosure, or intending to make a disclosure, must inform the Director of the F.B.I., or his designee, if he so requests.[139] Note, however, though there is no requirement to inform of an intent to seek legal counsel; under this amendment one assumes there is a requirement to inform after legal counsel has been sought.

The Reauthorizing Amendments Act, however, also made a change to the non-disclosure provisions of § 505(c).[140] The Act provides that, "[a]t the request of the Director," or his designee, "any person making or intending to make a disclosure under this section" must identify those persons to the Director of the F.B.I., or his designee.[141] In addition, if a disclosure was made *prior* to the request,[142] those persons must be identified as well, except when those persons are obtaining legal advice or assistance.

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135. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 115, 120 Stat. 192 (2006) (codified as amended at 18 U.S.C. § 2709(c). The Department of Justice attorneys state that going to a court to quash the request is permissible. Doe v. Ashcroft, 334 F. Supp. 2d 471, 494 (S.D.N.Y. 2004), *vacated on other grounds*, Doe v. Gonzales, 449 F.3d 415 (2nd Cir. 2006).

136. USA Patriot Improvement and Reauthorization Act, § 115 (codified as amended at 18 U.S.C. § 2709(c)(1)).

137. USA Patriot Improvement and Reauthorization Act, § 115 (codified as amended at 18 U.S.C. § 2709(c)(2)).

138. USA Patriot Improvement and Reauthorization Act, § 115 (codified as amended at 18 U.S.C. § 2709(c)(3)).

139. USA Patriot Improvement and Reauthorization Act, § 116 (codified as amended at 18 U.S.C. § 2709(c)(4)).

140. USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178 § 4(b), 120 Stat. 278, 280 (2006) (codified as amended at 18 U.S.C. § 2709(c)(4)).

141. *Id.*

142. *Id.* I'm not making this stuff up—it's in the statute and, try as I might, I cannot envision how I would know before hand that I was going to get a request such that I would be able to tell someone before receiving it.

Finally, the Reauthorizing Amendments Act adds a provision[143] stating that services provided by a library[144] "which include[s] access to the Internet, books, journals, magazines, newspapers, or other similar forms of communication in print or digitally by patrons for their use, review, examination, or circulation, is not a wire or electronic communications service provider for purposes of this section, unless the library is providing the services defined in § 2510(15) . . . of this title."[145] At first glance, this would not seem to alter much because, as we have seen above, almost any library offering an Internet service will allow access to email which would satisfy the statute's requirement that the service be one "which provides to users thereof the ability to send or receive wire or electronic communications."[146] Because the statute does not expressly include "email" as a service which the library may offer, it appears that any library offering "email" would be considered such an electronic services provider and, thus, subject to the NSL provisions of § 2709.

The Reauthorizing Amendments Act passed with little fanfare and even less legislative history; no House or Senate reports were issued pursuant to its passage.[147] Perusal of the Congressional Record debate, however, indicates that the thrust of the amendment actually is to remove libraries from being considered "electronic service providers" as that phrase is defined under 18 U.S.C. § 2510(15). Senator Murkowski baldly states it when she points out that "the fact that they may happen to offer their library patrons the use of the Internet does not make them a wire or electronic communications service provider."[148] Following up a few days later, Senator Leahy makes the remark that:

> [T]he bill is intended to clarify that libraries as they traditionally and currently function are not electronic service providers, . . . [A] library may be served with an NSL only if it functions as a true internet

143. USA Patriot Act Additional Reauthorizing Amendments Act § 5 (codified as amended at 18 U.S.C. § 2709(f)).

144. *See id.* (defining library by reference to 20 U.S.C. § 9122(1) (2006)). A library is very broadly defined as including a public library, school library, academic library or even special library (one maintained in a private institution). 20 U.S.C. § 9122(1) (2006). Such a broad definitions pretty much cover the waterfront of publicly available libraries in the United States.

145. USA Patriot Act Additional Reauthorizing Amendments Act § 5 (codified as amended at 18 U.S.C. § 2709(f)).

146. 18 U.S.C. § 2510(15) (2006).

147. *See* USA Patriot Act Additional Reauthorizing Amendments Act of 2006, Pub. L. No. 109-178 § 4(b), 120 Stat. 278, 280 (2006) (codified as amended in scattered sections of 50 U.S.C., 18 U.S.C., 15 U.S.C., and 12 U.S.C.) (2006).

148. 152 CONG. REC. S1497 (daily ed. Feb. 27, 2006) (statement of Sen. Murkowski).

> service provider, as by providing services to persons located outside the premises of the library.[149]

The sentiment is admirable, if still a bit vague, but leaves most libraries hanging since almost all libraries of any size do offer online services at home, as well as email.

VII. CONCLUSION

So, where do we stand after the welter of amendments and changes to §§ 215 and 505 of the PATRIOT Act? With regard to § 215, we stand in a good position, from the library point of view. Up to March, 2005 the section had been used only thirty-five times, according to Attorney General Gonzales,[150] and none of those FISA court orders had been directed to libraries. There are only a few cases relating to § 215, and only one of them seems to be continuing after the 2006 amendments.[151] This isn't too surprising considering the fact that the subpoena duces tecum is issued from a court, rather than from an administrative agency. As such it bears the imprimatur of a balanced and reasonable consideration of the issues and rights at hand.

In the case that is still open, *Muslim Cmty. Ass'n of Ann Arbor v. Ashcroft* (MCA), the plaintiff based its complaint on the constitutionality of section 215, alleging that it violated the First Amendment (those subject to the searches are permanently prohibited from disclosing their existence and the searches are predicated on First Amendment rights to free expression and speech); the Fourth Amendment (searches were not due to probable cause and those targeted had no notice or opportunity to be heard); and the Fifth Amendment (individuals were deprived of property without due process).[152] The government defendants have moved for dismissal, claiming the two amending acts, the Reauthorization Act and Reauthorizing Amendments Act, have worked to eliminate the claims of the plaintiffs.[153] The MCA district court, in a surprising move, has not

149. 152 CONG. REC. S1558 (daily ed. Mar. 1, 2006) (statement of Sen. Leahy).

150. *PATRIOT Act Hearings, supra* note 22 (statement of Alberto Gonzales, Attorney General, Department of Justice response to questions from the Committee on the Judiciary).

151. *See* Muslim Cmty. Ass'n of Ann Arbor v. Gonzales, 459 FSupp.2d 592 (E.D. Mich. 2006). By motion, plaintiffs voluntarily dismissed the action without order of the court, Notice of Voluntary Dismissal, Muslim Comty Ass'n of Ann Arbor v Gonzales, No. 03-72913 (E.D. Mich, Oct. 27, 2006). In a press release the ACLU cited ithe changes to the PATRIOT act, "Citing Improvements to the Law ACLU Withdraws Section 215 Action but Vows to Fight Individual Orders," Press Releas of Oct. 27, 2006 found at http://www.aclu.org/safefree/patriot/27211prs20061027.html.

152. *Id.* at 1.

153. *Id.* at 4.

mooted the case; rather, it denied the government defendants' motion to dismiss based on lack of standing under either the old statute or the new statute.[154] The court reasoned that the relief sought is a facial pre-enforcement challenge to section 215 and, thus, does satisfy the constitutional standing requirements.[155] Finally, the court ruled that, because the government defendants have yet to file an Answer to plaintiffs' Complaint, the court is going to allow plaintiffs to amend their complaint.[156]

It seems, however, that the basis of any suit, at least so far as it would affect libraries, would be predicated more on the "factual basis for the requested order."[157] If the statement of facts, created by the government agent requesting the order, is sufficient to meet the probable cause requirement, the order would issue constitutionally. The concern about the issuing judge's discretion seems still to be an issue despite the heading in the Act labeling it "judicial discretion."[158] The mere reference to "judicial discretion" in the section's subheading does not suffice to give the issuing judge discretion to deny the order. Perhaps, however, that concern is obviated by the fact that there is now an appellate process spelled out in the statute, whereas before, there was confusion as to whether the order was appealable, due to the secrecy of the order. Additionally, the discretion for seeking the FISA order has moved high up in the F.B.I. organization, at least for libraries, with the decision to be made by one of the top three officials in the agency. One presumes that only vitally important requests would filter to that level. Finally, the 2006 amendments specifically state that the recipient is allowed to seek legal counsel, whereas before, this right was not apparent. Overall, the amendments make the relationship of libraries to this piece of the PATRIOT Act much more palatable.

Why would a government agent, however, go to all the trouble to go to a FISA court to obtain a court-ordered production when there are the NSL statutes that could be used much more easily? This is quite obviously what is happening if one looks at the number of uses of section 215 versus the number of uses of the section 505 NSL.[159] Only one of the subpoenas

154. *Id.* at 3, 8.

155. *Id.* at 4, 8.

156. *Id.* at 8.

157. *See* USA Patriot Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177 § 106(b), 120 Stat. 192, 196 (2006) (the section labeled "Factual Basis for Requested Order" did not make its way into the compiled statute).

158. USA Patriot Improvement and Reauthorization Act § 106(c) at 196 (the section labeled "Clarification of Judicial Discretion" did not make its way into the compiled statute).

159. *See* Barton Gellman, *The FBI's Secret Scrutiny,* WASH. POST, Nov. 6, 2005, at A1 (quoting unnamed government sources and stating that more than 30,000 National Security

served under the NSL statutes—that of the Doe II case—has been attributed to libraries, and we are aware of it despite the fact that the subpoena issued therein notes on its face that receipt and compliance should not be disclosed to anyone. If there were others we would not expect to know about them.[160] From this disparity in numbers, thirty-five cases over thirty-nine months versus the 30,000 subpoenas issued each year, we can see the thrust of the investigations as a self-fulfilling mechanism—because there has been no requirement for judicial oversight, and most of the investigations have likely[161] not sought the incarceration of malfeasants but, rather, to foil foreign agents' or terrorists' plots.

As such, there may be no need to obtain information in a constitutionally valid manner such that it could be challenged in court. But what of the example posed by House of Representatives member Maxine Waters, where she inadvertently sits down at a crowded mall food court and has a desultory conversation with some known terrorists, and her bank records could subsequently be subpoenaed to "check up on her?" This same scenario follows through on a citizen who, for purposes of writing a paper on Islamic terrorism, uses a library's computer terminal to do the research, is seen doing so, is reported to the authorities, and the government agents subpoena the library for the computer records to check up on this citizen. Don't these two citizens have constitutional rights that should be preserved?

I believe we would all reply "Yes, they do." To examine what the legislative changes have accomplished we might want to look at what the courts have done concerning section 505 NSL issuances. Surprisingly, there has only been a little activity that has made it to the reported opinions, the Doe I and Doe II cases. Doe I dealt with a true Internet Service Provider while Doe II was a library in Connecticut. Doe II hinged on the issue of a gag order preventing the disclosure of the name of the recipient of the subpoena (a consortium called the Library Connection of Connecticut) as a content-based prior restraint on speech.[162] The government receded from its opposition after the 2006 amendments,

Letters are issued each year).

160. *See* GOODRUM'S IMPACT AND ANALYSIS, *supra* note 78 (indicating some activity going on, although the survey covering four years does not indicate much activity).

161. But again, how would we know since the government has not made a report to Congress on the administrative subpoenas since the Report to Congress in 2002, which is dated May 13, 2002 most likely only contains data from 2001.

162. Doe v. Gonzales, 386 F. Supp. 2d 66, 72-74 (S.D. Conn. 2005).

claiming the changes allowed the library to reveal its name, and the Circuit court agreed, dismissing the appeal as moot.[163]

Doe I, however, was vacated and remanded "for further proceedings on whether the new version of 18 U.S.C. § 2709(c), as revised and supplemented by the Reauthorization Act and 18 U.S.C. § 3511, violates the First Amendment on its face or as applied to John Doe I."[164] This case is back in the federal district court from whence it sprang and is proceeding.[165] It will be interesting to see what happens with the First Amendment claims.

But what of the libraries—are they any better off? The answer is yes, because many of the problems inherent in the original statute as amended through the PATRIOT Act have been addressed by Congress. The biggest change *might* be the deletion of libraries from consideration as an "electronic service provider" pursuant to the definition in 18 U.S.C. § 2510(15). I use the word "might" because although the wording of the statute exempts a library from the NSL process if it offers the traditional services which a library offers in the modern world (electronic access to books, journals, and newspapers, as well as the Internet in general), it still leaves up in the air whether offering email access (not specifically mentioned in the statute) might trigger the rather broad definition of an "electronic service provider."

Congress added an appeals process for the judicial review of these requests for information, clarified the non-disclosure provision, and also added a review of the need for secrecy by local U.S. district courts. Finally, it appears that the recipient of the administrative subpoena will be notified that he is entitled to legal counsel. It is possible that this will appear on the face of the subpoena, as well as information concerning the review of the non-disclosure requirements. Recipients have some new duties, as well. Previously they could simply not comply. Now the recipient has a duty to comply with the subpoena or face sanctions for non-compliance.

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163. Doe v. Gonzales, 449 F.3d 415, 421 (2d Cir. 2006). The length of time between the filing of the NSL at the library makes one question the "need for speed" expressed by the government; if speed were of the essence it would seem that the government would avail itself of a more traditional method, certainly judicially enforceable, of the grand jury subpoena. Here it would seem the government was more interested in flexing its muscles than it was in obtaining the information, since the government receded from its request only after the case had been appealed and decided by the Circuit court, some twelve months later.

164. *Id.*

165. A check of the PACER docket for the Southern District of N.Y. indicates the case is moving along as several entries indicate activity have been placed on the docket, as of last inspection on Feb. 1, 2007. *See* Doe v. Ashcroft, docket no. 1:04-cv-02614-VM.

Overall, while not a complete victory for libraries, it would appear that Congress listened to most of the concerns of librarians, and other defenders of citizens' constitutional rights, and made judicious changes to the statutes—changes which allow fundamental constitutional rights to co-exist along with law enforcement's need for information to defeat spies and terrorists.