

GOVERNMENT RELATIONS OFFICE & GOVERNMENT RELATIONS COMMITTEE
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USA PATRIOT ACT and PATRIOT Reauthorization Act: Section 215

BACKGROUND:

In the wake of the horrors on September 11, 2001, Congress responded to the tragedy by swiftly passing the *Uniting And Strengthening America By Providing Appropriate Tools Required To Intercept And Obstruct Terrorism (USA PATRIOT) Act of 2001* (P.L 107-56) just six weeks after the attacks. Despite the immediate outcry from groups like AALL who voiced their concerns about civil liberties and privacy rights, the law quickly passed with little debate and no hearings.

Included in Title II of the Act was Section 215, the so-called “library provision.” Section 215 expanded the Federal Bureau of Investigation’s (FBI) power to require the production of any tangible thing (including books, records, papers, and documents) it claims is relevant to authorized foreign intelligence and international terrorism investigations. Section 215 orders come with a “gag order” which prevents the recipients of the court order from disclosing that fact to anyone other than the attorneys involved in the case and to those who need to know in order to comply with the order.

AALL’s “[Statement to the Obama-Biden Transition Team](#)” articulates the Association’s opposition to the reauthorization of Section 215, due to sunset on December 31, 2009. We believe that Section 215 unnecessarily impinges on the privacy rights and civil liberties of library users and all Americans. If repeal of Section 215 is not possible, we urge Congress to include in the reauthorization bill a requirement to return to the pre-PATRIOT Act standard.

USA PATRIOT ACT OF 2001

Before Congress passed the PATRIOT Act, Section 215 was a little known and rarely used section of the Foreign Intelligence Surveillance Act (FISA) that allowed the Department of Justice (DOJ) to apply to the Foreign Intelligence Surveillance Court (FISC) for a warrant for the business records of common carriers, public accommodation facilities, physical storage facilities, or vehicle rental facilities.¹ The PATRIOT Act allowed a Section 215 order to be directed at *any* business, including libraries, for “any tangible thing.” This change in the law led many groups, including AALL, to worry that the Federal Bureau of Investigation (FBI) would begin to demand records about library users. In 2004, AALL’s Executive Board passed a [resolution](#) on the PATRIOT Act that expresses the Association’s opposition to expanding surveillance authorities that erode the privacy and confidentiality rights of library users.

¹ 50 U.S.C. § 1862 (2000). See the report by the Office of the Inspector General, United States Department of Justice, *A Review of the Federal Bureau of Investigation’s Use of Section 215 Orders for Business Records* (2007 Audit), Mar. 2007, <http://www.usdoj.gov/oig/special/s0703a/final.pdf> (see iii, v-vi, x-xi regarding the paucity of pre-PATRIOT Act FISA orders).

The PATRIOT Act also changed the standard for issuing an order for records. Prior to the PATRIOT Act, the law required “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 foreign power.”² The new law simply required a certification that “the records concerned are sought for an authorized investigation...”³

USA PATRIOT IMPROVEMENT AND REAUTHORIZATION ACT OF 2005

The extremely broad standard for issuing an order for records was slightly narrowed by the *USA PATRIOT Improvement and Reauthorization Act of 2005* (P.L. 109-177). Under the new law, there must be “reasonable grounds to believe” the records sought “are relevant to an authorized investigation.”⁴ The amended act still does not require the FBI to show individualized suspicion or that a specific individual was “strongly suspected” of terrorism. AALL strongly advocated at the time for a return to the “specific and articulable facts” standard.

In addition, the Reauthorization Act added a provision specifically intended to protect libraries: if the order is directed at library circulation records or patron lists, only three very high-level bureaucrats have the authority to issue the application for an order. The Director of the Federal Bureau of Investigation can issue the application for an order or can delegate the authority only to either the Deputy Director of the Federal Bureau of Investigation or the Executive Assistant Director for National Security. The authority cannot be delegated any further.⁵

The 2005 PATRIOT Reauthorization Act also requires the Attorney General to submit an annual Audit Report containing statistics on the number of Section 215 orders issued, including those issued to libraries. In addition, the Reauthorization Act required the Office of the Inspector General (OIG) of the DOJ to conduct a comprehensive audit of DOJ procedures, to review the effectiveness of Section 215.

According to the 2007 Audit Report, only six Section 215 applications were made that year, and none were issued to libraries. This can be attributed at least in part to the efforts of AALL and librarians around the country who had been vocal about the constitutional problems associated with Section 215 orders directed at libraries.⁶ The 2007 Audit Report also found that no Section 215 order created any analytical intelligence products and that no evidence obtained from a Section 215 order resulted in a major case development, such as the disruption of a terrorist plot.⁷

Constitutional challenges have resulted in amendments to the gag order provision of Section 215. Recipients are now explicitly authorized to consult an attorney. However, the gag order is still overly broad, as it prevents any discussion of the mere fact of receipt or some of the other

² 18 U.S.C. 1862, 2000.

³ 50 U.S.C. § 1861(b)(2).(2002 Supp.)

⁴ 50 U.S.C. § 1861(b)(2)(A) (2006 Supp.)

⁵ 50 U.S.C. § 1861(a)(3). (2006 Supp.)

⁶ 50 U.S.C. § 1861(b)(2)(A) (2006 Supp.)

⁷ *Id.* at 79.

aspects of the order that clearly do not impact national security, such as the effect on libraries, the “fishing expedition” aspect of any orders, or the detrimental impact of the gag order on personal and professional lives.

Although there is judicial review of the gag order, the order can only be reviewed after one year and can be modified or set aside "only if the judge finds that such order does not meet the requirements of this section or is otherwise unlawful."⁸ The order cannot be heard in a regular federal court, and the order cannot be modified or set aside because it is onerous, oppressive, or overbroad. This is not meaningful review.

STATUS OF THE 2009 REAUTHORIZATION ACT AND OTHER RELEVANT LEGISLATION IN THE 111th CONGRESS (AS OF AUGUST 2009)

Section 215 is due to sunset on December 31, 2009. While AALL supports the repeal of Section 215, we acknowledge that this may not be politically feasible. If repeal is not possible, AALL advocates for a return to the pre-PATRIOT Act standard that limits the government to collecting information only about terrorism suspects and other agents of foreign powers.

On March 12, 2009 Rep. Lamar Smith (R-TX-21) introduced the *Safe and Secure America Act of 2009* ([H. R. 1467](#)) to extend the sunset date of Section 215 for an additional ten years. AALL opposes this bill because it would allow the FBI to continue its overreaching surveillance of library users and other innocent Americans.

On August 10, 2009, Senators Russ Feingold (D-WI) and Richard Durbin (D-IL) [announced](#) that they are drafting reform bills for the PATRIOT Act. The senators asked the Attorney General and the Chairmen of the Senate Judiciary and Intelligence Committees to consider two previous bills, the [Security and Freedom Enhancement \(SAFE\) Act of 2005](#) and the [National Security Letter \(NSL\) Reform Act of 2007](#), both of which had bipartisan support in Congress. As a member of the Senate, President Obama co-sponsored both bills. The changes the senators are seeking would reform the way [National Security Letters](#) are used, protect the private business records of innocent Americans, and enforce judicial oversight.

The AALL Government Relations Office and Government Relations Committee will continue to monitor developments of the Reauthorization Act and other relevant legislation. We will update this Issue Brief with new developments as they occur.

[Link to Chart Summarizing Section 215 and its Effect On Library Records Before the Patriot Act, After the Patriot Act, and After the Reauthorization Act](#)

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⁸ 50 U.S.C. 1861(f)(2)(B).