

The *Terrifying* USA Patriot Act



Commentary by J.D. Tucille

In the wake of the bloody September 11 terror attacks, the USA Patriot Act passed quickly through Congress with little debate or scrutiny. Relying on assurances from the Justice Department that the bill would ease the prosecution of terrorists and help prevent future mass murders of American civilians, traumatized legislators essentially rubber-stamped the measure into law – in the Senate, only Russ Feingold dissented.

The law dramatically expands the definition of terrorism, and allows the federal government to exercise its powers in situations that would seem far removed from the attacks on the Pentagon and the World Trade Center.

Just ask Kelley Marie Ferguson. Ms. Ferguson isn't an especially popular person these days – especially among cruise ship passengers. Dragged along on a Hawaiian family vacation in April of this year, and apparently a little lacking in consideration for others, the 20-year-old Ferguson came up with truly desperate and desperately stupid plan to be reunited with her boyfriend. Did she jump ship at the next port? Nope –

The only significant check on the USA Patriot Act's powers was the addition of a "sunset" provision, which causes parts of the law to expire at the end of 2005.

she planted phony death threats around the cruise ship that she expected – accurately – would cut the whole cruise short. The woman's notes plucked her from the high seas all right – and landed her in the middle of the controversy over the USA Patriot Act. Under that law, she faces up to 20 years in prison for knowingly conveying "false information" about a terrorist attack.

Whoever willfully ... conveys or causes to be conveyed false information, knowing the information to be false, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime pro-

hibited by this subsection ... shall be fined under this title or imprisoned not more than twenty years, or both, if such act is committed, or in the case of a threat or conspiracy such act would be committed, on, against, or affecting a mass transportation provider engaged in or affecting interstate or foreign commerce

By contrast, a first-time conviction for voluntary manslaughter nets a maximum sentence of 11 years in California.

And then there's attorney Lynne Stewart, who faces an even longer stretch behind bars – up to 40 years — for actions that, arguably, constitute little more than vigorous advocacy for her client. On April 9, 2002, Stewart earned the dubious distinction of being one of the first people to be indicted under the USA Patriot Act. Stewart has earned a reputation over the years as an attorney willing to represent defendants who many other lawyers won't touch. Her client list has included accused mobsters, political radicals and convicted would-be terrorist Sheikh Abdel-Rahman.

Since his 1995 conviction for plan-

ning a campaign of bombings and assassinations, Abdel-Rahman's defense team has labored under "special administrative measures" intended to cut Abdel-Rahman off from the outside world.

Stewart's 2002 indictment alleges that in 2000 – before the passage of the USA Patriot Act – she violated those restrictions and provided "material support for terrorism" by helping Abdel-Rahman receive letters from his followers in Egypt, and then issuing a press release on his behalf. Aside from the Justice Department's interesting interpretation of what constitutes "material support for terrorism," and the dubious legal trick involved in indicting the attorney and her three co-defendants under a law passed a year after the alleged crimes, the Stewart affair poses important questions about attorney-client confidentiality.

Ex Post Facto

"*Ex post facto*" refers to a law that applies retroactively, criminalizing actions that were not illegal at the time they were performed. Article I, Section 9 of the U.S. Constitution prohibits *ex post facto* laws, but lawmakers often look for ways around this restriction. On June 27 of this year, the U.S. Supreme Court struck down a California statute retroactively extending the statute of limitations for child molestation cases, ruling that this not essentially different from an *ex post facto* law. This ruling could, of course, affect certain retroactive provisions of the Patriot Act.

It turns out that the Justice Department was able to provide a detailed list of Stewart's alleged transgressions because a 1998 court order allowed officials to secretly monitor conversations between Abdel-Rahman and his attorneys. While that court order had eventually expired, the Patriot Act and a contemporaneous Justice Department order let such monitoring proceed without judicial review

in the cases of federal inmates "suspected of facilitating acts of terrorism," (in the words of Attorney General John Ashcroft).

But there's that terrorism word again. Posed with the problem of distinguishing obscene books and films from legally protected material, Supreme Court Justice Potter Stewart once famously said, "I know it when I see it." A similar flexible definition seems to apply to terrorism – especially when government officials are looking for opportunities to apply new "anti-terrorism" powers.

The USA Patriot Act creates a new crime of "domestic terrorism," defined as activities that:

“(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

“(B) appear to be intended—

“(i) to intimidate or coerce a civilian population;

“(ii) to influence the policy of a government by intimidation or coercion; or

“(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping

The law allows prosecutors to pile yet another charge on defendants accused of carrying out bombings and shootings (acts already forbidden by law). But the definition of "domestic terrorism" potentially goes much further.

For starters, few political protests are held in the absence of some small hope that force of argument or strength of numbers will intimidate government officials into changing their policies. Many such rallies involve "violation of

the criminal laws" in the name of civil disobedience – such violations may be as minor as marching or holding signs outside the boundaries of a designated free speech zone during the Olympics or a political convention. And some participants in any sizeable rally pull stunts that arguably pose a threat to human life – opponents of the War in Iraq were accused of doing just that when they blocked traffic in cities across the country, forcing ambulances and fire trucks to take circuitous detours.

These, too, could be now prosecuted as domestic terrorism

Sound silly? Maybe. But did anybody expect a lonely woman pining for her boyfriend to be charged under the USA Patriot Act?

In fact, there's strong incentive for prosecutors to get creative with their application of the "terrorist" tag. The American Civil Liberties Union warned:

Under the USA Patriot Act, once the government decides that conduct is "domestic terrorism," law enforcement agents have the authority to charge anyone who provides assistance to that person, even if the assistance is an act as minor as providing lodging. They would have the authority to wiretap the home of anyone who is providing assistance. Also, the government could prosecute the person who provided their home under a new crime of "harboring" a terrorist (Section 803) or for "providing material support" to "terrorists."

Those are powerful tools for prosecutors, but only for use against acts defined as "terrorism."

The ACLU's list isn't even complete – for instance, it entirely misses the

Follow-Up Information

On July 22, a U.S. district judge threw out the most serious charges against Ms. Stewart, calling them "Constitutionally vague." The government is expected to appeal

government's ability to conduct secret searches of the homes and businesses of suspected "terrorists":

Under Section 213 of the USA Patriot Act, agents can execute search warrants without informing property owners and giving them the opportunity to contest the search – or the chance to monitor the search to ensure that it remains within authorized bounds. Section 213 requires only a belief that notifying a property owner of a search

"may have an adverse result," that "the warrant prohibits the seizure of any tangible property," and that after-the-fact notice be given to the property owner within a "reasonable period."

The Justice Department's official *Field Guidance on New Authorities Enacted in the 2001 Anti-Terrorism Legislation* admits that "reasonable period" is a "flexible standard to meet the circumstances of the case." The document suggests that, based on court decisions over the years, it could mean as little as seven days, or as many as 45 days – subject to extensions from a judge.

Oddly, nothing in Section 213 limits secret searches to suspected terrorist activity – they could potentially be conducted in the course of any federal investigation

The loudest outcries and angriest headlines over the anti-terrorism law have involved powers granted to the FBI by Section 215:

No person shall disclose to any other person (other than those persons nec-

essary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section.

This has been interpreted to mean that bookstores and libraries could be required to cough up sales and loan records without being permitted to contract their customers, or even to contact their own lawyers for an opinion. The American Library Association warns, "Many librarians and library users recall the FBI's Library Awareness Program of the 1970s and

80s, when the FBI inappropriately attempted to monitor patrons's reading habits and obtain personal information about library users."

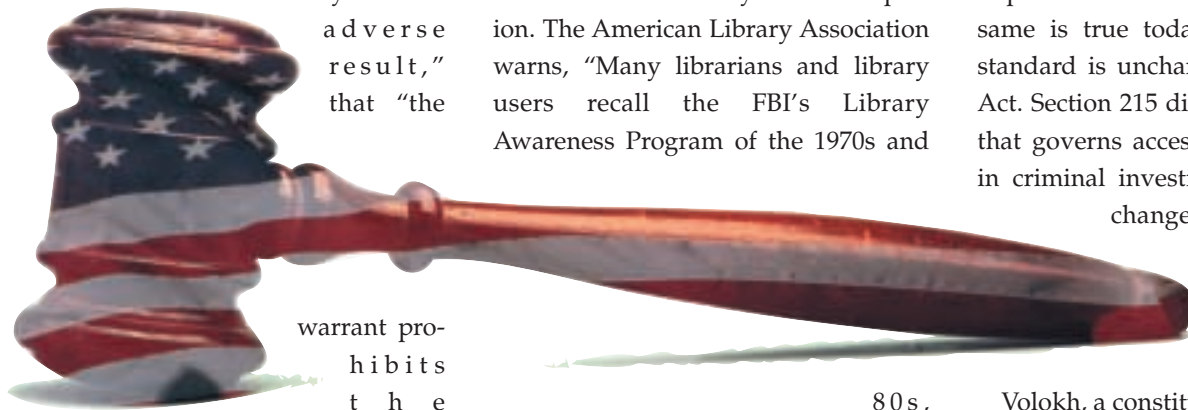
In response, Representative Bernie Sanders, of Vermont, has introduced the Freedom To Read Protection Act, which would exempt libraries and

bookstores from Section 215 of the USA Patriot Act. The bill is co-sponsored by civil liberties advocates from both major parties.

But in an analysis of Section 215 published on his online blog, Professor Eugene Volokh of the UCLA School of Law writes:

Pre-Patriot Act law did not require a probable cause search warrant. A mere grand jury subpoena sufficed in the criminal context, and didn't even require that a crime be committed. The same is true today— that very low standard is unchanged by the Patriot Act. Section 215 didn't change the law that governs access to library records in criminal investigations— rather, it changed the standard in terrorism investigations by lowering it to mere relevance.

Volokh, a constitutional scholar, cites case history to support his assessment of the law, and his opinion carries considerable weight. It may well be that, rather than expanding federal investigators' ability to probe people's reading habits, the USA Patriot Act raised a long-overdue red flag about a long-standing weakness in privacy protec-



Needs a headline

PRESS RELEASE FROM THE AMERICA LIBRARY ASSOCIATION and the AMERICAN BOOKSELLERS FOR FREE EXPRESSION:

[May 15, 2003] The book and library community today announced its strong support for the Freedom to Read Protection Act (H.R. 1157), a bill that restores the protections for the privacy of book and library records that were eliminated by the U.S.A. Patriot Act. Thirty-two groups representing booksellers, librarians, book publishers, authors and others joined several companies, including Barnes & Noble Booksellers and Borders Group Inc., in issuing a statement supporting H.R. 1157, which was introduced by Congressman Bernie Sanders (I-VT) on March

6. "The book community is united in believing that Section 215 of the Patriot Act threatens First Amendment freedom by making people afraid that their purchase and borrowing records may be moni-

tions.

So Representative Sanders's bill may not fix matters. It would amend the USA Patriot Act (actually the Foreign Intelligence Surveillance Act, which itself was amended by the USA Patriot Act), but leaves libraries and bookstores vulnerable to searches under other laws.

As powerful and controversial as the USA Patriot Act has proven to be, by no means does it represent the fulfillment of the federal government's Christmas list of must-have powers. In February of this year, a draft document leaked from the Justice Department outlined plans to further empower government officials to probe the details of Americans' private lives. Quickly dubbed "Patriot II" or "Son of Patriot," the Domestic Security Enhancement Act of 2003 included the following powers on its secretly drafted wish-list:

- ✓ warrantless access by investigators to consumer credit reports
- ✓ forcible collection of DNA data on suspected terrorists (poor Ms. Ferguson could end up in a permanent database)
- ✓ loosened legal restrictions on domestic surveillance

House Judiciary Chairman James Sensenbrenner promises that any effort to expand [the Patriot Act] will happen "over my dead body."

✓ immunity to lawsuits for investigators who overstep the law while gathering intelligence

✓ immunity to lawsuits for people who point their fingers at "suspected terrorists" for reasons real – or malicious restrictions of private encryption increased secrecy for government actions – including detentions and grand jury testimony loss of citizenship for people "suspected" of terrorist activity "with intent to relinquish his nationality" — with "intent" defined by the government.

Patriot II may well prove to be the straw that broke the camel's back. The document's leak prompted a public outcry: In particular, the provision for stripping people of their citizenship — and of many of the constitutional protections that accompany citizenship — prompted sharp criticism from across

the political spectrum. Not only has Patriot II been declared "dead on arrival" by many political observers, but the original USA Patriot Act is under serious assault.

A series of symbolic resolutions by college town councils criticizing the anti-terrorism law has expanded to a demand for changes to the law by Hawaii's legislature – with Alaska poised to follow. Representative Saunders's Freedom To Read Protection Act has 96 cosponsors as of May 17, and the Senate turned back an effort to remove provisions that will cause some parts of the USA Patriot Act to expire at the end of 2005. House Judiciary Chairman James Sensenbrenner promises that any effort to expand the law will happen "over my dead body."

But that's cold comfort for Kelley Marie Ferguson, Lynne Stewart and other "terrorists" indicted under the USA Patriot Act. They remain examples of just how perverse the law can get when passions are excited – and how far some officials will eagerly push government power on even the flimsiest of justifications. ■

J.D. Tucille is an Arizona-based writer and civil liberties advocate

tored by the government," Chris Finan, president of the American Booksellers Foundation for Free Expression, said.

"Protecting the confidentiality of one's use of the library is of primary concern to librarians," Judith F. Krug, executive director of the American Library Association's Office for Intellectual Freedom, said. "Rep. Sanders' bill would restore this core value of librarianship

Under Section 215 of the Patriot Act, FBI agents do not need to prove they have "probable cause" before searching bookstore or library records: They can get access to the records of anyone whom they believe to have information that may be relevant to a terrorism investigation,

including people who are not suspected of committing a crime or of having any

knowledge of a crime. The request for an order authorizing the search is heard by a secret court in a closed proceeding, making it impossible for a bookseller or librarian to have the opportunity to object on First Amendment grounds prior to the execution of the order. Because the order contains a gag provision forbidding a bookseller or librarian from alerting anyone to the fact that a search has occurred, it would be difficult to protest the search even after the fact.

If H.R. 1157 is enacted, law enforcement officials will still be able to subpoena bookstore and library records crucial to an investigation, but the courts will exercise their normal scrutiny in reviewing these requests.