JURISPRUDENCE

A Guide to the Patriot Act, Part 1

Should you be scared of the Patriot Act?

By DAHLIA LITHWICK and JULIA TURNER
SEPT 08, 2003 • 11:06 AM

What's hot for fall of 2003?

Well, the USA Patriot Act, for one thing. Although it passed in Congress almost without dissent in the aftermath of Sept. 11, it's suddenly being revisited, and this time around some of the folks holding opinions have actually *read the thing*. Among its detractors are 152 communities, including several major cities and three states, that have now passed resolutions denouncing the Patriot Act as an assault on civil liberties. More than one member of Congress has introduced legislation taking the teeth out of its most invasive provisions. And in a huge shock to the Justice Department, in July the so-called "Otter Amendment"—which de-funded the act's "sneak-and-peek" provision—passed in the House by a vote of 309-118. Introduced by a conservative Republican congressman from Idaho, C.L. "Butch" Otter, the amendment revealed the extent to which the Patriot Act engenders jitters across the political spectrum. Then there are the lawsuits, including one filed recently by the ACLU, urging the court to invalidate provisions of the act that threaten privacy or due process. All these reforms are wending their way through the system and the national

consciousness as Americans start to take a sober second look at what the act really unleashed.

On the other hand, there's the John Ashcroft "Patriot Rocks" concert tour, launched last month, which has him visiting 18 cities and talking up the act to local law enforcement officials. The DOJ also unloosed a new Web site last month, designed to shore up support for the act. Ashcroft contends that had the Patriot Act been in place earlier, 9/11 wouldn't have happened and that absent a Patriot Act, the country may have seen more 9/11s over the past two years—a double-double negative that's unprovable, but enough to scare you witless. There have also been a raft of op-eds and

articles—some evidently written by Ashcroft's U.S. attorneys at knifepoint—simultaneously making the point that the act has staved off

unspeakable acts of terror while maintaining that it made only tiny infinitesimal changes to the existing laws.

Part of the impetus for all the new activity is that some of the really great bits of the act are set to sunset in 2005, and some Republican senators are planning to introduce legislation to repeal the sunset provisions altogether. Copies of "Patriot II"—the act that was intended to follow Patriot and grant the government even broader powers—were leaked to the press last winter, and while the ensuing ruckus ensured that Patriot II is dead, much of it will evidently rise again this fall in the guise of the VICTORY Act, Orrin Hatch's attempt to deploy Patriot powers in the war on drugs. One of the reasons that Patriot is fighting for its life, then, is so that its creepy progeny may someday live as well.

How bad is Patriot, really? Hard to tell. The ACLU, in a new fact sheet challenging the DOJ Web site, wants you to believe that the act threatens our most basic civil liberties. Ashcroft and his roadies call the changes in law "modest and incremental." Since almost nobody has read the legislation, much of what we think we know about it comes third-hand and spun. Both advocates and opponents are guilty of fear-mongering and distortion in some instances.

The truth of the matter seems to be that while some portions of the Patriot Act are truly radical, others are benign. Parts of the act formalize

and regulate government conduct that was unregulated—and potentially even more terrifying—before. Other parts clearly expand government powers and allow it to spy on ordinary citizens in new ways. But what is most frightening about the act is exacerbated by the lack of government candor in describing its implementation. FOIA requests have been half-answered, queries from the judiciary committee are blown off or classified. In the absence of any knowledge about how the act has been used, one isn't wrong to fear it in the abstract—to worry about its potential, since that is all we can know.

Ashcroft and his supporters on the stump cite a July 31 Fox News/Opinion Dynamics Poll showing that 91 percent of registered voters say the act had not affected their civil liberties. One follow-up question for them: How could they know?

If you haven't read all 300-plus pages of the legislation by now, you should. If you can't, in the following four-part series, ***Slate*** has attempted to summarize and synthesize the most controversial portions of the act so you can decide for yourself whether you want Patriot, and the Patriots that may follow, to be a part of your world. Part 1 tackles Section 215, the law dealing with private records. Part 2 will address changes to the Foreign Intelligence Surveillance Act, or FISA, and "sneak and peek" warrants. Part

3 will discuss new electronic surveillance, and Part 4 will discuss miscellaneous provisions, including alien detentions.

Section 215, aka "Attack of the Angry Librarians"

Section 215 is one of the surprising lightning rods of the Patriot Act, engendering more protest, lawsuits, and congressional amendments than any other. In part this is because this section authorizes the government to march into a library and demand a list of everyone who's ever checked out a copy of *My Secret Garden* but also because those librarians are tough.

What it does: Section 215 modifies the rules on records searches. Post-Patriot Act, third-party holders of your financial, library, travel, video rental, phone, medical, church, synagogue, and mosque records can be searched without your knowledge or consent, providing the government says it's trying to protect against terrorism.

The law before and how it changed: Previously the government needed *at least* a warrant and probable cause to access private records. The Fourth Amendment, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and case law provided that if the state wished to search you, it needed to show probable cause that a crime had been committed and to obtain a warrant from a neutral judge. Under FISA—the 1978 act authorizing warrantless surveillance so long as the primary purpose was to obtain foreign intelligence information—that was somewhat eroded,

but there remained judicial oversight. And under FISA, records could be sought only “for purposes of conducting foreign intelligence” and the

target “linked to foreign espionage” and an “agent of a foreign power.” Now the FBI needs only to certify to a FISA judge—(no need for evidence or probable cause) that the search protects against terrorism. The judge has no authority to reject this application. DOJ calls this “seeking a court order,” but it’s much closer to a rubber stamp. Also, now the target of a search needn’t be a terror suspect herself, so long as the government’s purpose is “an authorized investigation … to protect against international terrorism.”

Downplaying the extent of these changes, the DOJ argued to Congress that 215 is no big deal, since grand juries could always subpoena private records in the past. The difference they don't acknowledge is that investigators may now do so secretly, and these orders cannot be contested in court. While the new DOJ Web site asserts that searches under 215 are limited to "business records," the act on its face allows scrutiny of "any tangible thing" including books, records, papers, documents, and anything else. The site also says U.S. citizens may not be subject to search, but the act does not differentiate. How can it, when a library or doctor's office is simply asked to produce a list of names? And here is where the Justice Department hedges: It claims that a citizen cannot be searched "*solely on the basis of activities protected by the First Amendment to the Constitution*." That means you can't have your records searched solely because you wrote an article criticizing the Patriot Act. But if you are originally from India and write that article, well, that's not "solely" anymore is it? To be sure, the ACLU is doing a bit of fearmongering when it says the DOJ can rifle through your records if they don't like what you're reading. If you're a U.S. citizen and not otherwise suspicious, you're probably safe, so long as all you do is read.

When the judiciary committee, inquiring into the civil liberties implications of Patriot, asked about 215, the DOJ said in July 2002: "Such an order could

of Patriot, asked about 215, the DOJ said in July 2002: "Such an order could conceivably be served on a public library, bookstore, or newspaper, although it is unlikely that such entities maintain those types of records. If the FBI were authorized to obtain the information the more appropriate tool for requesting electronic communication transactional records would be a National Security Letter." But as we will explain in Part 4, the government's NSL authority was also beefed up by the Patriot Act. In other words, the government may simply have a more effective means of conducting warrantless searches than the one everyone's riled up about.

How it's been implemented: The DOJ is playing this one particularly close to the vest. The act itself mandates semiannual reporting by the attorney general to Congress, but the only thing he must report is the number of applications sought and granted. Not very helpful unless that number is zero ...

When asked by the House Committee on the Judiciary to detail whether and how many times Section 215 has been used "to obtain records from a public library, bookstore, or newspaper," the DOJ said it would send classified answers to the House Permanent Select Committee on Intelligence. The judiciary committee had what it called "reasonable limited access" to those responses, and it reported in October 2002 that its review had "not given any rise to concern that the authority is being misused or abused."

Wanting to learn more, the ACLU and some other civil rights groups filed a FOIA request, arguing that the DOJ was classifying its answers unnecessarily. But this May, a federal judge in U.S. district court in Washington ruled that the DOJ had the right to keep the specifics hush-hush under FOIA's national security exemption. The next day, at a judiciary committee hearing, Assistant Attorney General Viet Dinh did throw a bone to librarians, noting that in "an informal survey of the field offices," Justice learned "that libraries have been contacted approximately 50 times, based on articulable suspicion or voluntary calls from librarians regarding suspicious activity." He noted that most such visits were in the context of

ordinary criminal investigations and did not rely on the powers granted by

Section 215. * He did not give specifics on searches of any other establishments.

Independent attempts to chronicle the frequency of records searches have proved inconclusive. Within months after Sept. 11, federal or local officials visited nearly 10 percent of the nation's public libraries "seeking Sept. 11-related information about patron reading habits," according to a University of Illinois survey. But since librarians are gagged under the act, it's not clear that these reports are accurate. In any event, the same study suggests that about 13.8 percent of the nation's libraries received similar requests in the year before Sept. 11, so it's impossible to say that the problem was exacerbated by the new law.

Would you know if Section 215 had been used on you? Nope. The person made to turn over the records is gagged and cannot disclose the search to anyone.

Sunsets in 2005: Yes.

Prognosis: The first lawsuit against the Patriot Act was filed by the ACLU on July 30 this year, targeting Section 215. The suit has six mostly Arab and Muslim American groups as plaintiffs. Their claim is that 215 violates

the Constitution and “vastly expands the power of the [FBI] to obtain

records and other ‘tangible things’ of people not suspected of criminal activity.”

In Congress, Rep. Bernard Sanders has proposed the Freedom to Read Protection Act to repeal provisions that subvert library patrons’ privacy, and in July 2003 Sens. Lisa Murkowski and Ron Wyden introduced the Protecting the Rights of Individuals Act, requiring FBI agents to convince a judge of the merits of their suspicions before obtaining an individual’s medical or Internet records. Similarly, Sen. Russ Feingold’s Library, Bookseller and Personal Records Privacy Act would allow FBI access to business records pertaining to suspected terrorists or spies only. Feingold’s bill would restore the pre-Patriot requirement that the FBI make a factual, individualized showing that the records sought pertain to a specific suspected terrorist.

Enough to get you through a cocktail party: 215 does extend FBI power to conduct essentially warrantless records searches, especially on people who are not themselves terror suspects, with little or no judicial oversight. The government sees this as an incremental change in the law, but the lack of meaningful judicial oversight and expanded scope of possible suspects is pretty dramatic.

Correction, Sept. 7, 2003: *This article originally neglected to note that most of the 50 library visits the Department of Justice reported to Congress occurred in the course of ordinary criminal investigations and did not rely on the powers granted by Section 215. (Return to corrected sentence.)*