

The Changing Definition of U.S. Libraries

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American libraries currently face a dramatic shift in how they are perceived, both by the public and by lawmakers. In order to preserve the traditional values observed by librarians, such as patron privacy and access to information, libraries must also preserve the traditional associations that have defined them. The value of libraries has been undermined by the threat of terrorism and the subsequent political pressure to

find blame for the terrorist attacks. Librarians must choose whether or not to stick to the traditional library brand, or evolve and market libraries as something else. Without public support, definitions will not change easily. The American public still views the library as a place to read and find books, and this definition must prevail for libraries to retain their relevance in American life.

Introduction

The way ordinary citizens view libraries should matter in public policy decisions. In the United States, technology and politics are shifting the perceived role of libraries in our culture away from research and education, and toward the threat of national security breakdowns and terrorist conspiracies. When members of the library community are told what to believe about libraries, public policy is being made without the public's approval.

Recent studies have shown that people think of books when they think of libraries. They do not think about privacy, or Internet, or terrorists (OCLC 2005). However, recent legislation describes libraries in complex terms, dealing with Internet service providers and electronic communication. While average Americans still view the library as a quiet place with books, members of Congress paint libraries as potential terrorism hot spots. Preserving libraries without destroying records or materials should be the goal for librarians in post-September 11 America.

The threat of terrorism

Libraries have been a subject of some controversy since the terrorist attacks of September 11, 2001. The USA PATRIOT Act (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 – Public Law 107-56, see Figure 1) that was passed shortly after the attack contained a provision that amended the Foreign Intelligence Surveillance Act (FISA). Section 215 gives the Federal Bureau of Investigation (FBI) the authority to “make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items), for an investigation to protect against international terrorism,” and compels the person receiving the order not to discuss it with anyone else. Section 215 has also been called the “Angry Librarians Provision” (U.S. House 2005b, 4) due to the strong objections raised by the American Library Association (ALA) (Jaeger *et al.* 2004, 102). The ALA claims that the USA PATRIOT Act infringes on the rights of library patrons, but it is not actually clear

that the Act would ever be used to get access to library items or records (Doyle 2005, 5). Because of the complexities of the PATRIOT Act and the conflicting statements by librarians and by Congress, many people assumed that the PATRIOT Act had just destroyed any right to privacy that may have previously existed (Kerr 2003, 608). The press fueled the fire even more, confusing the public by not distinguishing between national security letters, FISA requests, criminal search warrants and other orders (Doyle 2005, 5).

According to some, Section 215 could be far-reaching and give the government the authority to secure everything from travel records to genetic information of ordinary, law-abiding Americans (Dinh and Keefer 2006). Others, including legal experts, suggest that library patrons would have First Amendment arguments against any search of their library Internet usage history, and that Section 215 is really meant to get Internet Service Provider records and not library records (Minow 2002). Attorney General Alberto Gonzales said that Section 215 expressly protects First Amendment rights, and that libraries should not worry about the section because it nowhere mentions the word "library" (U. S. Senate 2005). Gonzales went on: "Section 215 simply does not exempt libraries from the range of entities that may be required to produce records." Librarians were not comforted by these words, because they opened up the possibility that any patron information could be a potential Section 215 request, complete with a gag order. This kind of request makes it impossible for librarians to assure patrons that their information and reading habits will be kept private.

Librarians worried that they might be compelled to spy on patrons, or at the other end of the spectrum, they would be compelled to stop keeping library use data altogether (Jaeger *et al.* 2004, 105). Often, library budgets depend on circulation statistics and community participation in library events, so keeping accurate data can be valuable to the library's future. Librarians were also unsure of how to respond to requests for documents because of the secrecy clause (Jaeger *et al.* 2004, 106). Section 215 created a need for new library training and new protocols, for which there was already little money allocated. Librarians were torn between their professional values of privacy and intellectual freedom, and the call for patriotism in a country at war with terrorism.

All of the uproar from librarians produced few positive changes in Section 215. The Section 215 language was changed in 2006 (by the USA PATRIOT Act Reauthorization of March 9, 2006) to include slightly more stringent requirements for records requests, but library records were specifically included in the law where they were previously not mentioned. The political reality has shifted for libraries. What were once known as quiet places to read and learn have become dangerous weapons against the United States, according to some politicians. The old values of privacy and intellectual freedom are no longer of value in a country under attack, and the new "reality" is that libraries will become safe havens for terrorists if citizens wish to hold on to the old values.

Perhaps the most inflammatory statements in America today are those involving September 11, 2001. When leaders and lawmakers invoke 9/11, the public is expected to react with patriotism. The fact that 9/11 changed the way we think about the world means that we sometimes go as far as changing the way America is governed and amending the Bill of Rights (U.S. Senate 2004). Obviously, foreign terrorists in this country became a real threat after 9/11, and law enforcement officials should be allowed to detect and prosecute terrorists. However, naming libraries as "terrorist sanctuaries" may go too far (Kochems, Rosenzweig and Carafano 2005). That definition could alter the way the public sees libraries and ultimately change our entire culture (Schiappa 2003, 167).

Why would libraries be targeted as terrorist sanctuaries? One answer to this question goes back to the weeks after September 11, 2001, when a public librarian in Florida reported that she saw one of the hijackers using the Internet terminal at the library (Pressley and Blum 2001). The sign-in sheet at the library apparently listed the name of one of the September 11 hijackers, as well. At the time, librarians were busy serving patrons who were desperate for information about the attacks, and the fact that terrorists may have used libraries went largely unnoticed (Matthews and Wiggins 2001). Librarians seemed to be more concerned with the librarian's act of reporting the patron than with the fact that public library services might have aided a foreign terrorist in the September 11 plot.

Years later, on April 28, 2005 during a House Judiciary Committee hearing, the U.S. Attorney for

Figure 1. The USA PATRIOT Act 2001, Public Law 107-56, first page of text.

115 STAT. 272

PUBLIC LAW 107-56—OCT. 26, 2001

Public Law 107-56
107th Congress

An Act

Oct. 26, 2001
[H.R. 3162]

To deter and punish terrorist acts in the United States and around the world,
to enhance law enforcement investigatory tools, and for other purposes.

*Be it enacted by the Senate and House of Representatives of
the United States of America in Congress assembled,*

Uniting and
Strengthening
America by
Providing
Appropriate
Tools Required to
Interrupt and
Obstruct
Terrorism (USA
PATRIOT ACT)
Act of 2001.
18 USC 1 note.

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title and table of contents.
- Sec. 2. Construction; severability.

TITLE I—ENHANCING DOMESTIC SECURITY AGAINST TERRORISM

- Sec. 101. Counterterrorism fund.
- Sec. 102. Sense of Congress condemning discrimination against Arab and Muslim Americans.
- Sec. 103. Increased funding for the technical support center at the Federal Bureau of Investigation.
- Sec. 104. Requests for military assistance to enforce prohibition in certain emergencies.
- Sec. 105. Expansion of National Electronic Crime Task Force Initiative.
- Sec. 106. Presidential authority.

TITLE II—ENHANCED SURVEILLANCE PROCEDURES

- Sec. 201. Authority to intercept wire, oral, and electronic communications relating to terrorism.
- Sec. 202. Authority to intercept wire, oral, and electronic communications relating to computer fraud and abuse offenses.
- Sec. 203. Authority to share criminal investigative information.
- Sec. 204. Clarification of intelligence exceptions from limitations on interception and disclosure of wire, oral, and electronic communications.
- Sec. 205. Employment of translators by the Federal Bureau of Investigation.
- Sec. 206. Roving surveillance authority under the Foreign Intelligence Surveillance Act of 1978.
- Sec. 207. Duration of FISA surveillance of non-United States persons who are agents of a foreign power.
- Sec. 208. Designation of judges.
- Sec. 209. Seizure of voice-mail messages pursuant to warrants.
- Sec. 210. Scope of subpoenas for records of electronic communications.
- Sec. 211. Clarification of scope.
- Sec. 212. Emergency disclosure of electronic communications to protect life and limb.
- Sec. 213. Authority for delaying notice of the execution of a warrant.
- Sec. 214. Pen register and trap and trace authority under FISA.
- Sec. 215. Access to records and other items under the Foreign Intelligence Surveillance Act.
- Sec. 216. Modification of authorities relating to use of pen registers and trap and trace devices.

the District of Columbia used the Florida public library case as an example of how terrorists are known to use libraries (U.S. House 2005c, 7). The committee members were shocked to learn of the situation, even though the witness was careful to explain that the only evidence was this librarian's description of the terrorist (after she had seen his picture in the paper). The damage was done, however, when the committee members imagined a terrorist going in and out of our publicly funded libraries to carry out their missions. Judiciary Committee Chairman James Sensenbrenner Jr., Republican from Wisconsin, put out a news advisory the same day to inform the public of the threat: "Regarding today's revelation... that 9/11 murderers used our public libraries to access the Internet and help plan their travel prior to 9/11, demonstrates the critical importance of the PATRIOT Act's Section 215. We put Americans' lives at risk if we foolishly provide sanctuaries – even in our public libraries – for terrorists to operate." Sensenbrenner's "revelation" happened to come years after the actual news was published, but the effect of using words such as "murderers" and "sanctuaries" is chilling. In just a few short years, statements in congressional hearings went from a defensive tone, asserting that libraries should not be havens for terrorists (U. S. House 2003b, 6), to an offensive one that alleged libraries had become such havens.

Others subsequently latched onto this idea of libraries as terrorist sanctuaries (Cravatts 2006). The Heritage Foundation issued a *WebMemo* warning that the Freedom to Read Act would "instead of protecting the privacy of citizens, it would turn libraries into potential safe havens for terrorists" (Kochems, Rosenzweig and Carafano 2005). Unfortunately for libraries, there was already a definition of terrorist sanctuaries in place, articulated by the National Commission on Terrorist Attacks Upon the United States (or the "9/11 Commission"): they are "the least governed, most lawless places in the world." Examples of terrorist sanctuaries in the 9/11 Commission Report included: the Pakistan-Afghanistan border, Saudi Arabia, Yemen, Somalia, Kenya and Liberia (Miko 2004). By analogy, libraries become threats to Americans' safety, and can no longer be characterized simply as places to read. Analogy is particularly useful when attempting to construct political definitions to fit a new reality, especially after a "political

revolution" (Braman 2006). The reality in which libraries are being threatened with the "terrorist" label is one in which information is more powerful than ever, and access to information is critical. Whether it is surveillance information, or publicly available materials that can be pieced together to form potentially dangerous conclusions ("inference attacks"), the library holds both.

Privacy: Essential to libraries?

"Inference attacks" were the subject of the Library Awareness Program launched by the FBI during the Cold War (Kaufman 2002). Librarians were approached and warned about the possible threat to national security that involved public information sources, and asked to reveal what foreigners were reading in the library. When the program was made known to the public, it was sharply criticized (Woods 2005). At the time, libraries were seen as guardians of constitutional rights, such as the right to access information, the right of association, and the right to privacy (Jaeger *et al.* 2004, 114).

While librarians cling to privacy as a defining value for the profession, it was never guaranteed to library patrons. The Fourth Amendment of the Constitution of the United States gives citizens the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," unless there is a warrant based on probable cause. "Papers" could be understood to include library records, except that the court in *United States v. Miller* held that information ceases to be a person's "private papers" by virtue of being handed over to a third party who may convey it to the government (Woods 2005). Thus, the Constitution does not protect library patron records from search and seizure. Most states have laws in place protecting patron record confidentiality, but a warrant (or a FISA order) will always trump patron privacy.

The Library Awareness Program of the 1980s was so troubling because librarians were being bullied into releasing patron information that was protected by law. There were no warrants in place, and librarians had no FISA orders to compel them to give any information to the FBI. The law says library records belong to libraries, and patrons therefore have no reasonable expectation of privacy in them, but the confusion between privacy law

and the values of librarianship makes it difficult to distinguish what patrons actually expect from the library in terms of privacy protections (U.S. House 2005b, 7).

The disconnect between reality and policy is seen over and over in congressional hearings. For years after September 11, Congress tried to make sense of the new political reality and the law that was being formed. The following transcript from a hearing on Fourth Amendment rights and the PATRIOT Act (April 28, 2005) illustrates one example of how vague language can serve different interests. Representative Scott asked about getting Section 215 orders from libraries when patrons were merely exercising their First Amendment rights (U.S. House 2005, 113):

Mr. SCOTT. Okay. Well, let's talk about this U.S. person where you say you can't get it solely for protected first amendment activities.

Mr. BAKER. Yes. That's correct.

Mr. SCOTT. And that solely invites a question. Suppose it's mostly for first amendment activities? A war protester?

Mr. BAKER. I am quite confident that my office, the Attorney General, and the FISA Court would be very concerned about any requests to conduct a FISA that was not done for a proper purpose; that was done apparently for a purpose to collect information about somebody who was merely protesting against the Government. There's—

Mr. SCOTT. What does "solely" mean?

Mr. BAKER. Solely means, in my mind, solely—the only reason.

Mr. SCOTT. And if it's mostly because of war protesting, but you got a little smidgeon of something else, it would be okay to get the information?

Mr. BAKER. In theory, that's what the language says. But—

Mr. SCOTT. Well, I mean in theory. I'm talking about the English language. Is that what the words say?

Mr. BAKER. Yes, it does.

Mr. SCOTT. Okay.

Here, Representative Scott is trying to argue that the law is dangerous to civil liberties by taking the literal meaning of the word "solely." Baker, on the other hand, wants to appease critics of the

law, and tries to soften the language and minimize the blow to First Amendment rights. There is a potential loophole in place for law enforcement authorities to get records even if they are mostly protected by the Constitution, but that loophole can be interpreted as a danger to free speech or as a harmless linguistic error, depending on the agenda of the reader.

Complex technologies, complex politics

Using library information to further criminal investigations is nothing new; circulation records were used in the Unabomber investigation to compare books checked out by Ted Kaczynski to those in the Unabomber's manifesto (U.S. House 2005b, 5) When the investigation of a crime leads to communications networks, "the network itself becomes a crime scene" (Kerr 2003, 610). The increase in technology and the threat of terrorism have forced policy makers to reconsider outdated laws and give law enforcement officials the opportunity to collect evidence from networks. In recent years, libraries have increasingly provided Internet access to members of the public, making them the subject of Internet- and national security-related policy decisions.

In March 2006, a new law was passed, with the intention of protecting library patron privacy. Public Law 109-178 amended the United States Code to ensure that libraries would not be defined as wire or electronic communication service providers, *unless the library is providing electronic communication services*. This provision has to do with National Security Letters, which can be issued by FBI field supervisors and have no judicial review or public accounting (Gellman 2005). Librarians were concerned that libraries could be viewed as electronic communication service providers by providing Internet access to patrons, and could therefore be subject to National Security Letters (U. S. Senate 2004). After all, "electronic communication service" is defined by the *United States Code, Title 18, Section 2510 (15)* as "any service which provides to users thereof the ability to send or receive wire or electronic communications." Libraries that allow patrons to send emails, participate in online discussion boards, or even view Web pages could fall under the definition of electronic communication services providers. Public Law 109-178 does not clarify this definition or re-

ally exempt libraries from it. Before its passage, Senator Durbin of Illinois addressed the confusion and asked the Senate bill sponsor, John Sununu of New Hampshire, to clarify what the bill meant. Sununu responded:

What we did in this legislation is add clarifying language that states that libraries operating in their traditional functions: lending books, providing access to digital books or periodicals in digital format, and providing basic access to the Internet would not be subject to a national security letter. (*Cong. Rec.* 2006, S1390)

Libraries would not be subject to national security letters simply because they offer "basic" Internet service, as long as they are acting as traditional libraries (Dinh and Keefer 2006, xxxiii). Senator Durbin remarked, "by way of comparison, a gas station that has a pay phone isn't a telephone company" (*Cong. Rec.* 2006, S1390). However, the Internet service provider (ISP) that provides access to the library could still be subject to a national security letter. Thus, national security letters can be issued to the ISP for records pertaining to emails sent by library patrons. This new law to "protect patron privacy" seems to add very little protection, if any. The law protects libraries in a different way: by defining them in a traditional sense and restricting library activities to those focused on reading and education. Libraries that evolve and add new, non-traditional functions may be perceived as a threat to national security.

Public perceptions of libraries

Outside the political arena, libraries are often viewed much the same as they have been for centuries. Traditional library definitions focus on the library's role as a book depository, where print materials are collected and ordered for the purpose of education, leisure and research (Ball 2000). Even though libraries now store many diverse types of material, and many libraries do not rely heavily on print materials, the word "library" still evokes images of stacks of books. The etymology of the word library comes from the Latin word for bark, which was used as writing material in Roman times, according to the *Oxford English Dictionary*, which defines the library as "a place set apart to contain books for reading, study, or reference." The *American Heritage Dictionary's* definition is similarly traditional: "a place in which

literary and artistic materials, such as books, periodicals, newspapers, pamphlets, prints, records, and tapes, are kept for reading, reference, or lending." These definitions leave out any mention of electronic materials or Internet access. What links traditional library definitions together is the lack of information about technology.

Modern definitions of libraries include information about newer technologies and services that libraries provide. The collaborative project *Wikipedia* goes beyond the traditional definition of a collection of books: "modern libraries are increasingly being redefined as places to get unrestricted access to information in many formats and from many sources." Similarly, *The Columbia Encyclopedia* mentions the importance of technology in libraries, emphasizing their ability to store more information than ever before and the power to provide quick access to information all over the world through the Internet.

Thus, there are two categories of library definitions that influence and are defined by public perceptions and language: traditional (those that focus on books and the storage and lending of those books); and modern (the definitions that attempt to widen the boundaries of traditional concepts). How the public views libraries is somewhere between these definitions. In order to determine what a library really is, the public's perception is the ultimate test. Through an understanding of what people want and need from the library, policy makers can change political definitions to reflect those needs.

OCLC conducted a survey in 2005 that gives a much more detailed picture of what the public thinks of libraries. Respondents were grouped according to those who were very familiar with libraries, and those who did not visit libraries often. When all American respondents were asked what they think of when they think of a library, almost 70% said "books." The survey did not limit people to one answer, but "book" or "books" was mentioned 2,152 times out of 3,163 respondents. Interestingly enough, the words "trust," "authoritative," and "privacy" were never mentioned. Besides "books," the other main associations with libraries were information, building, research, materials, reference and entertainment. The survey reported overwhelmingly positive associations with libraries, but it did indicate that the traditional definitions of libraries are still accurate.

Perhaps the public's association of libraries with books is an important consideration when determining what the standard library definition ought to be. If people can see the importance of libraries as managed collections, libraries can be saved from obsolescence. It has been suggested that the increasing reliance on digitized material will be detrimental to the role of libraries in the future. "A Web page with a set of links is not a library," and information must be carefully controlled and retained in order to prevent the "fading away" of libraries (Keller 2003). The paranoia about the PATRIOT Act, combined with government attempts to delete sensitive material from the public domain, might accelerate the problem further.

Definitions of modern libraries are problematic for both the U.S. Congress and the U.S. public. In general, people still think first of the traditional library, with rows of bookshelves, a reference librarian, a circulation desk and story time. In Congress, when a library tries to be something it is not, such as an electronic communication service provider, confusion sets in and specific legislation must be made to deal with the problem.

Librarians must choose whether or not to stick to the traditional library brand, or evolve and market libraries as something else. Without public support, definitions will not change easily. Political parties will be able to influence the public based on emotional ties to the perceived safety of pre-September 11 America.

As technology and politics grow increasingly complex, the temptation to surrender the authority to define our world to those who claim to be in touch with Reality in ways that we are not will increase. If it is agreed that definitions are made, not found, then we are encouraged to resist that temptation. (Schiappa 2003)

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