UNPATRIOTIC ACTS

The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You

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ACLU
AMERICAN CIVIL LIBERTIES UNION

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Published July 2003.

Written by Ann Beeson and Jameel Jaffer.

THE AMERICAN CIVIL LIBERTIES UNION is the nation's premier guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and freedoms guaranteed by the Constitution and the laws of the United States.

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FOREWORD

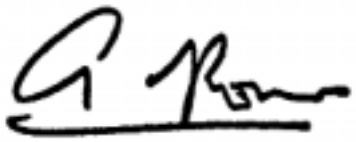
AMERICANS TEND to trust their government. No matter how partisan, no matter how contentious, those of us who studied the Constitution as children expect the federal government and its agents to ultimately do the right thing. Even now, after almost two years of living under the USA PATRIOT Act, most of us take our freedoms for granted – supposing that our homes, our medical records, our email are safe from prying eyes.

Some hear of immigrants jailed for long periods of time without charges or access to lawyers, of reputations sullied and marriages destroyed – and question the accuracy of news reports, wanting to believe there is a line our government will not cross.

But as this report, the eighth in a special series on civil liberties after 9/11, makes clear, the barriers have been lowered and the lines redrawn. The PATRIOT Act that was rushed through Congress after the attacks, under pressure from the Justice Department, greatly expanded the FBI's authority to monitor people living in the United States. One section in particular, giving the FBI unprecedented access to personal records and other belongings in violation of the First and Fourth Amendments, is misunderstood because officials haven't leveled with the press and public. Section 215 targets innocent people, not terrorists; it specifically gives the FBI authority to monitor people not engaged in criminal activity or espionage, and to do so in complete secrecy.

There should be no wiggle room in "inalienable rights." But according to information detailed in this report, the FBI can use the provision to obtain personal belongings directly from your home. It can also get your medical or psychiatric records, and lists of people who have borrowed a particular book, visited a particular Web site, or worshipped at a particular church, mosque, temple or synagogue.

Unpatriotic Acts is fact-filled, explicit and deeply unsettling. Once you've read it, I think you will find it hard to be complacent.



ANTHONY D. ROMERO
Executive Director
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UNPATRIOTIC ACTS

The FBI's Power to Rifle Through Your Records and Personal Belongings Without Telling You

IMAGINE THIS SCENARIO: You flee Iraq after being imprisoned and persecuted for your political views. When you arrive in the United States, a local charity helps you find housing and medical care. You start a small business, join a mosque, and become active in a Muslim community association. You use email at a public library to keep in touch with your extended family in Iraq, and to discuss politics with friends. Two years later, you are grateful for the freedoms you enjoy in your new home.

When the U.S. invades Iraq, you are thankful to be rid of Saddam but angry about civilian casualties and the extended U.S. occupation. You write a letter to the editor of your local newspaper encouraging a quick transfer of power to Iraqi civilians.

An FBI agent who is conducting an investigation of other Iraqi-Americans notices your letter and finds it troubling. Based on the letter, the sound of your name, and the outside possibility that you may be connected to the people he's investigating, he decides to investigate you. He goes to a secret court and gets an order that forces the library and its Internet service provider to turn over all your email messages. Then he gets another secret order to obtain records from the charity that helped you when you first arrived in the United States. Those records lead him to the local hospital, where he obtains records of medical treatment you received. He serves another order on the local mosque to find out whether or not you're a member or serve in a leadership position. Though he uncovered nothing suspicious about you in his fishing expedition, he gets another secret order forcing the Muslim community association to turn over its entire membership list. If not you, he thinks, maybe another member has some connection to those people he's investigating ...

As it turns out, you never learn that the FBI is spying on you. The FBI certainly doesn't tell you. And the library, the charity, the hospital, the mosque, and the community association are all prohibited – forever – from telling you or anyone else that the FBI has asked for your records. You simply never learn that the government has been rifling through your life.

Could such a thing happen to you or someone you know? Perhaps it already has. The USA PATRIOT Act vastly expands the FBI's authority to monitor people living in the United States. These powers can be used not only against terrorists and spies but also against ordinary, law-abiding people – immigrants from Iraq or Italy, dentists from Detroit or Denver, truck drivers from Tampa or Tulsa, painters from Peoria or Pittsburgh. Indeed, the FBI can use these powers to spy on *any* United States citizen or resident.

This report examines in detail one PATRIOT Act provision, Section 215, which gives the FBI unprecedented access to sensitive, personal records and any "tangible things." The report explains why Section 215 is misguided, dangerous, and unconstitutional. It reviews the history of unlawful surveillance, and explains why it would be a serious mistake for us to rely on the government to police itself. The report also documents attempts by Congress and the ACLU to challenge the secrecy surrounding the FBI's use of Section 215. It exposes a government disin-

formation campaign apparently intended to mislead the American public about the nature and scope of this new power. And finally the report explains what the ACLU is doing – and what you can do – to get Section 215 off the books.

of speech, because the threat of government surveillance inevitably discourages people from speaking out – and especially from disagreeing with the government.

SECTION 215 VASTLY EXPANDS THE FBI'S SPYING POWERS.

What the Law Says

Section 215 vastly expands the FBI's power to spy on ordinary people living in the United States, including United States citizens and permanent residents. It lets the government obtain personal records or things about *anyone* – from libraries, Internet service providers, hospitals, or any business – merely by asserting that the items are "sought for" an ongoing terrorism investigation. Section 215 threatens individual privacy, because it allows the government free reign to monitor our activities. It also endangers freedom

Section 215 amends an obscure law called the Foreign Intelligence Surveillance Act (FISA), which became law in 1978. FISA set out the procedures that the FBI had to follow when it wanted to conduct surveillance for foreign intelligence purposes. The system is extraordinary – not least because the FISA Court meets in secret, almost never publishes its decisions, and allows only the government to appear before it. But of course it applied only to foreign spies. Thanks to the PATRIOT Act, the FBI can now use FISA even in investigations that don't involve foreign spies. In fact, under Section 215 the FBI can now spy on ordinary, law-abiding Americans.

To obtain your personal records or things under Section 215, the FBI does not need to show

"probable cause" – or any reason – to believe that you have done anything wrong. It does not need to show that you are involved in terrorism, directly or indirectly, or that you work for a country that sponsors terrorism. If you are a United States citizen or permanent resident, the FBI can obtain a Section 215 order against you based in part on your First Amendment activity – based, for example, on the books that you borrowed from the library, the Web sites you visited, the religious services you attended, or the political organizations that you joined. If you are not a citizen or permanent resident, the FBI can obtain a Section 215 order against you based *solely* on your First Amendment activity.

In fact, Section 215 authorizes federal officials to fish through personal records and belongings even if they are not investigating any person in particular. Under Section 215, the FBI could demand a list of every person who has checked out a particular book on Islamic fundamentalism. It could demand a list of people who had visited a particular Web site. It could demand a client list from a charity that offers social services to immigrants.

A gag order in the law prevents anyone served with a Section 215 order from telling anyone else that the FBI demanded information. Because the gag order remains in effect forever, surveillance targets – even wholly innocent ones – are *never* notified that their privacy has been compromised. If the government uses Section 215 to keep track of the books you read, the Web sites you visit, or the political events you attend, you will simply never know.

The Foreign Intelligence Surveillance Court

Congress created the Foreign Intelligence Surveillance Court (FISC) in 1978 to oversee FBI surveillance in foreign-intelligence investigations. The FISC hears FBI applications for foreign-intelligence surveillance orders and warrants, including Section 215 orders. It is comprised of 11 district court judges who are appointed by the Chief Justice of the United States Supreme Court for terms of up to seven years. Since 1978, the FISC has heard approximately 15,000 FBI wiretap and electronic surveillance applications. (This number does not include Section 215 orders, which the FBI is not required to report.) Of these applications, the FISC summarily approved without modification all but five, and it did not reject even one.

While the FISC has traditionally granted FBI surveillance applications, in May 2002 its judges issued an extraordinary, unanimous opinion rejecting the Attorney General's bid for more power to conduct electronic surveillance under the PATRIOT Act. Unfortunately, that historic opinion was overturned by the Foreign Intelligence Surveillance Court of Review (FISCR), an appeals court that had never convened before. (The ACLU filed a friend-of-the-court brief but was not permitted to argue before the Court. More information about the extraordinary litigation before the Foreign Intelligence Surveillance Court of Review is posted at http://www.aclu.org/SafeandFree.) After the FISCR opinion, it is less likely that the FISC will again attempt to serve as a meaningful check on FBI surveillance.

Section 215

Section 215 amended the Foreign Intelligence Surveillance Act so that the relevant provision of that act now reads:

Access to certain business records for foreign intelligence and international terrorism investigations

(a) (1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring 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, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

(2) An investigation conducted under this section shall

(A) be conducted under guidelines approved by the Attorney General under Executive Order 12333 (or a successor order); and

(B) not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

(b) Each application under this section

(1) shall be made to—

(A) a judge of the court established by section 1803(a) of this title; or

Before the PATRIOT Act, the FBI could only obtain records. Now the FBI has the authority to obtain "any tangible thing."

People who are not U.S. citizens or permanent residents can be investigated solely because of their First Amendment activity – e.g., because they wrote a letter to the editor criticizing government policy, or because they participated in a particular political rally. U.S. citizens and permanent residents can be investigated in part on the basis of their First Amendment activity.

Applications for Section 215 orders are ordinarily heard by judges of the Foreign Intelligence Surveillance Court.

(B) a United States Magistrate Judge under chapter 43 of Title 28, who is publicly designated by the Chief Justice of the United States to have the power to hear applications and grant orders for the production of tangible things under this section on behalf of a judge of that court; and

(2) shall specify that the records concerned are sought for an authorized investigation conducted in accordance with subsection (a)(2) of this section to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities.

(c) (1) Upon 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.

(2) An order under this subsection shall not disclose that it is issued for purposes of an investigation described in subsection (a).

(d) No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

(e) A person who, in good faith, produces tangible things under an order pursuant to this section shall not be liable to any other person for such production. Such production shall not be deemed to constitute a waiver of any privilege in any other proceeding or context.

Judges of the Foreign Intelligence Surveillance Court have little authority to scrutinize or reject FBI surveillance applications. If the FBI specifies that – in its own opinion – Section 215's requirements are met, the judge must grant the surveillance order.

The FBI need not show "probable cause" or any reason at all to believe that the target of the surveillance order is engaged in criminal or terrorist activity. All the FBI needs to do is "specify" that the records are "sought for" an authorized investigation. The surveillance target may be completely innocent.

Those who are ordered to turn over their records (or "tangible things") are prohibited from mentioning to anyone else that the FBI made the demand.

THE FBI CAN USE SECTION 215 TO DEMAND ANY RECORDS OR "TANGIBLE THINGS."

There is no restriction on the kinds of records or things that the FBI can demand under Section 215. Before the PATRIOT Act, the FBI's authority under this provision was restricted to a discrete category of business records – records from vehicle rental agencies, storage facilities and other similar businesses. Section 215 expands this authority to reach "any tangible things (including books, records, papers, documents, and other items)," held by *any* organization or person. The FBI could use Section 215 to demand:

- personal belongings, such as books, letters, journals, or computers, directly from one's home.
- a list of people who have visited a particular Web site.
- medical records, including psychiatric records.
- a list of people who have borrowed a particular book from a public library.
- a membership list from an advocacy organization like Greenpeace, the Federalist Society, or the ACLU.
- a list of people who worship at a particular church, mosque, temple, or synagogue.
- a list of people who subscribe to a particular periodical.

In fact, the Attorney General himself has acknowledged that the FBI could use the law even more broadly. The following exchange between the Attorney General and Rep. Tammy Baldwin (D-WI) took place before the House Judiciary Committee in June 2003:

Attorney General John Ashcroft.

BALDWIN: Prior to the enactment of the USA PATRIOT Act, a FISA order for business records related only to common carriers, accommodations, storage facilities and vehicle rentals. Is that correct?

ASHCROFT: Yes, it is....

BALDWIN: OK. Now, under section 215 of the USA PATRIOT Act, now the government can obtain any relevant, tangible items. Is that correct?

ASHCROFT: I think they are authorized to ask for relevant, tangible items.

BALDWIN: And so that would include things like book purchase records?

ASHCROFT: ... [I]n the narrow arena in which they are authorized to ask, yes.

BALDWIN: A library book or computer records?

ASHCROFT: I think it could include a library book or computer records....

BALDWIN: Education records?

ASHCROFT: I think there are some education records that would be susceptible to demand under the court supervision of FISA, yes.

BALDWIN: Genetic information?

ASHCROFT: ... I think [we] probably could.

SECTION 215 VIOLATES THE CONSTITUTION.

Section 215 violates the United States Constitution. It violates privacy and due process rights guaranteed by the Fourth Amendment, and free speech rights guaranteed by the First Amendment.

> *The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, ...*
>
> – United States Constitution, Fourth Amendment

- **Section 215 violates the Fourth Amendment by allowing the government to search and seize your personal records or belongings without a warrant and without showing probable cause.**

The Fourth Amendment ordinarily prohibits the government from searching your home or office, or from seizing your records, unless it first obtains a warrant based on "probable cause" to believe that you are engaged in criminal activity. The Supreme Court has applied this protection not just to physical objects but to personal records and electronic data. Section 215 does not require the government to obtain a warrant or to establish probable cause before it demands your personal records or belongings. In fact, the FBI can use Section 215 against you even if it knows for a fact that you are not engaged in crime or espionage.

- **Section 215 also violates the Fourth Amendment because it does not require the government to provide you with notice – *ever* – that your records or belongings have been seized.**

Ordinarily the Constitution requires that the government notify you before it searches or seizes your records or belongings. Indeed, the Supreme Court has held that this "knock and announce" principle is at the core of the Fourth Amendment's protections; without notice, after all, a person whose privacy rights have been violated will never have an opportunity to challenge the government's conduct. While in some circumstances delayed notice is permitted to protect against the destruction of evidence, the Supreme Court has *never* upheld a government search for which notice is never provided.

> *Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*
>
> – United States Constitution, First Amendment

- **Section 215 violates the First Amendment because it allows the government to easily obtain information about, for example, the books you read, the Web sites you visit, and the religious institutions you attend.**

Section 215 expressly authorizes the government to obtain books, records, and other items that are protected by the First Amendment. The FBI could use Section 215 to order a library or bookstore to produce records showing that you had borrowed or bought a particular book. It could force an Internet Service Provider to turn over your email messages or records of which Web sites you've visited. It could demand that a political organization confirm that you participated in a political rally. It could even order a mosque to provide a list of all its members.

The Constitution's warrant and probable cause requirements protect First Amendment interests by prohibiting the government from spying on

people based solely on their political views or religious associations. In a 1972 case involving electronic surveillance, the Supreme Court wrote:

> *History abundantly documents the tendency of Government – however benevolent and benign its motives – to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs.*

Section 215 is likely to chill lawful dissent. If people think that their conversations, their emails, and their reading habits are being monitored, people will feel less comfortable saying what they think – especially if they disagree with government policies. Indeed, there is a real danger that the FBI will wield its Section 215 power specifically to silence dissenters.

- **Section 215 also violates the First Amendment by preventing those served with Section 215 orders from ever telling anyone that the FBI demanded information, even if the information is not tied to a particular suspect and poses no risk to national security.**

Section 215 prohibits people who receive orders for personal records or belongings from disclosing that fact to others even where there is no real need for secrecy. The gag order is extremely broad. It prevents people from even telling the press and public that the government has sought records, even if the statement is made in the most general terms, without identifying the specific target of the order. For example, it would prevent a library from publicizing statistics about the number of times the FBI had sought patron records in a given time period. To ensure compliance with the gag order, individual employees served with Section 215 orders must strictly limit telling even their fellow staff members that the FBI has demanded information.

Section 215 gag orders are automatic, and do not require the government to explain to the judge why secrecy is necessary. In other contexts, gag orders are imposed only where the government has made a showing that secrecy is necessary in the particular case. Section 215 gag orders are also indefinite, which means that surveillance targets – even wholly innocent ones – will never know their privacy was compromised. In certain investigations, secrecy may sometimes be necessary, and short-term gag orders may sometimes be unavoidable. But Section 215 gag orders require no necessity and are unlimited. If the First Amendment means anything, it means that the government cannot impose an indefinite gag order without reference to the facts of the particular case.

THE FBI CAN USE SECTION 215 TO TARGET IMMIGRANTS AND OTHER INNOCENT PEOPLE.

Section 215 was *specifically intended* to authorize the FBI to obtain information about innocent people – people who are not engaged in criminal activity or in espionage. Of course, not all innocent people are likely to be equally affected. As it has done in the past, the FBI is once again targeting ethnic, political, and religious minority communities disproportionately. In the war on terrorism, the FBI has unfairly targeted minority and immigrant communities with its surveillance and enforcement efforts. The FBI and the Immigration and Naturalization Service (INS) rounded up over a thousand immigrants as "special interest" detainees, holding many of them without charges for months. A "Special Registration" program now requires tens of

thousands of Arab and Muslim immigrants to submit to a call-in interview from which other immigrants are exempted. During the war in Iraq, many Iraqis and Iraqi-Americans were asked to submit to "voluntary" interviews with the FBI. And a Jan. 28, 2003 *New York Times* article by Eric Lichtblau *("F.B.I. Tells Offices to Count Local Muslims and Mosques"*) reported that the FBI ordered its field offices to "establish a yardstick for the number of terrorism investigations and intelligence warrants" by counting the number of Muslims and mosques in their districts.

There is little doubt, then, that Section 215 is being used against minorities and immigrants disproportionately. This doesn't make us any safer, of course. (It bears noting, for example, that *none* of the immigrants whom the FBI and INS held as "special interest" detainees was charged with a terrorism-related offense.) Indeed, targeting minorities and immigrants simply because of their ethnicity, religion, or nationality wastes resources that could be dedicated to apprehending real terrorists.

In fact, the FBI does not need the PATRIOT Act to investigate people who are legitimately suspected of engaging in terrorist or criminal activity; it has always had this power. Nor does the FBI need the PATRIOT Act to engage in surveillance of people who are legitimately suspected of spying for foreign governments or terrorist groups; it has had this power since 1978. The government can use these powers – powers that pre-date the PATRIOT Act – to vigorously pursue terrorists and other criminals, consistent with the Constitution.

"OUR CLIENTS have come to the United States seeking refuge from persecution. We help them get the services they need in order to adjust to life here. Of course, we can't get them the help they need if they won't trust us with their personal information. And they won't trust us with their personal information if they think we're going to hand it over to the FBI. Remember, many of our clients are people who came to the United States to escape totalitarianism. The last thing they want to be told when they arrive here is that the government is demanding access to their medical and social service records."

– **MARY LIEBERMAN**, Director, Bridge Refugee and Sponsorship Services (East Tennessee).

CONGRESS AND THE PUBLIC MUST KEEP AN EYE ON THE FBI.

The FBI has a troubled history. Its predecessor organization was responsible for the 1920 Palmer Raids in which thousands of immigrants were arrested and imprisoned solely because of their political beliefs. During the McCarthy era, the FBI supplied Senator McCarthy with information that ruined the careers of many innocent people. In the 1960s, the FBI engaged in a campaign to discredit Martin Luther King. They wiretapped his hotel rooms, tried to block his publications, and even threatened to disclose personal information about him if he did not commit suicide. (The ACLU's soon-to-be-released report, "J. Edgar Hoover Tactics in the 21st Century," discusses this history in more detail.)

Library Awareness Program

The FBI has sent spies into public libraries before. In June of 1987, FBI agents approached Paula Kaufman, the director of Academic Information Services at Columbia University, and demanded that she assist them in identifying possible KGB agents. The FBI told Ms. Kaufman that KGB agents were using libraries to gather technical science data and to recruit library patrons or the librarians themselves as spies. Instead of cooperating with the FBI, Ms. Kaufman exposed the FBI's dubious counterintelligence program in a letter to the library association. The disclosure of the FBI's Library Awareness Program caused a national uproar, particularly after it became known that the FBI had operated such programs in libraries since at least the early 1960s.

Other librarians spoke out – alarmed at the extent of the intrusion into patrons' privacy and academic freedom, and doubtful that they would be able to discern KGB spies from legitimate library patrons. When The New York Times asked an FBI spokeswoman, Susan Schnitzer, to define the type of behavior that librarians were being asked to report, she replied, "It's hard to define; anything not quite right." Statements such as these added to the anxiety that librarians felt about profiling their patrons.

Many public-interest organizations also reacted strongly to the disclosure of the Library Awareness Program. The American Library Association passed a resolution calling on the FBI to end the program. The National Security Archives filed a Freedom of Information Act request in July 1987 demanding that the FBI release all documents related to the program. (The bureau stalled at first but was forced to release the records a year later.) The ACLU sent letters to Congress expressing concern about the legality and efficacy of the program and arguing that the FBI should limit its investigations to people who were reasonably suspected of spying on behalf of foreign governments.

The ACLU of Southern California and the California Library Association created this bookmark to inform library patrons about the threats to their privacy.

In May 1988, the FBI issued a report, The K.G.B. and the Library Target 1962-Present. In it, the FBI admitted asking library directors to provide the circulation records of patrons "with Eastern European or Russian-sounding names," and to look out for people copying large quantities of technical information or placing "microfiches in a briefcase without ...checking them out."

While Congress failed to enact legislation to prevent a recurrence of misguided initiatives such as the Library Awareness Program, congressional and public attention to the program did eventually persuade the FBI to abandon – at least temporarily – its intrusive activities in public libraries. This dark episode was documented by Herbert N. Foerstel in his book *Surveillance in the Stacks: The FBI's Library Awareness Program.* Now Section 215 of the PATRIOT Act has put FBI agents back in the stacks.

In the late 1970s, a Senate report catalogued FBI abuses during the previous decades and concluded that, "…unless new and tighter controls are established by legislation, domestic intelligence activities threaten to undermine our democratic society and fundamentally alter its nature." In the late 1980s, the FBI's "Library Awareness Program" was exposed – a decades-old initiative to recruit librarians to spy on library patrons for connections to the KGB. In June of 1997, Louis Freeh, who was then FBI director, went before the House Judiciary Subcommittee on Crime to try to persuade the legislators that he and his agency should be given greater power. His candor stood out. "We are potentially the most dangerous agency in the country," he stated.

Especially now, when the FBI has far more surveillance power than it has ever had before, can we really afford to let this agency police itself?

Congress Questions the PATRIOT Act

Almost immediately after the PATRIOT Act became law, some members of Congress began to harbor doubts about the Act's surveillance provisions and about the manner in which the FBI appeared to be implementing them. In June 2002, the House Judiciary Committee sent Attorney General John Ashcroft a letter asking him to respond to 50 questions about the Justice Department's implementation of the PATRIOT Act. Many of the questions related to the Act's surveillance provisions and to Section 215 in particular. Over the subsequent months, other congressional committees began to ask questions of their own.

The Attorney General refused to cooperate fully with these congressional oversight efforts. Of the questions posed by the various congressional committees, many still remain unanswered. Even more problematic, while the Attorney General eventually answered some of Congress's questions, he declared many of the answers classified and insisted that they be withheld from the public. The Attorney General furnished even these classified answers only after the chairman of the House Judiciary Committee threatened to subpoena him in order to obtain the requested information.

A bipartisan report issued in February 2003 by senior members of the Senate Judiciary Committee expressed deep frustration with the Justice Department's refusal to submit to congressional oversight:

> [W]e are disappointed with the non-responsiveness of the DOJ and FBI. Although the FBI and the DOJ have sometimes cooperated with our oversight efforts, often, legitimate requests went unanswered or the DOJ answers were delayed for so long or were so incomplete that they were of minimal use in the oversight efforts of this Committee. The difficulty in obtaining responses from DOJ prompted Senator Specter to ask the Attorney General directly, "how do we communicate with you and are you really too busy to respond?"

The report castigated the Attorney General for his refusal to explain to the public why new surveillance powers were necessary and how those powers are being used. "It is our sincere hope," the report stated, "that the FBI and [Justice Department] will reconsider their approach to congressional oversight in the future." The report concluded: "The Congress and the American people deserve to know what their government is doing."

In May 2003, in response to increasing criticism from Congress and the public, the Justice Department finally released a few shreds of information about its use of new surveillance

powers. The release included information that the Justice Department had – for the previous 18 months – insisted could not be disclosed without jeopardizing national security. Still, the letter was more notable for what it *refused* to disclose. The letter refused to disclose guidelines that govern the FBI's use of foreign-intelligence surveillance powers, including Section 215. It also refused to say whether the FBI had ever used certain sections of the PATRIOT Act, including Sections 215 – let alone in what contexts that section had been invoked. As described below, the ACLU and other public interest organizations have been able to obtain slightly more detailed information through a Freedom of Information Act request.

The Public's Right to Know

In August 2002, the ACLU and other public interest organizations filed a request under the Freedom of Information Act to obtain information about the FBI's reliance on new surveillance powers. The request asked the Attorney General to disclose, among other things:

- the number of times that the FBI had used Section 215;
- the number of times that the FBI had used Section 215 to obtain records from a library, bookstore, or newspaper;
- the number of times that the FBI had used Section 215 to obtain records relating to a specific United States citizen or permanent resident; and
- the number of times that the FBI had used Section 215 against a specific person because of that person's engagement in activity protected by the First Amendment, e.g. her attendance at a political rally, or her membership in a particular political organization.

When the Attorney General failed to respond to the FOIA request, the ACLU and its coalition partners filed suit to force a response. After the suit was filed in October 2002, the Attorney General released approximately 350 pages of responsive material.

The records that the Attorney General was forced to release provide an intriguing – and often chilling – glimpse at the pervasiveness and nature of FBI surveillance under the PATRIOT Act. One released memorandum, apparently produced by the FBI's legal arm, emphasizes to FBI field offices that certain new surveillance powers – including Section 215 – can now be used not only against terrorists but also against ordinary people – including U.S. citizens and permanent residents – who are not suspected of criminal activity or espionage. Another document, a redacted list which is six pages long, suggests that the FBI has also invoked its National Security Letter (NSL) authority dozens – perhaps hundreds – of times since the PATRIOT Act was enacted. The NSL power allows the government to obtain some personal records without any court oversight whatsoever.

Still another released document lists the occasions on which the FBI has invoked Section 215. The list is relatively short – less than a page long – but, because the FBI has blacked out almost all information from the list, it is impossible to know how many times the FBI has invoked Section 215 or – just as important – in what contexts it has done so. The secrecy simply has no justification. No one expects the FBI to disclose the names of its surveillance targets or the details of its intelligence strategy. But there is no good reason why the Attorney General could not disclose, at least in general terms, how often new surveillance powers have been used, and in which contexts.

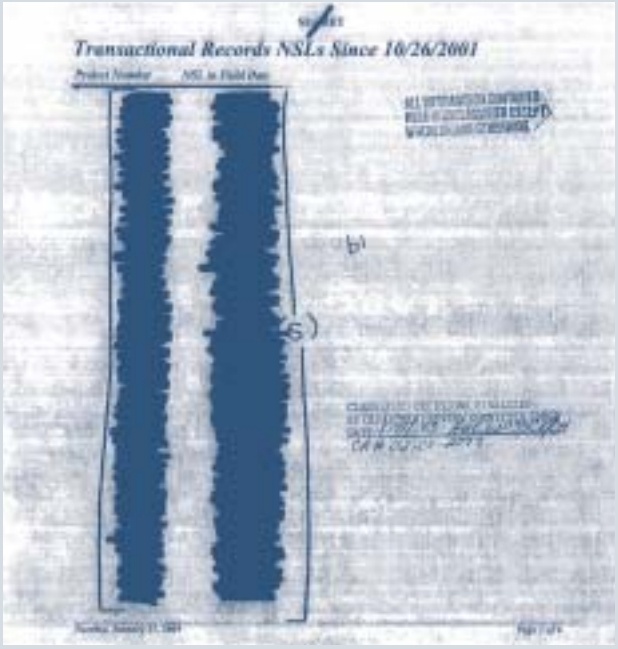
In May 2003, a federal district judge in D.C. held that the Freedom of Information Act does not

National Security Letters

National Security Letters (NSLs) allow the FBI to obtain certain kinds of sensitive personal records without obtaining any kind of court order. Three different statutory provisions provide NSL authority. One authorizes the FBI to order a telephone company or internet service provider to disclose your name, address, length of service, and local and long distance toll billing records. The second authorizes the FBI to order a bank to disclose your financial records. The third authorizes the FBI to order a credit reporting agency to disclose your credit report or to disclose the financial institutions with which you have accounts. Each of the NSL provisions includes "gag" language that prohibits businesses from telling you that the FBI demanded your records.

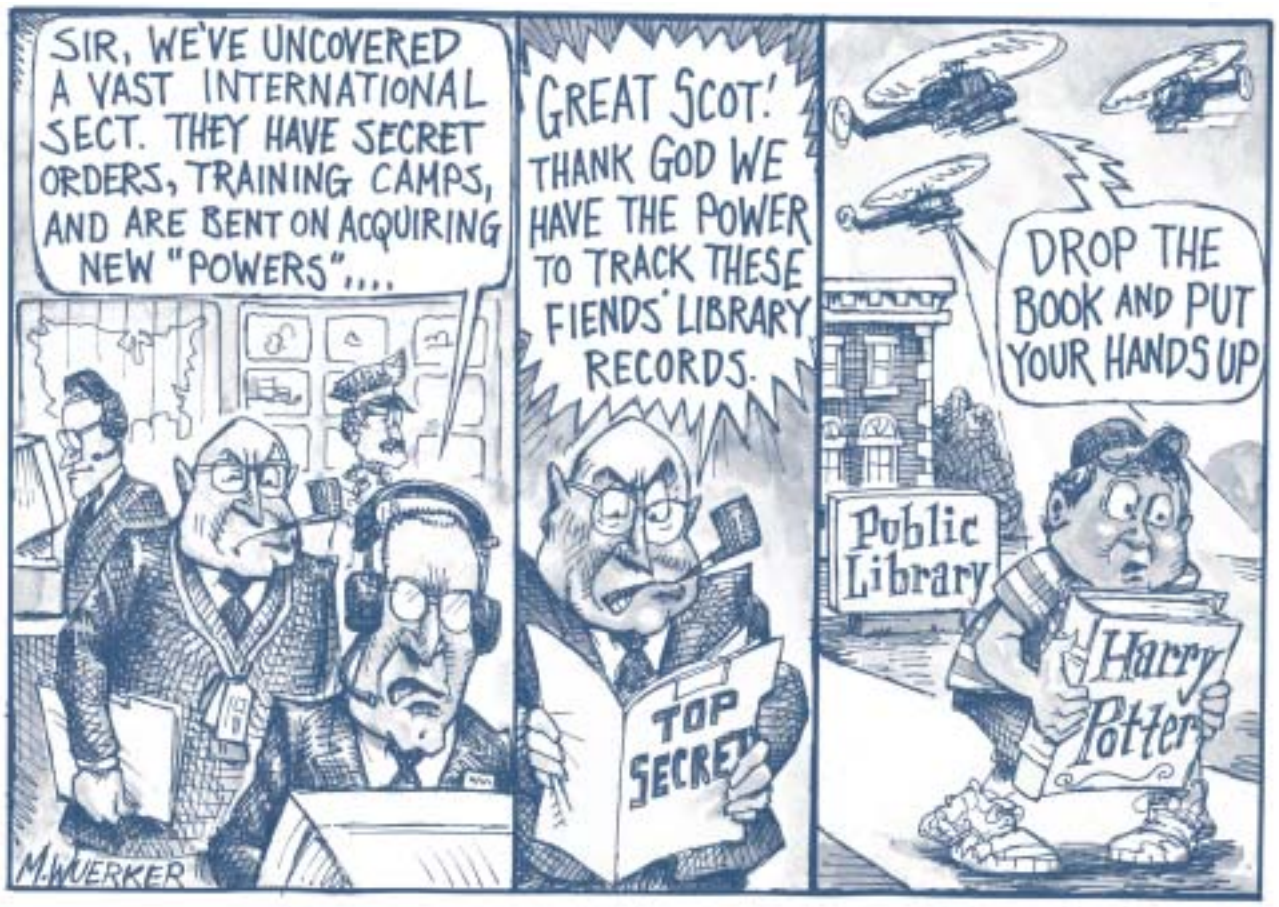
The principle difference between NSLs and Section 215 orders is that the FBI can issue NSLs unilaterally, without prior judicial approval, whereas Section 215 orders must be obtained in advance from the Foreign Intelligence Surveillance Court. The absence of judicial oversight means that, when it comes to the use of NSLs, the FBI has a free hand. Another difference, of course, is that NSLs are meant to be used only to obtain specific kinds of information, like credit reports. It now seems that the FBI is using NSLs much more broadly. In response to questions from a Congressional oversight committee, Assistant Attorney General Daniel Bryant recently conceded that the FBI might even be using NSLs to obtain records from libraries and bookstores.

The Assistant Attorney General's concession is particularly troubling since


Transactional Records NSLs Since 10/26/2001

NSL power was expanded under the PATRIOT Act. Before the PATRIOT Act became law in October 2001, the FBI could issue an NSL against you only if it had reason to believe that you were a foreign spy. Now, however, the FBI can issue an NSL against you even if it knows you are completely innocent of any such activity. The only requirement is that the NSL be "sought for" an ongoing investigation. And of course, there is no judicial oversight to ensure that even that minimal standard is met. The FBI is expected to police itself.

Records obtained by the ACLU and other public interest organizations under the Freedom of Information Act make clear that the FBI is using its expanded NSL power aggressively. In fact, the list of NSLs issued between Oct. 26, 2001 and Jan. 21, 2003 takes up six full pages. Does it really serve national security to allow the FBI to engage in such aggressive surveillance – including surveillance of ordinary, law-abiding Americans – without any judicial oversight whatsoever?



require the Attorney General to disclose further information about the FBI's use of new surveillance power. The judge found, however, that public advocacy groups had advanced a "compelling argument that the disclosure of this information will help promote democratic values and government accountability." Given the district court's decision, whether the public will be provided additional information about FBI surveillance is now up to the Attorney General and Congress. (For more information about the ACLU's FOIA, go to www.aclu.org/patriot_foia.)

If we want to avoid a repeat of the kinds of abuses that occurred in the past, public oversight is essential. The February 2003 Senate report noted that past FBI abuses have come to light only after "extended periods when the public and the Congress did not diligently monitor the FBI's activities." The report also emphasized that statutory reporting requirements, which are very limited, "are no substitute . . . for the watchful eye of the public." It stated: "Public scrutiny and debate regarding the actions of government agencies as powerful as the DOJ and FBI are critical to explaining actions to the citizens to whom these agencies are ultimately accountable." The Senate report got it absolutely right: Democracies work only if the public has the information it needs in order to hold the government accountable for its policies. Overbroad secrecy about government surveillance is wholly inconsistent with the most basic democratic principles. And as one judge eloquently put it, "An informed public is the most potent of all restraints upon misgovernment."

THE JUSTICE DEPARTMENT IS SPREADING DISINFORMATION ABOUT SECTION 215.

At the same time the Attorney General refuses to disclose even the most basic information about the way new surveillance powers are being used, government spokespeople are engaged in a campaign of disinformation concerning how new surveillance powers – and Section 215 in particular – *could* be used. (A recent ACLU report, "Seeking Truth From Justice: PATRIOT Propaganda - The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act," at www.aclu.org/SafeandFree, documents this disinformation campaign in detail.)

FBI spokespeople have repeatedly asserted, for example, that Section 215 cannot be used to obtain information about United States citizens. Here's just one of many examples:

> "This is limited only to foreign intelligence," said Mark Corallo, a spokesman with the Department of Justice. "U.S. citizens cannot be investigated under this act."
> – *Florida Today*, Sept. 23, 2002

In fact, Section 215 explicitly states that United States citizens and permanent residents can be targeted under the provision – on condition that they not be targeted solely because of activity that is protected by the First Amendment.

Government spokespeople have also repeatedly asserted that the FBI cannot obtain a person's records under Section 215 without probable cause. Again, here's one example of many:

Spies in the Stacks

There is evidence that the FBI is using its surveillance authority to monitor activity in public libraries. In October 2002, the Library Research Center at the University of Illinois at Urbana-Champaign conducted a survey of 1505 public libraries serving populations of more than 5000 people. The survey found that at least 178 libraries had been visited by the FBI. In addition, responding to a question from the House Judiciary Subcommittee on the Constitution, a senior Justice Department official confirmed that the FBI has asked for or demanded information from public libraries:

> We have made, in light of the recent public information concerning visits to the library, we have conducted an informal survey of the field offices, relating to its visits to library. And I think the results from this informal survey is that libraries have been contacted approximately 50 times, based on articulable suspicion or voluntary calls from librarians regarding suspicious activity.

This response makes clear that the FBI has been monitoring activity at public libraries, but it does not indicate whether the FBI has used Section 215 in particular. The FBI has refused to say, and the gag provision prevents anyone else from talking. A question on the Library Research Center's survey, however, asked libraries whether they had declined to answer any question because they thought that they were prohibited by law from doing so. Disturbingly, fifteen libraries answered "yes."

> The Justice Department spokesman, Mark Corallo, says the assertions about the Act are completely wrong because, for the FBI to check on a citizen's reading habits, it must get a search warrant. And to get a warrant, it must convince a judge "there is probable cause that the person you are seeking the information for is a terrorist or a foreign spy."
>
> – *Bangor* [ME] *Daily News*, April 9, 2003

In fact, Section 215 does not require the FBI to show probable cause. All the FBI has to do in order to invoke the provision is specify that the records are "sought for" an ongoing investigation. (This standard is sometimes called a "relevance" standard.) The FBI does not have to show any reason at all to believe that the target of the investigation is a criminal or spy, let alone a terrorist. Indeed, the FBI can use Section 215 even against people whom it knows to be wholly innocent of any wrongdoing. The government's assertions to the contrary are simply wrong.

The Justice Department's own documents – obtained through the ACLU's Freedom of Information Act request – acknowledge that Section 215 does not require probable cause. An Oct. 26, 2001 memo to "All Divisions" from the FBI's Office of General Counsel (and approved by FBI Director Robert S. Mueller III) includes a section on "Changes in FISA Business Records Authority." It reads:

> [Field offices] may continue to request business records …through FBIHQ in the established manner. However, such requests may now seek production of any relevant information, and need only contain information establishing such relevance.

In a December 2002 letter to Congress, Deputy Attorney General Larry D. Thompson made essentially the same point:

> Under the old language, the FISA Court would issue an order compelling the production of certain defined categories of business records upon a showing of relevance and "specific and articulable facts" giving reason to believe that the person to whom the records related was an agent of a foreign power. The USA PATRIOT Act changed the standard to simple relevance.

The government has misrepresented Section 215 in yet another way by asserting that the provision can be used only against terrorists and spies:

> Justice Department spokesman Mark Corallo called [librarians' opposition to the PATRIOT Act] "absurd." The legislation "doesn't apply to the average American," he said. "It's only for people who are spying or members of a terrorist organization."
>
> – *Journal News* [NY], April 13, 2003

> Before demanding records from a library or bookstore under the PATRIOT Act, he [Corallo] said, "one has to convince a judge that the person for whom you're seeking a warrant is a spy or a member of a terrorist organization."
>
> – *San Francisco Chronicle*, March 10, 2003

In fact, nothing in Section 215 prevents the FBI from using the provision against ordinary, law-abiding people. As noted above, the FBI cannot invoke Section 215 unless the records it demands are "sought for" an ongoing investigation. It is the FBI itself, however, that determines whether this requirement is met, and in any event the relevance standard certainly does *not* require the FBI to say – let alone convince a judge – that the target of the Section 215 order is a terrorist or spy.

Especially in light of the Attorney General's refusal to disclose information about how new surveillance powers are being used, the government's misleading statements about how those powers *could* be used are exceedingly troubling. The public needs accurate information about the PATRIOT Act.

Misrepresentations about new surveillance powers undermine the public's ability to determine whether the new powers are too broad, whether they are being abused, and whether they should be renewed before they sunset in 2005. The disinformation campaign short-circuits democratic control over government policy.

THE ACLU IS WORKING TO RESTORE CONSTITUTIONAL RIGHTS.

The ACLU is drawing on all of its advocacy tools to fight Section 215.

First, we are filing in late July 2003 a lawsuit to have Section 215 declared unconstitutional and unenforceable. Our legal papers argue that Section 215 violates the Fourth Amendment because it authorizes the FBI to conduct intrusive investigations without probable cause and without notice. We argue that Section 215 also violates the First Amendment because it chills free speech and unjustifiably prevents organizations from disclosing even to innocent people that their privacy has been compromised.
Among the plaintiffs in the suit are:

- **Muslim Community Association of Ann Arbor** (Ann Arbor, Michigan) – a non-profit organization that serves the religious needs of Muslims in and around Ann Arbor. The MCA, which has approximately 1000 regis-

"IN THE BEGINNING, I hesitated to participate in this lawsuit because I feared government retaliation. FBI agents recently singled me out for a visit at home. I am a U.S. citizen, but perhaps they singled me out because of my religion, or because I was active in rallying local communities and civil rights groups to support some of my friends who were imprisoned for minor immigration violations. The visit was not a pleasant experience. The FBI has no right to investigate me or my fellow Arab and Muslim immigrants when we have done nothing wrong. Eventually, I decided to speak out and join this lawsuit because I care about what's happening to the country and to the Constitution."

– **HOMAM ALBAROUDI**, Member, Muslim Community Association of Ann Arbor

tered members, owns and administers a mosque and an Islamic school.

- **American-Arab Anti-Discrimination Committee** (Washington, DC) – a national civil rights organization committed to defending the rights of people of Arab descent. ADC, which was founded in 1980 by former U.S. Senator James Abourezk, is the largest Arab-American grassroots organization in the United States.

- **Arab Community Center for Economic and Social Services** (Dearborn, Michigan) – a human services organization committed to the development of the Arab-American community in all aspects of its economic and cultural life. ACCESS provides a wide range of social, mental health, educational, artistic, employment, legal and medical services.

- **Bridge Refugee and Sponsorship Services** (Knoxville, Tennessee) – an ecumenical, nonprofit organization dedicated to helping refugees navigate the road to United States citizenship. Bridge recruits and trains church sponsors to help refugees create new lives in East Tennessee; and manages refugees' cases until the refugees are eligible to apply for United States citizenship.

- **Council on American-Islamic Relations** (Washington, DC) – a non-profit, grassroots membership organization dedicated to presenting an Islamic perspective on issues of importance to the American public, and to empowering Muslims in the United States through social and political activism. CAIR has chapters nationwide.

Second, the ACLU is actively urging Congress to repeal or amend Section 215. Bills to repeal or at least limit Section 215 have been introduced in both the House and Senate. Other proposed legislation would provide for increased public and Congressional oversight of PATRIOT Act powers. (See www.aclu.org/SafeandFree.)

Finally, as part of a growing grassroots movement, the ACLU is supporting coalitions around the country that are working to pass community resolutions opposing the PATRIOT Act. As this report goes to press, 142 communities in 27 states have passed resolutions opposing the USA PATRIOT Act, and dozens more are preparing to do so. Communities that have adopted resolutions range from the small, such as the North Pole, Alaska and Carrboro, North Carolina, to the very large, such as Philadelphia, Baltimore, Detriot and San Francisco. (For more on community resolutions, see www.aclu.org/resolutions.)

The strength of our democracy depends on our commitment to individual privacy, equality, and freedom of expression. The ACLU is fundamentally committed to protecting those rights. We will not forget the surveillance abuses of the past, or allow a return to the mistakes of that era. We urge you to join us in this important battle for liberty.

OTHER SAFE & FREE REPORTS

Civil Liberties After 9-11: The ACLU Defends Freedom (September 2002)

Insatiable Appetite: The Government's Demand for New and Unnecessary Powers After September 11 (October 2002)

Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society (January 2003)

Freedom Under Fire: Dissent in Post-9/11 America (May 2003)

Independence Day 2003: Main Street America Fights the Federal Government's Insatiable Appetite for New Powers in the Post 9/11 Era (July 2003)

Seeking Truth From Justice: PATRIOT Propaganda – The Justice Department's Campaign to Mislead The Public About the USA PATRIOT Act (July 2003)

J. Edgar Hoover Tactics in the 21st Century: History gives African Americans reason for alarm over new federal police powers (forthcoming September 2003)

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