

THE PATRIOT ACT AND THE FIRST AMENDMENT

A Statement from the Freedom to Read Committee of the Association of American Publishers

WHY THE BOOK COMMUNITY IS CONCERNED

The right of an individual to read what he or she chooses without the government's knowledge or interference is a basic precept of any free and open society. As Supreme Court Justice William O. Douglas wrote: "Once the government can demand of a publisher the names of the purchasers of his publications, the free press as we know it disappears. Then the spectre of a government agent will look over the shoulder of everyone who reads....Fear will take the place of freedom in the libraries, book stores, and homes of the land."¹

The publishing community, along with other segments of American society, recognizes the urgency of providing federal and state law enforcement officials with the tools they need to gather and act upon intelligence that may prevent the commission of terrorist acts on American soil. However, it is essential that in pursuit of enhanced law enforcement capabilities, the fundamental constitutional protections that surround the freedom to read not be sacrificed without the most stringent standard of judicial oversight.

The Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism Act (commonly referred to as the USA PATRIOT Act) passed by Congress in the wake of the horrific events of September 11, 2001, contains provisions that threaten the First Amendment-protected activities of book publishers, booksellers, librarians, and readers.

Section 215 of the Act, titled "Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations" gives the government expansive authority to conduct broad searches of any home or business pursuant to an investigation of terrorism. Section 215 poses a significant threat to the work of investigative journalists who write about subjects that may be related to terrorism. Section 215 also threatens the privacy and First Amendment rights of library patrons and bookstore customers whose reading choices and Internet usage patterns may be subject to disclosure despite existing protections for the confidentiality of library readership records and customer records in bookstores. Under section 215 a library or bookstore can be compelled to turn over information about patrons and customers, including borrowing records of a particular

¹ *United States v. Rumely, (1953)*

individual or a list of individuals who have borrowed or purchased a particular book or visited a particular web site.

Specifically, section 215:

- ❖ gives the FBI authority to obtain a search warrant for “any tangible things (including books, records, papers, documents and other items) for an investigation to protect against international terrorism or clandestine intelligence activities. The ability to obtain a search warrant *is limited only by the need to show relevance*.
- ❖ provides that an order pursuant to this section is to be obtained *ex parte* (that is, without an adversarial hearing) and that the production of things pursuant to such an order and indeed the existence of the order itself may not be disclosed to anyone other than those persons necessary to produce the materials.
- ❖ overrides state shield laws and federal common law protection for journalists’ source materials. Such materials are generally discoverable only under a far more demanding standard that reflects an understanding by legislatures and the courts that journalists cannot properly serve the public interest in disseminating information if their efforts are routinely co-opted by law enforcement.

The incursions on First Amendment-protected activities are particularly troubling because search warrants for books, journalists’ interview notes, bookstore purchase records, library usage information, and other similar materials (1) can be obtained without an adversarial hearing or the need to show probable cause, and (2) are issued under a gag order that denies the party subject to the order the right to reveal the fact that such a warrant has been received, thus leaving publishers, librarians and booksellers unable to defend their right to disseminate and the right of their patrons to receive constitutionally protected materials.