

## Who Knows?

The FBI may be hot on the trail of books read by potential terrorists. We're not sure because we're not permitted to know

by Nat Hentoff

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Civil libertarians have passionately debated the pros and cons of the USA Patriot Act, passed in rapid response to the Sept. 11 attacks. Yet one provision targeting the First Amendment has largely escaped public scrutiny -- except among bookstore owners and librarians.

Under Section 215 of the Patriot Act, the director of the Federal Bureau of Investigation or his designee may seek an order from a specialized federal court "requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities." The Patriot Act incorporates part of the Foreign Intelligence Surveillance Act (FISA), under which this court handles cases that the government wants kept secret for national security reasons.

The news that the government was planning to check up secretly on Americans' reading habits was enough to send shivers through the ranks of bookstore owners and librarians. The threat to freedom of speech couldn't be clearer: Investigating what we read is not that far from investigating what we say and think.

On Nov. 1, Chris Finan, president of the American Booksellers Foundation for Free Expression (ABFFE), sent a letter to booksellers around the country warning them that they might be receiving visitors from the FBI. In issuing the order to search store records for books purchased by those suspected of involvement with terrorism, Finan explained, "The judge makes his decision *ex parte*, meaning there is no opportunity for you or your lawyer to object in court." Finan added that when the bookseller is suddenly confronted by the FBI, "You cannot object publicly either."

Indeed, the law states that "[n]o person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section that the Federal Bureau of Investigation has sought or obtained)." Here is a gag order that would have intrigued George Orwell.

### Keeping Quiet

Gag orders are not new, of course. But when they are imposed on participants in trials or pretrial proceedings, the word is swiftly communicated to the public via the press, and the order itself can be fought in open court. Under Section 215, booksellers -- and librarians, to whom the provision also applies -- are much more restricted.

Finan cautioned booksellers to be very careful. "Although the wording of the law seems to suggest that contacting anyone about the court order is forbidden," he wrote, "it is ABFFE's belief that you remain entitled to legal counsel. Therefore, you may call your attorney and/or ABFFE. Because of the gag order, however, you should not tell ABFFE that you have received a court order under FISA. You can simply tell us that you need to contact ABFFE's legal counsel."

Judith Krug, director of the American Library Association's Office of Intellectual Freedom, has given the same advice to her members.

I have been told that, as of this writing, the FBI has made at least three visitations under Section 215. That's the only information I have. I don't know if the searches have been in libraries or bookstores, and I can't reveal my sources without putting them in danger of punishment for disobeying a court order.

What happens when there is an actual case contesting these searches -- will those court proceedings themselves be subject to a gag order under the Patriot Act? Attorneys who work with the American Library Association and the ABFFE have suggested that the gag order may indeed prevent the press, and therefore the public, from knowing about subsequent court proceedings. (After all, Attorney General John Ashcroft has already closed most immigration hearings to the press in his ceaselessly innovative war on terrorism.)

Even when -- as in this column and a very few articles elsewhere -- the word gets around that buying or borrowing books may put you in the FBI's database, how is it possible to track what the government is doing? How many libraries and bookstores are being required to turn over the reading lists of suspects? And what are the titles of the books that attract the FBI's attention? Orwell's *1984*? My *Living the Bill of Rights*?

It is worth noting that under Section 802 of the Patriot Act, one definition of "domestic terrorism" covers "acts [that] appear to be intended . . . to influence the policy of a government by intimidation or coercion." How broadly does the government define "intimidation" these days? Would *The Collected Opinions of William O. Douglas* qualify?

I was thinking of the Patriot Act last month when I saw President George W. Bush on television speaking to students at Qinghua University in Beijing. "Life in America shows that liberty, paired with law, is not to be feared," he said. "In a free society, diversity is not disorder. Debate is not strife. And dissent is not resolution."

Having recently debated the attorney general's chief legal adviser, Viet Dinh, a keenly intelligent semanticist, I expect that Dinh would respond to librarians' and booksellers' apprehension by referring to this part of Section 215: "An investigation under this section shall not be conducted of a United States person solely upon the basis of activities protected by the first amendment to the Constitution of the United States."

What this means, as parsed by counsel for the ABFFE and the American Library Association, is that any "United States person" remains free to criticize -- though not intimidate -- the attorney general by speaking in a public park. Or by writing a critical letter to a newspaper. But if the FBI suspects that this person is somehow involved in broadly

defined "terrorist" activities, her book selections can no longer be private.

In the Dec. 21 *Capital Times*, a newspaper in Madison, Wis., where there are a lot of bookstores and libraries, Marsha Rummel, manager of the Rainbow Bookstore Cooperative, said that she is not reassured by that alleged First Amendment exception: "The FBI could come and demand information on an activist in town -- or who knows who -- wanting to know which purchases they made."

And Barbara Dimick, director of the Madison Public Library, added, "We're real jittery. It puts us in a hard position. We want to tell people who use the library that records are confidential, and they can use materials without fear of intimidation. That's being usurped now by federal agents who need to discover information about possible terrorism action."

But one bookstore owner -- Sandy Torkildson, who presides over A Room of One's Own -- has a solution. She told *Capital Times* that she "does not keep sales records by purchaser name, in order to protect her customers." Unfortunately, Torkildson may be underestimating the FBI's ever advancing technological skills.

### **Speech vs. Food**

In cooperation with the American Bar Association, Justice Anthony Kennedy has begun a "Dialogue on Freedom," urging judges and lawyers to speak at high schools on fundamental American freedoms in the wake of the Sept. 11 attacks on, as he puts it, "the rule of law." On Feb. 4, along with Harvard Law professor Arthur Miller, Kennedy brought the dialogue to New York's Stuyvesant High School.

As reported on National Public Radio, professor Miller asked the students what books they would give to a woman in a foreign country, who supports her country's dictator, in order to give her an accurate picture of America. Among the students' suggestions: *1984* and Henry David Thoreau's *Civil Disobedience*. At that point, Justice Kennedy asked, "Suppose the woman tells you that she would get in serious trouble if these books were found in her house?"

One student, Miranda, replied that she would "give her the ability to go get them," but Kennedy wouldn't allow her to "play with the hypothetical." So Miranda said, "I would give them to her."

"Would you urge her to keep them?" the justice asked. "Would you urge her to take the risk?"

The answer from Miranda was "Yes." But Richard, another student, said, "If I knew that she could not have freedom, then what's the point of risking her life? Because, I mean, before you can do anything about freedom and liberty and pursuit of happiness, you must be able to live. You must be able to, you know, feed your family and put clothes on your back."

And so Justice Kennedy asked, "Have you been a human if you can't dream about freedom? Isn't that what we're talking about -- and doesn't that cause some risks?"

Section 215 of the Patriot Act, which is no hypothetical, strips away some of that freedom -- to presumably buy us some safety. But how do we explain to those students in New York and Beijing why some Americans -- how many, we don't know -- now take a risk when they borrow or buy books? And how do we explain why the rest of us can't even know which books make the FBI's list?

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