

NOTE

THE USA PATRIOT ACT'S APPLICATION TO LIBRARY PATRON RECORDS

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“Throughout history, official surveillance of the reading habits of citizens has been a litmus test of tyranny.”

- Senator Sam Ervin¹

I. INTRODUCTION

Would you like it if someone took a list of all the books that you checked out of the library and based on that list tried to deduce your political loyalties? For the intellectually curious, that would be a nightmare: who has not tried to expand their understanding of the world by picking up a book on a political system or history with which they disagree? In the past, law enforcement agents could access library patron records by showing probable cause to get a warrant, but they had to use specific patron records for evidentiary, not investigative purposes. With the 2001 passage of the USA PATRIOT Act,² the legislature allowed law enforcement agents to access a library's patron records without requiring specificity or probable cause, so long as protection against international terrorism is a significant purpose of the investigation.³ In its application to library records, civil liberties activists feel that this broadened government power is unjustified: it will not provide useful intelligence information because patrons do not have access to confidential information in libraries. Furthermore, investigation of library patron records will have a “chilling effect” on patrons' use of the libraries; afraid of being judged by their choice of certain books, people will limit

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1. HERBERT N. FOERSTEL, *SURVEILLANCE IN THE STACKS: THE F.B.I.'S LIBRARY AWARENESS PROGRAM* 6 (1991) (quoting Senator Sam Ervin, Letter to the Secretary of the Treasury (1970)).

2. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (hereinafter “USA PATRIOT Act”), Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 5, 8, 10, 12, 15, 16, 18, 21, 22, 28, 31, 42, 47, 49 and 50 U.S.C.).

3. The Act's “business records” section allows searches of library records. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. §§ 1861-1862 (West Supp. 2002).

their reading.⁴ Using reading lists for intelligence purposes ignores the multitude of reasons people use libraries: for entertainment, for broadening horizons, for scholastic purposes, for answering a question or assuaging curiosity. We read because “[t]he world is full of mostly invisible things/ [a]nd there is no way but putting the mind’s eye/ [o]r its nose, in a book, to find them out.”⁵ The USA PATRIOT Act’s broad powers, as they apply to library patron records, threaten our exploration of the world of ideas.

This Note will analyze the ways the USA PATRIOT Act disregards the protection the Fourth Amendment gives library patron records. “Library patron records” as discussed in this paper are limited to those records that identify patrons and the books that the patrons have checked out of the library. This Note will not discuss searches of computer use in libraries.⁶

Section II of this paper will give the background necessary to analyze the use of the USA PATRIOT Act. First, it outlines the history of the USA PATRIOT Act and how it applies to library records. Next, it discusses the history of government investigations of library records, and the evolution of the Fourth Amendment’s application to government searches. Section III of this paper tries to identify exactly what problems lie in the USA PATRIOT Act’s application to library records. Finally, Section IV suggests some alternatives to the USA PATRIOT Act’s heavy-handed approach to intelligence gathering, and I argue for a special exception to the Act that would bring back the higher search standards that library patron records have traditionally enjoyed.

II. THE USA PATRIOT ACT, SEARCHES, AND LIBRARY RECORDS

A. *The USA PATRIOT Act is Born*

In the past decade the USA faced an alarming wave of terrorist violence on its own soil. Timothy McVeigh showed America that a disillusioned person

4. The “chilling effect,” a fear-driven self-censorship, was first recognized by the Supreme Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). “A chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity.” Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 693 (1978) (emphasis omitted). Librarians specifically fear a chilling effect if library patrons, afraid of government misinterpretation of the books they read, avoid controversial books or books on topics that the patron thinks the government might find suspect. See *id.*

5. HOWARD NEMEROV, *To David, About His Education, in THE COLLECTED POEMS OF HOWARD NEMEROV* 268, 268 (1977).

6. Numerous authors have already discussed the USA PATRIOT Act’s application to Internet use. E.g., Peter Del Bianco, Jr. & F. Mark Terison, *Is Big Brother Watching Out for Us?*, 17 ME. B.J. 20 (2002); Amitai Etzioni, *Implications of Select New Technologies for Individual Rights and Public Safety*, 15 HARV. J.L. & TECH. 257 (2002); Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002).

or two could take the lives of close to two hundred victims in a single act with the 1995 Oklahoma City bombing.⁷ Another attack came on September 11, 2001, when a handful of terrorists hijacked civilian planes and used them as weapons to destroy the World Trade Center and the Pentagon, killing thousands.⁸ Both of these incidents are part of a new type of violence made possible with modern technology and the evolution of guerilla war tactics.⁹ Understandably, the United States government, which had not seen such widespread civilian casualties on its own soil since the Civil War,¹⁰ was distressed at the damage a few hard-to-trace individuals could inflict. Congress hurriedly passed the USA PATRIOT Act,¹¹ enabling more comprehensive tracking of individuals and looser standards for intelligence gathering.

Proponents of the USA PATRIOT Act argue that with the continuing threat of terrorist violence, law enforcement agents need flexibility and full discretion to ferret out terrorists. Terrorists have been operating on American soil and have taken advantage of technology that makes them difficult to

7. Timothy McVeigh was convicted in June 1997 for the April 19, 1995 Oklahoma City Federal Building bombing that killed 168 people and injured over 500 others. Julie Delcour, *McVeigh Dead; End is Quick, Quiet for Man Behind Bombing*, TULSA WORLD, June 12, 2001, at A1.

8. Nineteen terrorists linked to Al Qaeda, seven of whom had some pilot training, hijacked four planes. PAUL L. WILLIAMS, *AL QAEDA: BROTHERHOOD OF TERROR* xix (2002). United Airlines Flight 175 and American Airlines Flight 11 crashed into the World Trade Center towers in New York killing 157 passengers and crew and 2,792 people in the buildings. Todd Venezia, *Mystery of a 9/11 Victim Who Lives*, N.Y. POST, Dec. 14, 2002, at 009. American Airlines Flight 77 crashed into the US Pentagon killing sixty-four passengers and crew, and United Airlines Flight 93 crashed in Pennsylvania killing its forty-five passengers and crew. Ben Fenton & Toby Helm, *Seven Pilots Were Among 19 Hijackers*, THE TELEGRAPH, Sept. 15, 2001, at <http://www.salon.com>. Altogether, approximately ten thousand casualties (both dead and injured) resulted from the September 11 attacks. John Podhoretz, *Hollywood Searches for a New Script: Popular Culture after September 11*, in OUR BRAVE NEW WORLD: ESSAYS ON THE IMPACT OF SEPTEMBER 11, at 108 (Wladyslaw Pleszczynski ed., 2002).

9. Guerilla fighters operate in small bands, sometimes organized, usually behind enemy lines and use hit-and-run tactics and sabotage to surprise and torment the enemy. WORLD BOOK, INC., *Guerilla Warfare*, in 8 THE WORLD BOOK ENCYCLOPEDIA 419 (2001). When waged in cities, guerilla warfare often takes the form of bombings, kidnapping, or other violent acts. *Id.*

10. The American Civil War of 1861-1865 was the last war fought on American soil. I do not include Pearl Harbor in the count of domestic civilian casualties because Hawaii was a colony in 1941, and therefore the attack was not an event on American soil. MICHAEL GANNON, *PEARL HARBOR BETRAYED: THE TRUE STORY OF A MAN AND A NATION UNDER ATTACK* (2001). Furthermore, the 2,403 Americans killed, lost or mortally injured in the Pearl Harbor attack were largely military, not civilian, although the United States was not at war at the time. *Id.* at 235.

11. Jon Baumgarten et al., *The Patriot [sic] Act Flies through Congress*, 6 No. 9 CYBERSPACE LAW 15 (stating that the USA PATRIOT Act passed in a mere two days). At the time, there was some complaint that the bill was pushed through Congress too hastily. Although he was a minority voice, Representative Bob Barr (R-GA) questioned,

Why is it necessary to rush . . . [the USA PATRIOT Act] through? . . . Does it have anything to do with the fact that the department has sought many of these authorities on numerous other occasions, has been unsuccessful in obtaining them, and now seeks to take advantage of what is obviously an emergency situation to obtain authorities that it has been unable to obtain previously?

Byron York, *The World that Did Not Change—Much: Partisanship and the Politics of National Security After 9/11*, in OUR BRAVE NEW WORLD: ESSAYS ON THE IMPACT OF SEPTEMBER 11, at 28 (Wladyslaw Pleszczynski ed., 2002).

track, such as anonymous library Internet use and pay-as-you-go cellular phone cards. Law enforcement agents claim to require broader access to communications and business records to meet this intelligence challenge. When information gathering is easier, authorities are more likely to intercept terrorists' plans. The USA PATRIOT Act gives government agents this freedom to gather information.

As it applies to library patron records, however, the Act is criticized for the same broad powers that make this information collection possible. There is a fear that this is a step backward to an era when government agents investigated patron records in search of communists, Vietnam War dissenters, and other parties perceived as anti-government.¹² Stripping privacy protections for all patrons, not just suspected terrorists, marks the end of the privacy Americans enjoy in public libraries and the start of subjecting Americans to searches of dubious value. The USA PATRIOT Act allows too much invasion of citizens' privacy liberties¹³ in the doubtful hope of finding terrorists.

Critics also claim that a synthesis of already collected information, not an increase in what is collected, is the answer; the US Government now collects so much information that it is "choking on more information than [the agencies can] digest."¹⁴

B. *The USA PATRIOT Act's Application to Libraries*

The USA PATRIOT Act allows a representative of a governmental entity who has a rank no lower than the Assistant Special Agent in Charge of the F.B.I.¹⁵ must apply to either a federal District Court judge¹⁶ or to a mag-

12. Solove, *supra*, note 6, at 1107-08. In addition to the F.B.I.'s Library Awareness Program, the U.S. Army, the C.I.A. and various state and local police departments have been involved in sometimes extensive information gathering operations, amassing files on U.S. citizens' reading habits, finances, health and "personal and sexual relationships that could be used to discredit them." *Id.* at 1108. For a description of the Library Awareness Program, see *infra* note 33.

13. Among other things, the USA PATRIOT Act allows law enforcement agents secret access to Internet and telephone communications, as well as allowing broad powers to search business records. USA PATRIOT Act of 2001. See *supra* note 2. It is rumored that an earlier version of the USA PATRIOT Act would have stripped even more liberties, such as suspending habeas corpus. Steve Bonta, *The Un-American Patriot Act*, 18 THE FREE REPUBLIC 01, (Jan. 14, 2002), at <http://www.freerepublic.com/focus/news/723204/posts> (last visited Feb. 23, 2003). This version "'dumbfounded' members of Congress who read it . . . It is disquieting to know that someone in official Washington might be seriously thinking about curtailing the ancient protection against arbitrary and unjust imprisonment." *Id.*

14. James X. Dempsey, *Civil Liberties in a Time of Crisis*, 29 HUM. RTS. 8, 9 (2002) ("Sweeping in even more information will not make the picture any clearer. In this way, the expanded surveillance powers are likely to make counterterrorism efforts more inefficient.").

15. USA PATRIOT Act of 2001 § 215, 50 U.S.C. § 1861 (2001).

16. *Id.* The judge can be in any district where "activities related to the terrorism *may have* occurred, for a search of property or for a person within or outside the district." USA PATRIOT Act of 2001 § 219, FED. R. CRIM. P. 41(b)(3) (2001) (emphasis added). This means that a judge could have no connection to the jurisdic-

istrate judge¹⁷ for a court order allowing the search of “all tangible things” in the library.¹⁸ This judge can be from the Foreign Intelligence Surveillance Act (“FISA”) secret court.¹⁹ The agent does not need to allege any specific facts to obtain this order, and foreign intelligence or investigation of terrorism only need to be “a significant purpose” of the search.²⁰ The application for the court order must specify that the records are sought as part of an ongoing investigation and will be used to “obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities”²¹ The library must fully cooperate in the investigation of its records if presented with a court order,²² and librarians are bound to secrecy regarding the investigation.²³ Neither the librarians nor the library will be held liable for any harm that results from their good faith compliance with the order.²⁴

The Attorney General can authorize an emergency search that can continue for up to seventy-two hours.²⁵ If the Attorney General invokes the emergency search power, he must immediately apply for a court order allowing the search to continue.²⁶

tion where the activities in question take place, and may be less equipped to judge the reasonableness of the warrant.

17. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861.

18. *Id.* “All tangible things” include written records of patrons, documents, and any other items the library might have recording patron activities. *Id.* The F.B.I. can also access any databases, Internet traffic, anything stored on a computer hard drive in the library, and even backups of databases. USA PATRIOT Act of 2001 § 203, 18 U.S.C.A. § 2510 (2001). The library can be required to disclose any computer files from the past 180 days or less, if such files exist. USA PATRIOT Act of 2001 § 212, 18 U.S.C.A. § 2703 (2001). If the library has the information, the library will have to disclose the patron’s name, address, and records of computer session times and duration. *Id.* The order will last for the time necessary to complete the investigation or ninety days, whichever is less (exceptions are provided for investigations outlined in 50 U.S.C.A. § 1801 as defined in 50 U.S.C.A. § 1805 (d) and 50 U.S.C.A. § 1824 (d)(1)). USA PATRIOT Act of 2001 §§ 206, 207, 225, 50 U.S.C.A. § 1805 (2001). If necessary, the court can allow an extension. *Id.* Under 50 U.S.C.A. § 1842, the F.B.I. can also use wiretaps to trace library Internet use. USA PATRIOT Act of 2001 § 214 (2001). The Internet tap is perhaps a more beneficial search, but one that has an even greater capacity to chill intellectual exploration.

19. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861.

20. USA PATRIOT Act of 2001 § 218, 50 U.S.C.A. § 1804 (a)(7)(B).

21. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861. The only exception to this is that a U.S. citizen cannot be considered an agent of a foreign power solely based on activities protected by the First Amendment. USA PATRIOT Act of 2001 § 207, 50 U.S.C.A. §§ 1805, 1824.

22. Chances are that the order will issue. The FISA Court, which hears warrant requests under the USA PATRIOT Act, “has never turned down a surveillance request.” *The Limits of Trust*, WASH. POST, Aug. 23, 2002, at A26.

23. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861(d).

24. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861(e).

25. USA PATRIOT Act of 2001 § 207, 50 U.S.C.A. §§ 1805(f), 1824(e).

26. *Id.* If the court denies the application to continue the search, then the search must stop immediately. *Id.* The problem with this provision is that a good deal of privacy could be improperly invaded in the time before a court rules on the application or in the seventy-two hours allowed by statute. Furthermore, it is hard to imagine a situation necessitating immediate access to a list of someone’s reading material.

The USA PATRIOT Act also allows librarians to disclose patron information to law enforcement personnel if they have reason to believe that there is an “emergency involving immediate danger of death or serious physical injury to any person.”²⁷

There are rumors that the government has used its USA PATRIOT Act special powers to search libraries across the country.²⁸ The gag order in the Act prevents librarians from sharing with the public the extent and nature of the secret warrants’ use.

C. Privacy and the Library Patron Record: The “Chilling Effect”

Government searches of library patron records have a history. Fearing communist activity, the post-World War II American government used library records, among other sources, to find political dissidents.²⁹ The 1950’s McCarthy era was marked with rampant misinformation and tenuously based conclusions that led to “blacklists” and wrongful convictions.³⁰ In response to the wave of political censorship and threats to intellectual freedom, the American Library Association³¹ wrote its Freedom to Read Statement “which encouraged librarians and publishers to make available the widest diversity of information and expression.”³² Ten years later, ignoring warnings against quelling intellectual freedom by judging people based on their reading material, the F.B.I. began amassing records on citizens, including information on library use.³³ These searches produced little or no useful

27. USA PATRIOT Act of 2001 § 212, 18 U.S.C.A. § 2702(b)(7).

28. “In July, several libraries across the nation said F.B.I. agents had demanded information on reading records.” Christopher Newton, *Lawmakers Square off with Justice over Request for Patriot Act Disclosure*, SAN DIEGO UNION-TRIB., Aug. 20, 2002, available at <http://www.signonsandiego.com/news/nation/20020820-1513-patriotact-congress.html> (last visited Feb. 23, 2003).

29. Felicity Barringer, *Using Books as Evidence Against Their Readers*, N.Y. TIMES, Apr. 8, 2001, at WK3.

30. RICHARD H. ROVERE, SENATOR JOE MCCARTHY (1959).

31. The American Library Association (“A.L.A.”) is a professional organization of librarians.

32. FOERSTEL, *supra* note 1, at 1.

33. The American government first used library patron information as part of domestic surveillance in the 1960s. *Id.* at 4. These files were related to “domestic security, civil disturbances, and campus unrest and generally did not result in criminal charges.” *Id.* at 3-4. Sometime before the 1980s, the F.B.I. began its unofficial “Library Awareness Program.” Ulrika Ekman Ault, Note, *The F.B.I.’s Library Awareness Program: Is Big Brother Reading Over Your Shoulder?* 65 N.Y.U. L. REV. 1532, 1535 (1990). The program consisted of F.B.I. agents trying to enlist the assistance of librarians in monitoring the reading habits of ‘suspicious individuals.’ *Id.* at 1534. Congress never explicitly authorized this program. *Id.* at 1535. The Library Awareness Program is vaguely defined and has no official title; “Library Awareness Program” is the term F.B.I. officials reportedly gave librarians they approached, and the name the media picked up. *Id.* The Library Awareness Program has been described as a “ham-handed effort that betrayed insensitivity to the fact that libraries are symbols of Americans’ First Amendment rights. The idea of government agents scrutinizing the reading material of library patrons was chilling.” RONALD KESSLER, *THE BUREAU: THE SECRET HISTORY OF THE F.B.I.* 225 (2002).

material,³⁴ and government agents had an alarming tendency to misuse the information.³⁵ Afraid of a chilling effect, libraries responded to F.B.I. inquiries by training their staff, including volunteers, to refer all questions to the library director, even when accompanied by an F.B.I. badge, and by changing their policies to keep minimum patron records.³⁶ States began passing statutes protecting library records as private.³⁷ F.B.I. agents did not stop trying to search library patron records.³⁸ At times, F.B.I. agents claimed that they did not have to comply with the state statutes passed specifically to protect the privacy of library patron records.³⁹ For the most part, the statutory protections have proven effective, although court orders have forced

34. See, e.g. Ault, *supra* note 33, at 1534 (stating that the F.B.I. was never able to justify its Library Awareness Program with any concrete evidence of its usefulness); KESSLER, *supra* note 33, at 225 ("In the end, the program produced very little useful information."). James H. Greer, Assistant Director of the F.B.I., claims that there is more justification for the Library Awareness Program, but it is classified and he cannot reveal it. *F.B.I. Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 100th Cong. 121 (1989).

35. Law enforcement agents have misused this material for both personal purposes and professionally. Solove, *supra* note 6, at 1108. "For example, during the late 1960s and early 1970s, the Philadelphia Police Department (PPD) compiled about 18,000 files on various dissident individuals and groups. During a national television broadcast, PPD officials disclosed the names of some of the people on whom files were kept." *Id.*

36. Karen Coyle, *Privacy and Library Systems*, (2002), at <http://www.kcoyle.net/il2002.html> (last visited Jan. 14, 2003).

37. All states except Hawaii, Kentucky, and Oregon have legislation that protects library record privacy. See, ALA. CODE § 41-8-8-10 (2002); ALASKA STAT. § 40.25.140 (Michie 2002); ARIZ. REV. STAT. § 41-1354 (2002); ARK. CODE ANN. § 13-2-701 (Michie 2002); CAL. GOV'T CODE § 6267 (West 2002); COLO. REV. STAT. § 24-72-204 (2002); CONN. GEN. STAT. § 11-25 (2001); DEL. CODE ANN. tit. 29 § 10002 (2002); D.C. CODE ANN. § 39-108 (2002); FLA. STAT. ch. 257.261 (2002); GA. CODE ANN. § 24-9-46 (2002); IDAHO CODE § 9-340E (Michie 2002); 75 ILL. COMP. STAT. 70/1 (2002); IND. CODE ANN. § 5-14-3-4 (Michie 2002); IOWA CODE § 22.7 (2002); KAN. STAT. ANN. § 45-221 (2002); LA. REV. STAT. ANN. § 44:13 (West 2002); ME. REV. STAT. ANN. tit. 27 § 121 (West 2001); MD. CODE ANN., STATE GOV'T § 10-616 (2002); MASS. GEN. LAWS ch. 78, § 7 (2001); MICH. COMP. LAWS § 397.601-603 (2002); MINN. STAT. § 13.40 (2001); MISS. CODE ANN. § 39-3-305 (2002); MO. REV. STAT. § 182.817 (2001); MONT. CODE ANN. § 22-1-1101-03 (2002); NEB. REV. STAT. § 84-712.05 (2002); NEV. REV. STAT. ANN. 239.013 (Michie 2000); N.H. REV. STAT. ANN. § 91-A:15 (2002); N.J. STAT. ANN. § 18A:73-43.2 (West 2002); N.M. STAT. ANN. § 18-9 (Michie 2002); N.Y. C.P.L.R. LAW § 4509 (Consol. 2002); N.C. GEN. STAT. § 125-19 (2001); N.D. CENT. CODE § 40-38-12 (2002); OHIO REV. CODE ANN. § 149.432 (West 2002); OKLA. STAT. tit. 65, § 1-105 (2003); OR. REV. STAT. § 192.502 (2001); PA. STAT. ANN. tit. 24, § 4428 (West 2002); R.I. GEN. LAWS § 38-2 (2002); S.C. CODE ANN. § 60-4-10 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 1-27-3, 14-2-51 (Michie 2002); TENN. CODE ANN. § 10-8-101-03 (2002); TEX. GOV'T CODE ANN. § 552.124 (Vernon 2003); UTAH CODE ANN. § 63-2-302 (2002); VT. STAT. ANN. tit. 1 § 317 (2001); VA. CODE ANN. § 2.2-3705 (Michie 2002); WASH. REV. CODE ANN. § 42.17.310 (West 2002); W. VA. CODE § 10-1-22 (2002); WIS. STAT. § 43.30 (2001); WYO. STAT. ANN. § 16-4-203 (Michie 2002). These state statutes either specifically provide for library record confidentiality or privacy, or create an exemption from a public record disclosure statute when library records identify the patron and/or their use of the library. Some of these statutes penalize prohibited disclosure, while others offer no remedy for improper disclosure. Almost all statutes require librarians to release the records when presented with a court order. Even Hawaii and Kentucky have provided Opinions of the Attorney Generals stating that library patron records should be kept private because the individual's right to privacy outweighs the public's interest in disclosure of the information. 90 Op. Att'y Gen. 30 (Hi. 1990); 81 Op. Att'y Gen. 159 (Ky. 2002). For a discussion of the motivation of some states in passing the library record privacy laws, and the variety of the laws, see FOERSTEL, *supra* note 1, at 133-50. *Contra* Paul D. Healey, *Chicken Little at the Reference Desk: The Myth of Librarian Liability*, 87 LAW LIBR. J. 515, 527 (1995) ("Any obligation to protect exchanges at the reference desk derives from ethics, not law.").

38. Ault, *supra* note 33.

39. *Id.*

libraries to release their records⁴⁰ and there is at least one instance of a library's voluntary release of a patron's records.⁴¹

Government agents looking at check-out lists for intelligence purposes can easily misinterpret, and have misinterpreted,⁴² research for a school science project as evidence of terrorist machinations. The F.B.I. director William S. Sessions admitted that when searching libraries as part of the Library Awareness Program,⁴³ the F.B.I. specifically looked for students working on term papers because those papers "assist[ed] in the SIS (Soviet Intelligence Services) collection effort and also help[ed] to identify students who might be potential recruitment targets."⁴⁴ Books lists do not tell what a person's political bent is: the curious mind, trying to know one of last century's greatest horrors, might take *Mein Kampf*⁴⁵ from a library, which a government agent could easily misinterpret as evidence of Nazi leanings.

Librarians want library records kept private⁴⁶ because they fear misinterpretation of reading choices and the effect that searches have on readers. Libraries are meant to "[p]rovid[e] . . . a safe place for the community to exchange ideas."⁴⁷ Their records are "not ordinary third-party records like telephone or bank records. They should not be available to intelligence agencies just for the asking."⁴⁸

40. In *Brown v. Johnston*, 328 N.W.2d 510 (Iowa 1983), the Iowa Supreme Court ruled that neither Iowa Code Chapter 68A protecting the confidentiality of library records nor any librarian privilege barred execution of a prosecutor's subpoena *duces tecum* requiring the library's keeper of records to present all records of persons who checked out certain books. The Court held that the state's interest in finding a person or persons who had engaged in ritual animal slaughter overrode either the protections of Chapter 68A or the librarian's privilege. *Id.* For criticism of this decision's disregard for library patron privacy, see Carolyn M. Hinz, Comment, *Brown v. Johnston: The Unexamined Issue of Privacy in Public Library Circulation Records in Iowa*, 69 IOWA L. REV. 535 (1984).

41. SHIRLEY A. WIEGAND, LIBRARY RECORDS: A RETENTION AND CONFIDENTIALITY GUIDE 1-5 141 (1994) (describing one library's voluntary publication of potentially embarrassing patron circulation information in an effort to shame patrons into returning overdue books).

42. FRANK J. DONNER, THE AGE OF SURVEILLANCE: THE AIMS AND METHODS OF AMERICA'S POLITICAL INTELLIGENCE SYSTEM 357 (1980). At McClelland's request in 1967 "The ATF scoured the records of urban books listed under the catalogue heading of explosives or relating to guerrilla warfare." *Id.* In one case the ATF flushed the names of two teenagers working on a term paper. *Id.*

43. For a description of the Library Awareness Program, see *supra* note 34.

44. Letter from William S. Sessions, Director of F.B.I. to Dr. David R. Bender, Special Libraries Association (June 7, 1988), *F.B.I. Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 100th Cong. 55-57 (1989).

45. ADOLF HITLER, MEIN KAMPF (Stackpole Sons 1939) (1925).

46. See, e.g., AMERICAN LIBRARY ASSOCIATION, CODE OF ETHICS, III, available at <http://www.ala.org/alaorg/oif/ethics.html> (last visited Jan. 14, 2003) ("We protect each library user's right to privacy and confidentiality with respect to information sought or received, and materials consulted, borrowed, acquired or transmitted,"); AMERICAN LIBRARY ASSOCIATION, POLICY MANUAL, Policy 54.15, no. 3, 237, available at http://www.ala.org/alaorg/oif/pol_conf.html (last visited Jan. 14, 2003) ("Libraries must protect each user's right to privacy with respect to information sought or received, and materials consulted, borrowed, or acquired.").

47. Gladys Ann Wells & Melissa Moore, *Libraries and the 21st Century: What Forms of Information Distribution Will Survive?*, 697 PRACTISING L. INST./PAT. 945, 962 (2002).

48. *F.B.I. Counterintelligence Visits to Libraries: Hearings Before the Subcomm. on Civil and Constitu-*

The Supreme Court's interpretation of First Amendment free speech includes the "right to receive" speech.⁴⁹ When patrons censor their reading, that "chilling effect" violates their First Amendment right to receive.⁵⁰ If records are not private, librarians fear that "[t]he effect of forced disclosure of library records would be to chill citizens' reading of unpopular or controversial books because others might learn of it."⁵¹

These searches cause patrons to censor themselves, harming their First Amendment rights, but have not revealed any intelligence information. Government investigations of library records have never shown a librarian guilty of treason⁵² or provided other intelligence information.⁵³ One librarian has complained that "F.B.I. agents harassing librarians in settings that contain no classified material suggests a gross waste of national resources. The librarian's job is to protect the rights of the patron, not to decide which of its holdings might be 'sensitive' and which of its users might be foreign operatives."⁵⁴ The records show the reading habits of individuals, not information about government activity or the official acts of public officials; therefore they are not useful to intelligence operations.⁵⁵

Some librarians have gone so far as to argue that the library records should be private because "user information has had the same level of confidentiality protection as educational and medical records."⁵⁶ Proponents for a

tional Rights of the Comm. on the Judiciary, 100th Cong. 1 (1989) (Statement of Rep. Edwards, Member, House Comm. on the Judiciary).

49. The Supreme Court first recognized the "right to receive" information in *Martin v. City of Struthers*, 319 U.S. 141 (1943). The "right to receive" was also found where government closely supervised a citizen's exercise of his First Amendment rights, causing the citizen to censor his exercise of that right. *Lamont v. Postmaster General of U.S.*, 381 U.S. 303 (1965) (holding that a statute requiring anyone receiving communist literature to register with the U.S. Post Office had the incidental effect of discouraging the free exercise of the First Amendment right to receive (or a "chilling effect")). Justice Brennan later found that the "right to receive" "is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Edu. v. Pico*, 457 U.S. 853, 857-58 (1982) (discussing the prohibition of certain books in school libraries). Philip J. Morin, III has argued that any constraint on patrons' use of the library (a "chilling effect") violates their right to receive. Philip J. Morin, III, Comment, *Why Kreimer Can't Read: Striking the Proper Balance Between Library Access and Problem Patrons in Kreimer v. Bureau of Police*, 46 RUTGERS L. REV. 1845 (1994). Morin's analysis further finds that libraries are "designated public fora" and that the individual's enjoyment of the library must be balanced against the needs of the community. *Id.* at 1864-65. If we accept this, then the community's interest in avoiding terrorist inflicted harm must be weighed against the individual's interest in library record privacy. Solove, however, argues that privacy is a form of freedom (not an individual right), which means that it cannot be weighed against community interests. Solove, *supra* note 6, at 1115-18.

50. By limiting their exposure to certain books, citizens are effectively censoring themselves and therefore denied freedom of expression.

51. *Brown*, 328 N.W.2d at 512.

52. FOERSTEL, *supra* note 1, at 113.

53. See *supra* note 34.

54. Kenneth A. Winter, *Privacy and the Rights and Responsibilities of Librarians*, 1997 THE KATHARINE SHARP REV. 4, (1997), available at <http://www.lis.uiuc.edu/review/winter1997/winter.html> (last visited Jan. 14, 2003).

55. FOERSTEL, *supra* note 1, at 124.

56. Wells & Moore, *supra* note 47, at 961 ("Libraries[]" . . . user information has had the same level of

protected relationship status for librarian/patron have a difficult argument to make because unlike confessionals and doctors' offices, libraries are public places.

Library records are unique and deserve privacy from government scrutiny. There is no evidence that government searches of library records have any value.

D. Traditional Standards for Warrants and Searches

The Fourth Amendment is the starting point for any discussion of warrants and searches in the United States. It grants:

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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁵⁷

Although this Amendment has three possible interpretations,⁵⁸ it is understood to grant the judiciary the power to find some searches reasonable, even when made without a warrant.⁵⁹ The Supreme Court has, however, "stated repeatedly that warrants are the rule and judicially preferred."⁶⁰ Under the Fourth Amendment, citizens have an implied right to privacy; some searches are too invasive and are therefore unreasonable.⁶¹

Regardless of one's interpretation of the Fourth Amendment, a search generally requires "probable cause," and that government agents specifically describe the objects they expect to recover in the warrant.⁶² These requirements

confidentiality protection as educational and medical records, the Patriot [*sic*] Act violates the libraries fundamental value of protecting user privacy."). Ault argues that the librarian/patron relationship should be a protected relationship like that of doctor/patient or priest/penitent. Ault, *supra* note 33.

57. U.S. CONST. amend. IV.

58. These are:

(1) that the "reasonable" search is one which meets the warrant requirements specified in the second clause; (2) that the first clause provides an additional restriction by implying that some searches may be "unreasonable" and therefore not permissible, even when made under warrant; or (3) that the first clause provides an additional search power, authorizing the judiciary to find some searches "reasonable" even when carried out *without* a warrant.

JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 42-43 (1966).

59. WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.1(a) (3d ed. 1996 & Supp. I 2002).

60. LAWRENCE C. WADDINGTON, ARREST, SEARCH AND SEIZURE 108 (1974).

61. The Amendment does not indicate what searches are too invasive. As Landynski has observed, "The search and seizure provision, as finally drafted and adopted, had both the virtue of brevity and the vice of ambiguity." LANDYNSKI, *supra* note 58, at 42-43.

62. *See id.* U.S. CONST. amend. IV.

are to ensure that the warrant is not used to harass people, and that agents do not invade privacy needlessly, without a particular purpose.⁶³ The Fourth Amendment reflects the concern that the American government not continue the colonial British government's use of "general warrants"⁶⁴ that were "sufficiently vague to justify the search of any house, boat, or wagon that seemed appropriate to the executing officer."⁶⁵ Sharing this concern centuries later, courts maintain a policy of preventing the government from unnecessarily invading the privacy of its citizens.

From its start in the Bill of Rights, the right to individual privacy suffered growing pains and stretch marks as the twentieth century's technological leaps forced the law to fit a body its youth never anticipated.⁶⁶ When the United States Supreme Court was first faced with the wiretap as a search in *Olmstead v. United States*, it created the "trespass" rule: anything that did not *physically* invade one's space would not be considered a search for purposes of the Fourth Amendment.⁶⁷ The Supreme Court later realized that people justifiably relied on privacy in their phone conversations, and that limiting "searches" to physical invasions made little sense, so it discarded the trespass rule in *Katz v. United States*.⁶⁸ The Court then held that the Fourth Amendment protects people, not places.⁶⁹ Justice Harlan's concurrence in *Katz* focusing on the defendant's "reasonable expectations of privacy"⁷⁰ has become the theoretical basis of Fourth Amendment protection.⁷¹

What is private and protected from searches under the Fourth Amendment is contextual: it varies by situation.⁷² If the potential gain to the commu-

63. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE AND SURVEILLANCE, AND FAIR TRIAL AND FREE PRESS* 41 (1969).

64. For an excellent history of warrants and the opinions of the Founding Fathers regarding warrants, see *id.* at 24-50. Taylor finds that:

[O]ur constitutional fathers were not concerned about warrantless searches, but about overreaching warrants. . . . Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods—an interesting use of a practice already obsolescent to limit and mitigate a current and dangerous practice.

Id. at 41. Taylor warns that our current practice of viewing warrants as preferable to warrantless searches has its own dangers. *Id.* at 46-47.

65. WADDINGTON, *supra* note 60, at 88. General warrants were also unlimited in scope. *Id.*

66. For an obvious example, the founding fathers did not have telephones, and could not have anticipated the problem of whether to extend a privacy right to phone calls.

67. *Olmstead v. United States*, 277 U.S. 438 (1928).

68. *Katz v. United States*, 389 U.S. 347 (1967).

69. *Id.* The Supreme Court held that: "once it is recognized that the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353.

70. *Id.* at 361.

71. LAFAYE, *supra* note 59, at § 3.1(a).

72. Patricia Mell, *Is Privacy Obsolete in a Nation Fighting Terrorism?* Address Before the American

nity does not outweigh the harm of intruding on an individual's privacy, then that search is unreasonable.

Library records rely on Fourth Amendment protections, and a warrant to search these records must balance individual privacy against the community's interest in the search.⁷³ Do people have a reasonable expectation of privacy in the library's records of their activities? Almost all states have legislation to protect the privacy of library patron records, showing that they value this privacy.⁷⁴ These statutes protecting library record privacy usually provide an exception to that privacy in the case of court orders.⁷⁵ A court order requires a showing of probable cause that the search will find its object and is necessary to the investigation.⁷⁶ In our legal tradition's policy of encouraging disclosure, courts hearing warrant requests are usually open to the public. The publicity acts as a check on the parties' actions.⁷⁷ To some degree, defendants can challenge the accuracy of the facts in the warrant affidavit,⁷⁸ but third parties subjected to a search have no right to challenge a warrant.⁷⁹

In addition to states' recognition of the need for library patron record privacy, courts have found that patrons have a right to privacy in their reading choices,⁸⁰ and that privacy right has variously outweighed⁸¹ or been subordi-

Association of Law Schools 2003 Annual Meeting (Jan. 4, 2003) (forthcoming MICH. ST. U. L. REV. 2003).

73. The Fourth Amendment applies because the legal theories of third party records and bailment fail to protect library records. The Supreme Court allows warrants to search third parties because "whether the third-party occupant is suspect or not, the State's interest in enforcing the criminal law and recovering the evidence remains the same." *Zurcher v. Stanford Daily*, 436 U.S. 547, 560 (1978). The Court rejected the District Court's contention that third parties should not be subjected to warrants and that a subpoena *duces tecum* would better protect the third party's privacy interest and be a more appropriate method of gaining information. *Id.* Justice Stevens' dissent argued that the framers could not have meant to subject third parties to warrants because from the time Fourth Amendment was written and down to the time of *Hayden*, seizures of private papers were generally not permissible, and so it is understandable that "the Warrant Clause was not framed to protect against them." *Id.* at 578 (Stevens, J., dissenting) (citing *Warden v. Hayden*, 387 U.S. 294 (1967)). The theory of bailment could protect library patron records if patrons gave information to the library with the reasonable expectation that the library would not share the information with outsiders. See *Rawlings v. Kentucky*, 448 U.S. 98 (1980). The case *United States v. Miller* throws doubt on the possibility of bailment, however, because the *Miller* court found that bailment did not protect bank records. 425 U.S. 435 (1976) (finding that defendant, who had not registered or paid taxes on his whiskey business, had no protectable Fourth Amendment interest in bank records). If bailment does not protect bank records, then it probably does not protect library records either. A library's only hope of preventing a chilling effect on its patrons is by showing that a search of library patron records is unreasonable under the Fourth Amendment.

74. See *supra* note 37.

75. *Id.*

76. FRANK W. MILLER ET AL., *THE POLICE FUNCTION* 120 (6th ed. 2000).

77. Judges are carefully selected individuals, appointed because people perceive them as capable of remaining impartial and making fair judgments. However, judges are only human and capable of error. Senator McCarthy, famous for inventing evidence he used in his communist hunts, was a judge for four years. ROVERE, *supra* note 30, at 89. While we trust judges, making them work in the public eye can only improve their performance.

78. *Id.* at 132-44.

79. LAFAVE, *supra* note 59, at § 4.1(f).

80. *Brown*, 328 N.W.2d at 512; *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1055 (Colo. 2002).

81. *Tattered Cover*, 44 P.3d at 1056 (holding that even with specificity in the warrant application, state law protected patron's right to privacy of reading material that outweighed state's interest in linking the sus-

nated to society's need for the information.⁸² Courts agree that reading materials implicate the First Amendment in searches of library records, and therefore the search must meet the Fourth Amendment's particularity requirements with "scrupulous exactitude."⁸³

State legislatures and courts apply a higher standard to searches of library patron records. The USA PATRIOT Act strips this higher protection from library records.

III. SO WHAT IS THE PROBLEM?

The USA PATRIOT Act allows the Federal government to conduct searches that are illegal under state law.⁸⁴ It changes the standard for searches of library patron records because searches under the Act do not require probable cause or a specific description of the object of the search. The lower standards for searches create two problems: first, stripping the protection of a higher search standard from library patron records risks a chilling effect on patrons' library use. Second, the Act gives the executive branch broad powers, ignoring our government's system of checks and balances.

If there is a declaration of war, the government can strip or alter basic constitutional rights, such as the Fourth Amendment protection from unreasonable searches.⁸⁵ This is not the case now.⁸⁶ Although President Bush speaks often of the "war on terrorism," there has not been a declaration of war and there is no war justification for suspending basic constitutional rights such as the Fourth Amendment.⁸⁷ Even if a state of war did exist, there is no evidence that the government has a compelling need to access library patron records. USA

pect to the crime scene).

82. *Brown*, 328 N.W.2d at 512 (holding that the investigation was sufficiently narrow, and society's need to find a person or persons who had engaged in ritual animal slaughter overrode either the state law protections or the librarian's privilege).

83. *Tattered Cover*, 44 P.3d at 1056 (citing *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1978)).

84. See *supra* notes 37-40 and accompanying text.

85. Lisa M. Ivey, Comment, *Ready, Aim, Fire? The President's Executive Order Authorizing Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism is a Powerful Weapon, But Should It Be Upheld?* 33 CUMB. L. REV. 107 (2002-2003).

86. *Id.*

87. Congress alone has the power to declare war, and has not done so. *Id.* As one author has pointed out, the absence of a declaration of war leaves America with nothing but ambiguity:

President Bush's guarantee of a 'long, long struggle,' absent a measurable goal, and without a quantifiable conclusion, suggests that America will be in a permanent militarized state until the end of our days, forever erasing the distinction between 'war time' and 'peace time.' . . . With no legal declaration of war, there can be no cessation of hostilities. With no nations from which to demand surrender, there will be no surrender ceremonies.

DAVID POTORTI, *Coming to a Mall Near You: Just War, in SEPTEMBER 11 AND THE U.S. WAR: BEYOND THE CURTAIN OF SMOKE* 99, 99 (Roger Burbach & Ben Clarke eds., 2002).

PATRIOT Act searches of library patron records should stay within constitutional limits on searches.

A. Overbroad Scope of the USA PATRIOT Act

By not requiring probable cause, the government can use the USA PATRIOT Act to conduct searches on anyone, anywhere, so long as a government agent suspects that person of being somehow involved in terrorist investigations. The degree of suspicion does not need to be reasonable to get a warrant. The USA PATRIOT Act disregards precedent by allowing searches of places, not people, and by eliminating the Fourth Amendment's probable cause and particularity requirements.

1. What Ever Happened to Probable Cause?

Although suspicion might be sufficient grounds to make a decision in private interactions, the legal profession finds instinct-based suspicions too specious to justify the invasion of one's privacy. Traditionally, a government agent needed some convincing reason to suspect someone of committing a crime, and had to present that reason to an impartial judge before getting a warrant to invade that person's privacy.

Past legislation relaxed the probable cause requirement in searches of foreign nationals,⁸⁸ but the USA PATRIOT Act lowers protection of its citizens in a whole new way. Under FISA,⁸⁹ the government granted its executive branch broader powers to investigate terrorism. FISA allows warrants for electronic surveillance if the primary purpose of the surveillance is intelligence gathering and the target is a foreign power or an agent of a foreign power (including terrorist groups).⁹⁰ FISA Courts have found that the Act passes muster: it does not violate citizens' Fourth Amendment rights, and the lower FISA standard for foreign nationals is justified by the state's interest in combating foreign terrorism.⁹¹

88. The probable cause requirement was lowered in searches of foreign nationals when terrorism was the purpose of the search. The Foreign Intelligence Surveillance Act ("FISA") of 1978, 50 U.S.C.A. §§ 1801-1811 (1994 & Supp. 1999), 8 U.S.C. § 1101 (2000), 47 U.S.C. §§ 605-606, and in scattered sections of 18 U.S.C.

89. *Id.*

90. Michael T. McCarthy, *USA PATRIOT ACT*, 39 HARV. J. ON LEGIS. 435, 443 (2002) (citing 50 U.S.C.A. §§ 1805, 1801(b)(2)(c)). The USA PATRIOT Act lowered the already low FISA standard by replacing "purpose" with "significant purpose," which made it possible to use conduct searches not based wholly on terrorism-related cases. *Id.* at 444.

91. In re: Sealed Case, 310 F.3d 717, 745 (Foreign Intelligence Surveillance Ct. 2002).

The USA PATRIOT Act, however, creates a standard, lower than that of the FISA standard. It allows searches “relevant to an ongoing criminal investigation,”⁹² where terrorism is “a significant purpose”⁹³ of the search, and the search is not “conducted of a United States person solely upon the basis of activities protected by the First Amendment.”⁹⁴ This is an unprecedented low level of proof: “relevant” could mean just about anything. Terrorism no longer needs to be the only purpose of the investigation to obtain this information.⁹⁵

It is hard to imagine why the U.S. government needs to extend these broad powers to searches when terrorism is not the only alleged crime and not the only purpose: what other purposes are valid to invoke the awesome search powers in this Act? Even more frightening, is the provision stating that the search cannot be “solely” based on First Amendment activities. This leaves the possibility that First Amendment activities could be a large factor in the search. The Act exposes foreign nationals to investigations based solely on First Amendment protected acts.⁹⁶ If anything has a chilling effect on people’s exercise of their First Amendment rights, it is this provision: when we think that the government will invade our privacy just because we have spoken freely, or read a book that a government agent views as suspicious, then we will refrain from these activities. We will begin to fear our government—that it might misinterpret a book we have read and, like Orwell’s Big Brother,⁹⁷ punish us for exercising our constitutional right to ideological freedom. The missing probable cause standard allows searches that the Fourth Amendment is intended to prevent.

92. USA PATRIOT Act of 2001 § 216, 18 U.S.C.A. § 3123.

93. USA PATRIOT Act of 2001 § 218, 50 U.S.C.A. §§ 1804, 1823 (changing “purpose” to “a significant purpose”).

94. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861.

95. Bonta, *supra* note 5.

96. By limiting the requirement that the searches are not based solely on First Amendment activities to citizens, the Act leaves open the possibility that foreign nationals residing in the USA will be subject to searches, based solely on that foreign nationals’ First Amendment activities in the USA. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861. For example, a Swiss national residing in the USA could be the subject of a USA PATRIOT Act investigation because she wrote a letter to the editor of a newspaper that questioned President Bush’s motivation in the proposed attack on Iraq. This would be completely unrelated to terrorist activity, the search would authorized based only on the person’s exercise of freedom of speech. This person would then be subject to phone taps, her e-mails could be captured and read without her knowledge, a warrant could be granted to look at the records in the library she frequents, and the bank she uses. When examining those bank and library records, the agent will have access to records of hundreds of other citizens although no one suspects those citizens of committing a crime. This scenario is highly unlikely, but under the USA PATRIOT Act it is possible.

97. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (Penguin Books 1954) (1949).

2. Probable Cause Exceptions Do Not Apply

There are exceptions to the probable cause requirement. To decide if probable cause is required, the court will apply a balancing test looking at: the intrusiveness of the search, the nature of the harm investigated, the difficulty of detecting the harm if probable cause is required, and the extent to which a probable cause requirement would disrupt smooth government functioning.⁹⁸

A search of library records is not the same as a search of one's home, but it is intrusive nonetheless. The book that one reads is a matter of personal choice. If someone knows he will be judged by the book he reads, he will choose reading material based on how he thinks others will interpret that book choice. He will not choose a book based on what he wants to read, the chilling effect will occur and curtail the intellectual freedom that our society values.

USA PATRIOT Act searches investigate harm to prevent terrorist activities; terrorism has cost thousands of lives in the past decade and could cause thousands more. The value of knowing what books one has read in a terrorist investigation, however, is dubious. It is as reliable as deciding a person is Moslem because they do not eat pork. Plenty of people avoid pork for non-religious reasons, but one cannot distinguish the reason when only given their food choice. Because of the dubious value of reading lists in investigations of potential terrorism, the harm investigated by USA PATRIOT Act searches is better seen as the exercise of one's right to receive, in which case the harm is very low.

A probable cause requirement would make these searches more difficult because the value is so speculative: the higher standard would make a court take more care analyzing the value of the search before it allowed a library search in a terrorist investigation.

The dubious value of these searches means that probable cause is even more necessary in library patron record searches. Despite the dangers of misinterpreting patron records and the lack of evidence that patron records help intelligence investigations, the F.B.I. is reputedly using its USA PATRIOT Act powers to search library records.⁹⁹

As for the degree to which probable cause requirement would disrupt smooth government functioning, it is not clear that this would interrupt government functioning at all: the value of these records is so tenuous, an inves-

98. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS* 140 (4th ed. 2000).

99. *See supra* note 28.

tigation might even be better off without the records, focusing on more clearly probative evidence instead.

Looking at the courts' factors, library patron record searches for a terrorist investigation do not fit into the probable cause exception: while the nature of the harm investigated is potentially severe, the search is too intrusive, the risk of a chilling effect too great and the value of this search's results are too questionable to justify facilitating this type of search. Nonetheless, because of the USA PATRIOT Act, almost anyone is the possible target of a search, provided the government can show that there is a *chance* of terrorist activity, and the search is not entirely based on that person's First Amendment protected activities.

3. Eliminating the Particularity Requirement

After probable cause is established, the Fourth Amendment requires that a warrant request "particularly describ[e] the place to be searched, and the persons or things to be seized."¹⁰⁰ The court will not issue a general warrant: the agent must be able to describe precisely what the investigating officers expect to find. For example, when a New York Judge issued a warrant for "obscene objects" and then accompanied police officers to add items to the warrant list while the search was in progress, he found himself the subject of a Supreme Court reprimand.¹⁰¹ The Supreme Court found that the judge's presence during the search ruined his impartiality and the judge could not objectively decide if the search was reasonable.¹⁰² The specificity requirement leaves citizens open to government harassment, or warrant abuse.¹⁰³ The USA PATRIOT Act, however, does not require specificity; the government can use these warrants for the "production of any tangible things."¹⁰⁴ As one author described the problem:

100. U.S. CONST. amend. IV.

101. *Lo-Ji Sales, Inc. v. N.Y.*, 442 U.S. 319 (1979).

102. *Id.*

103. This stripping away of non-suspect citizens' Fourth Amendment rights is compounded by the USA PATRIOT Act's failure to recognize the Supreme Court's holding in the landmark case *Katz v. United States*, 389 U.S. 347 (1967) that Fourth Amendment protections are for people, not places. Ignoring this, the USA PATRIOT Act authorizes searches of business records "for an investigation to protect against international terrorism or clandestine intelligence activities." USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861. It took people out of the equation. This, in conjunction with the lack of particularity requirement, opens up non-suspected persons to searches that effectively ignore their Fourth Amendment protections. FISA and OCCSSA, gave law enforcement officials broad powers to collect information on terrorists and their activities. These measures were sufficient, in fact, to gather information on the September 11 attacks: the government failed to prevent the attacks not because of a lack of information, but because agencies did not share their information (the new Department of Homeland Security is meant to remedy this problem) and the warnings that did exist went unheeded. McCarthy, *supra* note 89, at 441.

104. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861.

Previously, the F.B.I. could get the credit records of anyone suspected of being an international terrorist. Under the new 2001 legislation, the F.B.I. can get the entire database of the credit card company. It can go into a public library and ask for the records on everybody who ever used the library, or who used it on a certain day, or who checked out certain kinds of books.¹⁰⁵

It is unclear why the US government might need access to all bank records at a bank that might possibly have records on one terrorist: such a broad search warrant easily results in a “fishing expedition.” This exposes innocent citizens to invasions of privacy the government has historically justified only for the most criminal of suspects.

B. Unchecked Executive Branch Power under the USA PATRIOT Act

In addition to being overbroad, the USA PATRIOT Act creates an imbalance between the three branches of government. It gives broad power to the executive branch. For example, it allows the executive branch to initiate emergency searches, with minimal oversight by the judicial branch. The lowered requirements make the executive’s job easier, but that is not necessarily prudent. Each branch of government has a carefully defined role and can check the others to prevent abuse of power.

In *Marbury v. Madison*, the Supreme Court established its power to overrule legislation as unconstitutional.¹⁰⁶ A court can only check the legislative and executive branches if someone challenges an act of those branches in a case before its bench.¹⁰⁷ The USA PATRIOT Act allows judicial review before a warrant issues and a library search begins.¹⁰⁸ This is acceptable, but afterwards, no one can tell anyone that a search has occurred,¹⁰⁹ and “[t]here can be no public outcry and congressional pressure over abuse of secret FISA warrants if targets are unaware of the surveillance.”¹¹⁰ Because they are the subjects of the search, patrons would be the only parties with standing to challenge the warrant,¹¹¹ but the patron’s ignorance of the investigation means that he or she can-

105. Dempsey, *supra* note 14, at 9.

106. *Marbury v. Madison*, 5 U.S. 137 (1803).

107. Because it has already passed into law, the opportunity for an executive veto on the legislation has passed. The only available executive checks on the USA PATRIOT Act are the executive branch’s use of the Act (it can choose not to exercise the full power that Congress granted, which is unlikely since the executive proposed the Act and even wanted looser checks on its power) or a judicial ruling saying the Act is unconstitutional.

108. See *supra* notes 15-17 and accompanying text.

109. See *supra* note 23 and accompanying text.

110. McCarthy, *supra* note 89, at 452.

111. In order to bring a case in court, one must have “standing” which requires that the plaintiff suffer “an ‘injury in fact’—an invasion of a legally-protected interest which is (a) concrete and particularized and (b)

not challenge the warrant in court.¹¹² Librarians, as third parties, cannot challenge the warrant.¹¹³ The patron, the only party with standing to challenge the warrant or the USA PATRIOT Act's provisions affecting citizens' rights and creating overbroad executive power, has no chance to be heard in court. No one is in a position to challenge the executive's use of USA PATRIOT Act searches.

The government has already misused these searches. As a result, judges have accused agents of lying in warrant applications.¹¹⁴ Obtaining a warrant is so easy that, it is hard to believe that agents fabricate information to get a warrant when probable cause is not even required.

The Act allows for a tort cause of action against government officials who improperly reveal sensitive information.¹¹⁵ However, the problem is that this remedy comes after the harm has occurred. The agents should not collect the information in the first place.

IV. CHANGING THE USA PATRIOT ACT: SOLUTIONS TO PROTECT LIBRARY PATRON RECORD PRIVACY

The USA PATRIOT Act is overinclusive insofar as it ignores our basic Fourth Amendment right to privacy, and freedom from unreasonably broad searches conducted without probable cause. The "war on terrorism" is not an official war—it has not met the constitutional provisions requiring a declaration of war and the government cannot strip Fourth Amendment rights with the justification of war.¹¹⁶ Because no one knows if he or she is the subject of a USA PATRIOT Act search, no one can challenge the consti-

'actual or imminent, not "conjectural" or "hypothetical.'" [citations omitted] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 555-56 (1992). Because the patron, not the librarian, suffers any injury from unreasonably invasive warrants in this case, the patron and not the librarian would be the party with "standing" who could bring the injustice to court. While there is a gag order, the patron will not know that an agent is searching records of books they have read.

112. One must know about a warrant to contest its use. The Supreme Court has held that an individual has a right to notice that a warrant was used to seize their property so that "the owner can pursue available remedies for its return." *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999). The USA PATRIOT Act gag order denies citizens any chance of notice, and thus any chance to challenge an improperly used warrant.

113. While librarians cannot challenge a warrant, they could challenge a subpoena. For this reason, a subpoena might be a better way for the government to access these records: a subpoena would not be secret, and the library could challenge the subpoena in court before it was executed. However, a subpoena is only used when a case is being tried, not in an investigation, and the subpoena is usually only reviewed by a judge if the subject of the subpoena protests (a grand jury subpoena would be the exception to this general rule). Although it would have the benefit of less secrecy, the requirement of a court case to use a subpoena would ruin the government's investigatory purpose, and it is not an ideal solution.

114. Dan Eggen & Susan Schmidt, *Secret Court Rebuffs Ashcroft: Justice Dept. Chided On Misinformation*, WASH. POST, Aug. 23, 2002, at A01.

115. McCarthy, *supra* note 89, at 439.

116. Furthermore, the "war on terrorism" has no time boundaries, rendering problematic the Act's "sunset clause" termination date of December 31, 2005. USA PATRIOT Act of 2001 § 224. If for some reason the "war on terrorism" ended before that date, the Act's extraordinary provisions would be without the superficial justification of "war" it now has.

tutionality of the Act in court. It is unlikely that the executive branch that requested this power will check itself and resist infringing on Fourth Amendment protected privacy. The only way to correct the overinclusive scope of the USA PATRIOT Act and give privacy back to Americans is through a congressional amendment to the Act. Congressmen should be asked to amend the USA PATRIOT Act to protect to the privacy of library patron records.

There are many approaches Congress can take to return privacy to library patron records. Critics have proposed solutions to the Act's blemishes. One solution comes from Congress itself and another from the American Library Association. I will present these proposals and then offer my own suggestion to remedy the Act's overinclusive application to library patron records.

A. The Congressional Solution

After rushing the USA PATRIOT Act through, Congress saw some problems with the USA PATRIOT Act.¹¹⁷ In the House Judiciary Committee's open letter to the Attorney General requesting information on the Act's usage, question 12 of the letter addressed the investigation of library records.¹¹⁸ This letter mentions two potential safeguards against misuse: a requirement of supervisory approval when seeking information from libraries, and a determination that the information could not be obtained through means other than the search.¹¹⁹ A supervisory approval requirement for library searches would still leave the broad search power in the executive branch. If an agent first determined that there were no other less intrusive means of obtaining the information, abuse of these searches would be less likely. Although sufficient, these recommendations do not go far enough: they leave the unchecked executive powers in place, and there is still the chance that Fourth Amendment rights will be ignored if there are no other less intrusive means of obtaining the information.

117. Letter from F. James Sensenbrenner, Jr., House Judiciary Committee Chairman, & John Conoyers, Jr., Ranking Member of House Judiciary Committee, to U.S. Attorney General John Ashcroft (June 13, 2002), available at <http://www.house.gov/judiciary/ashcroft061302.htm>.

118. *Id.*

119. These recommendations support Michael McCarthy's speculation that many provisions of the bill are over-inclusive because of the speed of the Act's passage and the climate at the time: Capitol Hill was in chaos due to the anthrax threat, and legislators lacked the time and opportunity to develop complex definitions that would avoid over or under-inclusiveness. McCarthy, *supra* note 89, at 451. McCarthy also excuses the Act's breadth by saying that Congress felt that the executive would limit its own power. *Id.* These are poor excuses: the chaotic climate should have made Congress especially careful with the Act, and it contradicts our government's structure to let one branch "check" its own use of power.

B. The American Library Association's Solution

Probably no group has a greater interest in changing the USA PATRIOT Act than the American Library Association. Librarians have a strong interest in maintaining patrons' free access to books. The American Library Association pushed for the state statutes that kept library records confidential. A very active organization, it has not held back its criticism for the USA PATRIOT Act.¹²⁰ In a letter to Congress before the Act was passed, the American Library Association along with the American Law Library Association and the American Research Library Association asked Congress to maintain the "high standard for obtaining a court order requiring the release of library records."¹²¹ That recommendation was not heeded.

Since the passage of the USA PATRIOT Act, the American Library Association has recommended that libraries have a plan for dealing with a search warrant including a chain of command or a designated library privacy officer.¹²² The American Library Association further recommends that librarians insist on having legal counsel present before complying with a warrant, that libraries keep records of patron information at a minimum, and that libraries periodically destroy such records.¹²³

There are some problems with these recommendations: first, the subject of a warrant might not be able to stall a search until an attorney is present. Second, the recommendation to keep records holding patron information at a minimum hinders the library's development of patron services.¹²⁴ Libraries will be unable to collect information that they would use to customize user services, track information to assess and improve library ser-

120. See, e.g., Letter from The American Association of Law Libraries et al., to U.S. Congress (Oct. 2, 2001), available at <http://www.ala.org/washoff/patriot.html> (last visited Jan. 14, 2003).

121. The American Association of Law Libraries, American Library Association and Association of Research Libraries together in an open letter to Congress pled against the USA PATRIOT Act's passage. *Id.* ("We are concerned that some of the legislation proposed thus far threatens the rights of the public and undermines the confidentiality that is crucial for the flow of information needed for the provision of library services and importantly, the vitality of our democracy"). The American Library Association was not alone when it asked Congress to keep high standards for searches of library records. The ACLU also wrote a letter to Congress before it passed the Act, asking Congress to ignore Ashcroft's push for haste, and instead to deliberate on the potential harm the Act's breadth could inflict on civil liberties. Letter from Laura W. Murphy, Director, ACLU Washington Office & Gregory T. Nojeim, Associate Director & Chief Legislative Counsel, ACLU, to U.S. House of Representatives (Oct. 23, 2001), available at <http://www.aclu.org/congress/1102301a.html> (last visited Oct. 14, 2002).

122. AMERICAN LIBRARY ASSOCIATION, POLICY ON CONFIDENTIALITY OF LIBRARY RECORDS, available at http://www.ala.org/alaorg/oi/po1_conf.html (last visited Jan. 14, 2003).

123. *Id.* Libraries around the country have followed this advice. One librarian stated that his library now destroys all patron records that are more than thirty-five days old. He cannot destroy them after a shorter time, he needs the backup—the records proved invaluable in a recent computer crash.

124. Coyle, *supra* note 36.

vices, and run systems in an efficient and cost effective manner.¹²⁵ Even more worrying, if a library does not maintain thorough records, it will be unable to monitor its system use to detect intrusions and identify those who have used systems for illegal or harmful purposes.¹²⁶

Some also advocate informing users that a USA PATRIOT Act search could violate the privacy of the library's records containing their user information.¹²⁷ Libraries should let users know that their records cannot be kept confidential, but warning patrons of the lack of confidentiality means that the librarian's fears of a chilling effect will almost certainly be realized.

C. A Different Approach

Congress makes decent recommendations, but they are not sufficient. They still allow library searches under a low standard inconsistent with our Fourth Amendment rights. The American Library Association solutions are not comprehensive enough. They leave in place the problematic provisions and try to minimize their effects.

Instead of using patches to mask the negative effects of the Act, I suggest amending the USA PATRIOT Act to specify an exception for library patron records to the searchable "business records."¹²⁸ This method of protecting library records has been used in Britain's Anti-Terrorism Act's "special procedure material" exception.¹²⁹ This exception recognizes that certain records "covering anything that a person acquired in the course of his trade, business or employment, and which he holds subject to an express or implied undertaking to keep it confidential" should have closer scrutiny before they are searched.¹³⁰ In order to search "special procedure material, a circuit judge must find that the information adds substantial value to the investigation of a serious offense, that other methods of obtaining access to the material would clearly not succeed, and that the search is in the public interest and outweighs any harm to confidential relationships.¹³¹ This exception protects library records because librarians acquire patron information in their work, and have expressly undertaken to keep that information confidential.¹³² In adopting such an exception to the USA PATRIOT Act, Congress could narrow the description of "special procedure material" so that the exception applies only to libraries, and not to other busi-

125. *Id.*

126. *Id.*

127. *Id.*

128. USA PATRIOT Act of 2001 § 215, 50 U.S.C.A. § 1861.

129. CLIVE WALKER, BLACKSTONE'S GUIDE TO ANTI-TERRORISM LEGISLATION 43 (2002).

130. *Id.* at 43-44.

131. WALKER, *supra* note 129, at 44.

132. See AMERICAN LIBRARY ASSOCIATION, *supra* note 46.

nesses if it fears that such an exception would limit government agents too much in their searches.¹³³ A legislatively-imposed rigorous standard such as this would restore patron confidence in the confidentiality of library patron records, preventing a chilling effect. Such an exception would acknowledge the importance of these records.

Creating a special records exception to USA PATRIOT Act searches would restore the scrutiny traditionally given to library records searches. The use of a circuit judge, not a private court, means that the warrant request and hearing will be public, and the judge and government agents will be more careful in their actions. The agent will have to prove more than that terrorism is a significant purpose of the search. The agent would have to show what "probable cause" is by showing that the information sought is of substantial value to the investigation.

The agent will also have to show that other methods of obtaining the material will not succeed. This is similar to Congress' suggestion that agents show that no other means will obtain the information targeted in the search. This requirement means that agents will have to think through other options and cannot invade a citizen's privacy only because it is the easiest way to get the information. Implicit in this requirement is the idea that the agent's search is targeting information with particularity, which will prevent the warrant from being misused for a "fishing expedition."

Weighing the public interest against the potential harm to confidential relationships would return library records to the protection they have previously had: as has been discussed above, the harm of a chilling effect generally outweighs any speculative value in a search of library patron records. This extra scrutiny will reduce searches of library patron records to only the most essential searches. The higher standard will restore public confidence in the privacy of their records and negate any chilling effect.

The special records exception will also have the value of restoring the balance of power in the government's branches. When a circuit judge's approval is required before a search of library records, the government agent cannot initiate an "emergency search" of these records. Additionally, the fact that the hearing is in public, not in a secret or distant court, means that citizens will be aware of these searches and have standing to challenge the violation of their library record privacy by use of the Act.

133. For example, the rigorous "special procedure material" standard as defined in Britain's Anti-Terrorism Act could apply to bank records and telephone records. Bank and telephone record privacy or lack thereof arguably does not affect citizens' First Amendment rights the same way that a lack of privacy in library patron records would, so Congress might like to retain the lowered search standard for bank records and telephone records, limiting the "special procedures material" higher standard to searches of library patron records.

Ideally, library patron records will never be subject to government supervision: reading books should never be a crime, or have criminal implications. Library books are unclassified. A person can look at these books in the library and not have it on their record, or buy the book with cash at a bookstore: library check-out lists do not have probative value. If the government feels that it needs to know the details of someone's library activities, then there is a high risk of a chilling effect negating intellectual freedom, which a court should rigorously scrutinize. We should worry about protecting citizens' liberties, not about making an intelligence agent's job easier.

V. CONCLUSION

The USA PATRIOT Act, as it applies to library patron records, strips away too many American liberties. Library records are not as valuable to a terrorist investigation as, for example, bank records may be. There is a great risk that by exposing library patron information to unjustifiably low-standard searches, there will be a chilling effect. Although searches pursuant to the USA PATRIOT Act are terrorist searches, "the security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions."¹³⁴ The USA PATRIOT Act should be amended to exempt library patron records from special searches. There is no compelling reason to discard the old standards of probable cause and particularity and there is every reason to maintain intellectual liberty by protecting these records from unnecessary searches.

134. *United States v. New York Times Co.*, 328 F. Supp. 324, 325 (S.D.N.Y. 1971).