



**Statement for the Record
U.S. Senate Committee on the Judiciary,
Subcommittee on the Constitution**

for the hearing:

“Restoring the Rule of Law”

**Submitted by
the American Library Association and the Association of Research Libraries**

The American Library Association (ALA) and the Association of Research Libraries (ARL) (hereafter known as “the Libraries”), submit this statement for the record to the Senate Judiciary Committee’s Subcommittee on the Constitution hearing titled, “Restoring the Rule of Law” held on September 16, 2008.

Founded in 1876, the ALA is the oldest and largest library association in the world with more than 66,000 individual members and 4,000 library and corporate members dedicated to improving library services and promoting the public interest in a free and open information society.

The ARL is a nonprofit organization of 123 research libraries in North America. ARL’s members include university libraries, public libraries, government and national libraries. ARL influences the changing environment of scholarly communication and the public policies that affect research libraries and the diverse communities they serve.

Looking to the future, the next President and Congress must work vigorously to ensure the privacy rights of our citizenry while enforcing the law. Protecting library patron privacy and the confidentiality of library records are deep and longstanding principles of librarianship, and guide the daily work of all types of libraries. Based on these principles, the Libraries have worked to reform legislation related to privacy, National Security Letters (NSLs), and the Foreign Intelligence Surveillance Act (FISA). Recommendations to the next President and Congress by Libraries related to these policies are included below. In addition, a number of related issues not addressed in this statement, which are extremely important to libraries include: the accountability and transparency of government, especially via the Freedom of Information Act (FOIA); improving access to e-government information; and ensuring public access to Presidential records.

Privacy

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” -- Fourth Amendment of the U.S. Constitution

Libraries have deep and longstanding principles concerning the protection of patron privacy. Privacy is essential to exercise free speech, free thought, and free association. In a library (physical or virtual), the right to privacy is the right to open inquiry without having the subject of one’s interest examined or scrutinized by others. Forty-eight states and the District of Columbia have patron confidentiality laws; the attorneys general in the remaining two states (Hawaii and Kentucky), have issued opinions recognizing the privacy of library users’ records; and ten state constitutions guarantee a right of privacy or bar unreasonable intrusions into patrons’ privacy. The courts have established a First Amendment right to receive information in a publicly funded library. Further, the courts have upheld the right of privacy based on the Bill of Rights of the U.S. Constitution.

Libraries remain pillars of democracy, institutions where citizens come to explore their concerns, assured that they can find information on all sides of controversial issues, and confident that their explorations remain personal and private. For example, a woman looking for information on divorce or breast cancer does not want those concerns known to anyone else; a student who wants to study about the Qur'an should not have to wonder if the government is inquiring about why he is interested in this topic; a business owner curious about markets for his products or services in the Middle East should not have to worry that by researching these markets at the public library he will arouse FBI suspicions. In a recent and very public case in which a library was served an NSL, a person affected by the gag order simply and yet so eloquently stated, “Spying on people in the library is like spying on them in the voting booth.”

In looking to the future, the next President and Congress must work to restore privacy rights that have eroded in recent years with the expanded use of National Security Letters, while at the same time, balancing the enforcement of the law. For libraries to flourish as centers for unencumbered access to information, librarians must stand behind their patrons’ right to privacy and freedom of inquiry. Patrons should feel comfortable using library materials and services knowing that their use of the library is not monitored. The Libraries have consistently stated that while librarians fully support the efforts of law enforcement in legitimate investigations, those efforts must be balanced with an individual’s fundamental and constitutional right to privacy.

National Security Letter (NSL) Reform and the USA PATRIOT Act

In recent years, the USA PATRIOT Act, coupled with the Intelligence Authorization Act of FY 2004, drastically expanded the Federal Bureau of Investigation’s (FBI’s) authority to obtain business and personal records of Americans by issuing National Security Letters (NSLs). This expansion directly impacts library patrons’ rights and expectations of privacy when using library services – as NSLs do not require prior judicial approval and can be used to obtain a wide range of documents based on claims that the information is merely “relevant” to a terrorism investigation. In addition, the FBI can keep records acquired via an NSL indefinitely, even after the subject of the records has been deemed innocent of a crime and is no longer of intelligence interest. Arguably, while the FBI needs prompt access to some types of information acquired

under NSLs, civil liberties are nonetheless being sorely tested by law enforcement abuses of national security letters. The questions raised vindicate the concerns that the library community and others have had for the last several years about the broad powers expanded under the USA PATRIOT Act. The Libraries believe changes can be made that conform to the rule of law, do not sacrifice law enforcement's abilities to pursue terrorists, yet maintain civil liberties guaranteed by the U.S. Constitution.

We are driven by a key principle of librarianship -- the deep-rooted commitment to patron confidentiality. To function as such, the public must trust that libraries are committed to such confidentiality. When the USA PATRIOT Act was signed into law, our Libraries, and booksellers, authors and others, were concerned about the lack of judicial oversight as well as the secrecy associated with a number of the Act's provisions and the NSLs, in particular. Adding to heightened concern is the inherent nature of the NSL gag orders themselves -- librarians receiving these letters are not able to inform patrons about specific or broad inquiries. Nor can libraries report the use of NSLs to local or Congressional officials, impeding both oversight responsibilities to insure that abuses are not occurring and the ability to assess the use of such legal tools. The Libraries call on the next President and Congress to demand greater accountability on these important issues.

The Libraries would also like to highlight that the misconception still exists that some civil liberties were restored in the revised PATRIOT Act. Language in the revised law appears to protect the privacy of library records; however, a loophole inserted into the wording allows the FBI to use an NSL to obtain library records nonetheless. The revision states that a library functioning in a "traditional role" is not subject to an NSL *unless* it is providing "electronic communication services," which the law defines as "any service that provides to users thereof the ability to send or receive wire or electronic communications." Thus, any library providing Internet service can still be served with an NSL -- which is essentially every library in the United States today. Robert Mueller, FBI Director, in a written response to a Senate Judiciary Committee inquiry, even stated that new language "did not actually change the law."

While the re-authorized USA PATRIOT Act appears to provide a way to challenge the lifetime gag order imposed on anyone who is required to turn over records to the FBI via an NSL, a loophole in the wording makes it virtually impossible for anyone to successfully challenge the gag order. According to the revised PATRIOT Act, if the government declares that lifting the gag order would "harm national security"; the court must accept that assertion as "conclusive" and dismiss the challenge. Hence, there is no prior judicial review to approve an NSL and, with rare exception, no legal way to challenge an NSL after the fact.

Like so many others, the library community believes that secrecy is a threat to open government and a free society. It is the secrecy surrounding the issuance of NSLs that permits their misuse. Because all recipients of NSLs were gagged, no one knew exactly how many the FBI had issued; there was no public examination of the practice; and finally, there was no inquiry into whether such action was the best use of FBI resources. These questions cannot be asked if gag orders and other forms of secrecy prevent Congress from knowing the power the FBI exerts. Secrecy that prevents oversight and public debate is a danger to a free and open society.

Therefore, the Libraries urge the next President and Congress to re-consider the PATRIOT Act. Restore basic civil liberties. Restore constitutional checks and balances by requiring judicial

reviews of NSL requests for information, especially in libraries and bookstores where a higher standard of review should be considered. National security letters are very powerful investigative tools that can be used to obtain very sensitive records. The FBI should not be allowed to issue them in an unrestrained and unrestricted manner. NSLs should not be issued unless a court has approved the action and found that the records being sought are truly relevant to identifying a suspected terrorist. We believe that terrorists win when fear of them induces us to destroy the rights that make our country free. However, because of the gag order imbedded within NSLs, the next President, our elected Senators and representatives, and the American public, are denied access to the stories and information about these abuses. This is information that is needed to conduct oversight, work for appropriate changes to current law, and seek to protect our constitutional rights.

FISA Reform and Looking to the Future

Related to the privacy concerns raised by the unrestricted and unmonitored use of NSLs, the Libraries seek language in future reform and modernization of the Foreign Intelligence Surveillance Act (FISA) that ensures judicial review of law enforcement requests for library patron records or surveillance of library users through library networks. The Libraries strongly believe that when the government seeks foreign intelligence information from libraries in the United States, it should do so only on an order authorized by the Foreign Intelligence Surveillance Court (FISC), regardless of whether the person using the library services is a U.S. citizen or not, or located with the United States or abroad. Libraries are gateways to freedom abroad – as they offer expanded services globally, provide distance learning opportunities, and serve American and foreign students abroad, as part of their essential mission.

Libraries are, of course, subject to law enforcement. Librarians respect the law and most certainly want to abide by the law when it comes to pursuing terrorists and protecting our country. We recognize and accept that, with appropriate judicial review, law enforcement can obtain certain patron information with subpoenas and appropriate court orders. What has disturbed the library community in recent years has been the idea that the government could use the USA PATRIOT Act, FISA, NSLs and other laws, to learn what our patrons were researching in our libraries with no prior judicial oversight or after-the-fact review.

A 2005 report released by the ALA documents the *chilling effect* of law enforcement activity in libraries. The *Impact and Analysis of Law Enforcement Activity in Academic and Public Libraries* found that library patrons are intimidated by intrusive measures such as the USA PATRIOT Act and NSLs. This so-called chilling effect can take on many forms – for example, a library patron concerned about the privacy (or lack thereof) of their library records may be hesitant, or even decide not to, checkout or view certain materials.

We ask the next President and Congress to help us with our ongoing efforts to rebalance our patrons' civil liberties with the need for protecting our national security.

Submitted for the record September 23, 2008

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