



ASSOCIATION OF
RESEARCH LIBRARIES

THE PROTECT AMERICA ACT AND LIBRARIES

The Protect America Act (PAA) has broad implications for libraries and library users. As Congress considers amending the Act prior to its sunset, the library community (the “LC”) asks that its interest, and those of its users, be protected in the final bill language by requiring a warrant from the Foreign Intelligence Surveillance Court (“FISC”) to access the facilities of, or to obtain other information from, libraries in the United States. The LC recognizes that the government must have the ability to perform its foreign intelligence activities in an efficient manner, and given the unique concerns of libraries, ensuring that FISC authorization and oversight exists for intelligence activities conducted within libraries in the United States is consistent with the government’s needs and the reasonable expectation of privacy and freedom of expression by LC users.

The PAA unhinges all protections available to U.S. citizens using libraries.

Section 105B begins with the words “notwithstanding any other law.” Thus, any of the restrictions and protections in the law today applicable to the LC do not apply to the collection of foreign intelligence *within the United States*, and therefore from libraries, when the government shows that the information *concerns* a person reasonably believed to be outside the United States, including a citizen. Thus, without court oversight or a warrant, the Attorney General and Director National Intelligence can require libraries in the United States to disclose the most sensitive user information if it concerns a person abroad and is deemed to be foreign intelligence information. We see no limitation on physical searches of library premises or even interception of mail from abroad to a library in the United States. Indeed, even the procedures related to the seizure of business records under Section 215 of the USAPA, as amended, would not apply. Thus, *any* person who has access to records can be compelled to assist the government in obtaining those records with fewer safeguards than provided in Section 215. While the government must have the ability to obtain foreign intelligence information, the LC sees no reason why such intelligence gathering cannot occur pursuant to FISC oversight and authorization when libraries within the United States are the subject of the intelligence activity. Libraries throughout the United States have a long history of respecting patron privacy. This has been recognized in state and municipal law and most recently, by Congress in changes made to the USA PATRIOT Act.

The PAA permits the FBI to conduct warrantless surveillance on library staff, students, researchers and other users who are American citizens abroad.

Section 105B(a)(1) of the Act permits the FBI to acquire communications and other information when the acquisition of foreign intelligence information concerns *persons reasonably believed to be located outside the United States*. The term “person” means any individual, and includes a citizen of the United States. The LC has a large constituency of users abroad, ranging from students to faculty and researchers studying abroad to librarians working at foreign institutions. The government has said that the focus of the PAA is on the communications of foreign targets involved in terrorism. The law should say so and this could be accomplished at least partially by excluding a “United States person” from the reach of Section 105B.

The PAA permits the FBI to conduct warrantless surveillance on library premises or through those communications providers that connect libraries to the Internet.

Specifically, Section 105B(a)(3) of the Act permits the FBI to obtain the foreign intelligence information from or with the assistance of a communications service provider, custodian, **or other person** (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications. The LC believes that regardless of whether the foreign intelligence involves persons reasonably believed to be located outside the United States, access to libraries and the systems upon which they rely to provide services in the United States should only be accomplished pursuant to a warrant authorized by and subject to the oversight of the FISC. For example, as currently written, surveillance of campus libraries could occur through university infrastructure without the knowledge of the library, or through another service provider higher up in the network architecture. When the intelligence activity involves but circumvents libraries, there is no opportunity for meaningful oversight or to petition for review because the service provider to the library itself has no incentive to consider or raise the privacy or speech concerns of the LC if the warrantless intelligence activity sweeps too broad. By requiring FISC oversight when the intelligence activity involves libraries, these concerns can be addressed through the petition process.

The PAA authorizes the warrantless seizure of stored communications and other records belonging to U.S. citizens if they concern a person abroad.

Because Section 105B of the PAA is not constrained by any other law, the protections afforded U.S. citizens under the Electronic Communications Privacy Act, for example, do not apply when targeted communications merely *concern* a person reasonably believed to be located outside the United States. We understand that the government did not necessarily intend the PAA to reach so far, but the plain language of the Act authorizes the warrantless seizure of an email account or other online information of a library user who is a U.S. citizen if the government believes the information is about the target who is abroad. While the LC believes that any acquisition of communications or records from libraries within the United States should be done pursuant to a warrant issued by the FISC, at the very least, the word “concerns” should be deleted as part of the amendments to make clear that what is to be acquired is the communications *of* the target, not *about* the target.

Concluding Comments

The LC appreciates that the PAA was passed in haste and that its sunset in 6 months allows Congress the opportunity to carefully weigh the concerns of all Americans in crafting procedures that ensure the government has the tools to gather vital foreign intelligence while protecting the privacy of citizens.

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