



National Security Letters Can Intrude on Executives' Businesses

IT'S VEGAS FOLKLORE, A RECURRENT MALE FANTASY and a porn cliché (not that I rent those kinds of videos, if the FBI is reading this). The repressed librarian — hair wrapped tight in a bun, hiding behind thick glasses and lost in a blouse buttoned to her chin — hits the bright lights of Las Vegas and goes wild. She loses the glasses, lets down her locks and unbuttons the blouse to her navel. What happens in Vegas, as the ads tout, stays in Vegas.

Except, of course, when it doesn't — when what happens in Vegas winds up in a government database. Which explains how the librarian, Las Vegas and the legions of workers who cater to the librarian's whims in Sin City (employees of hotels, restaurants, car rental agencies, casinos, travel agencies, etc.) got sucked into the debate over re-upping the Patriot Act — a debate that died down (for now), after President George W. Bush on March 9 signed legislation renewing the act.

The Patriot Act — which passed within weeks of the Sept. 11, 2001, terrorist attack on America and by huge majorities in Congress — not only loaded law enforcement with greater powers of surveillance, but also reduced and sometimes eliminated judicial oversight. Fewer checks and balances; more blank checks.

The act's passage sparked protests from the usual suspects — the American Civil Liberties Union, the National Association of Criminal Defense Attorneys and civil libertarians of all stripes.

Congress tuned them out. Still, legislators hedged their bets by mandating 16 provisions that would expire in four years. Now, with a few cosmetic changes, all 16 have been re-upped, 14 permanently and two for another four years.

Among the earliest and most vocal critics of the Patriot Act were librarians. It was probably inevitable that Bush and librarians would square off. After all, librarians live for books and Bush . . . well,

let's just say he's not a reader. Librarians became so outspoken over the act that §215, one of the provisions just reauthorized, became known as the "library provision." Section 215, which actually applies to all businesses, not just libraries, allows the FBI to grab records without a district court order or a grand jury subpoena.

The process is simple. The U.S. Department of Justice need only apply to the Foreign Intelligence Surveillance Act (FISA) Court for records allegedly relevant to a terrorism investigation. The business whose records are seized can — and most likely will — be slapped with a gag order. Until this year, there was no judicial review of these gag orders. Now, there is no meaningful judicial review. A modest concession by the administration allows a gag order to be reviewed by a court after one year (unless the ban is extended for a second year, and a third).

Gag orders make it hard to tell how the feds may use and abuse their power. For example, the FBI claims not to have used §215 to demand records from libraries. But librarians insist otherwise, stating that they must suffer in silence (irony alert: librarians being told to shush), or risk prosecution.

More alarming, the furor over §215 has overshadowed a bolder power grab by the feds. The administration has been playing a shell game with the public. While foes of the Patriot Act tried to table §215, the real action has been under the table, via the proliferation of national security letters (NSLs). According to a Nov. 16, 2005, article on www.miamiherald.com, the number of NSLs issued by the feds has skyrocketed to an estimated 30,000 a year. With such widespread use, it would be more accurate to call them national insecurity letters.

NSLs were born in the 1970s for use in espionage and terrorism cases, but were greatly expanded by the Patriot Act's §505. Unlike a §215 subpoena, not even a pretense of judicial review exists with NSLs, nor does prosecutorial oversight. Each of the special agents in charge of the FBI's 56 field offices is authorized to issue NSLs, as are other high-level FBI brass. NSLs carry a permanent gag order.

PATRIOT ACT PRESSURES

- THE REAL ACTION REGARDING THE PATRIOT ACT IS THE PROLIFERATION OF NATIONAL SECURITY LETTERS (NSLs).
- AN NSL CAN CRIPPLE A COMPANY WITH A SHORT-FUSE DEMAND FOR A WIDE RANGE OF DOCUMENTS.
- THE PATRIOT ACT SADDLED "FINANCIAL INSTITUTIONS" WITH STAGGERING PAPERWORK DEMANDS.

In an effort to placate librarians, legislators, in the extension bill signed this month, forbid the use of NSLs to seize records from libraries that relate to their “traditional” functions. In addition, businesses hit with NSLs no longer must spill their lawyers’ names to the FBI.

Despite those minor concessions, however, the FBI hit the jackpot with NSLs — no courts, no prosecutors, no review. According to former U.S. attorney and congressman Bob Barr in a Nov. 18, 2005, *Times Argus* article, NSLs are “the weapon of choice by the administration to conduct fishing expeditions.”

More chilling, in 2003 the administration raised the stakes. In the past, agents had to destroy the records of citizens and businesses gathered through NSLs when an investigation closed. But by Executive Order 13388, signed by Bush in 2003, those records are now dumped into a permanent data bank for “data mining” by federal agents. A citizen may never know that sensitive records on him have been swept up, and will be kept forever in federal files.

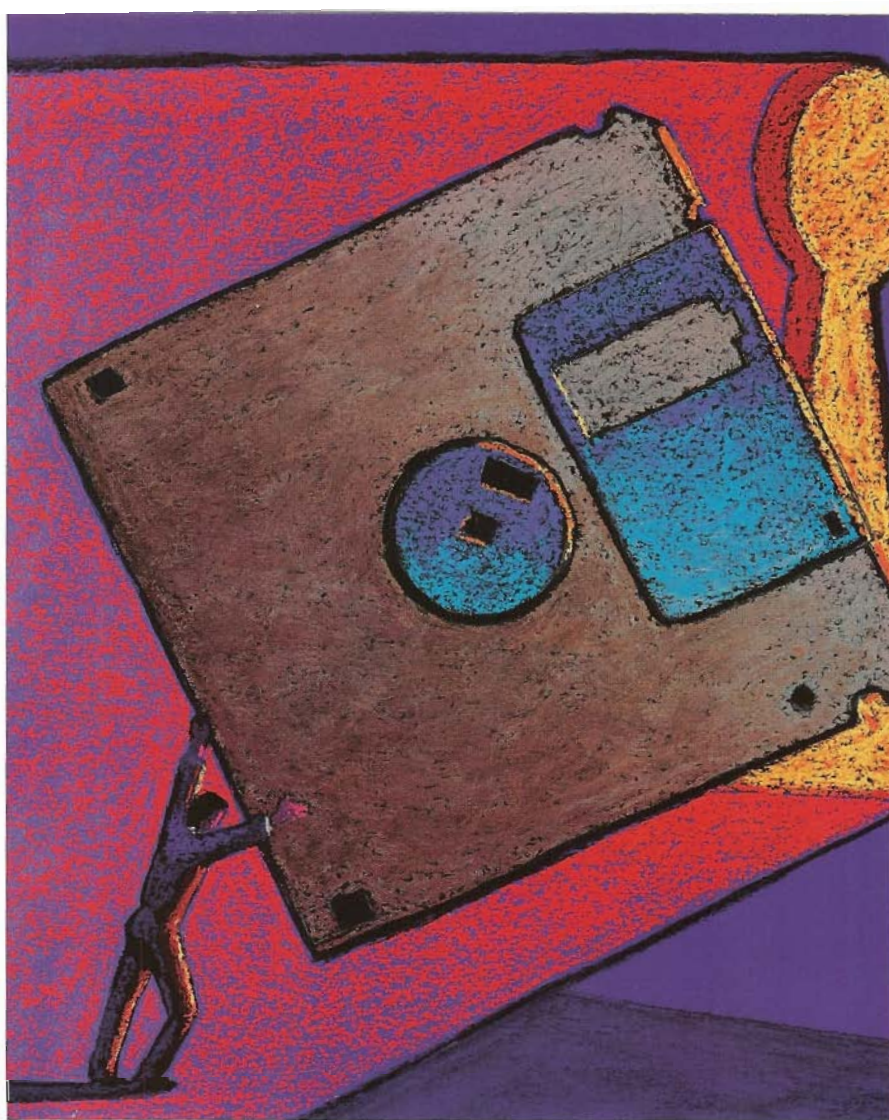
OUTRAGE OVERDUE

Like a §215 order, an NSL can cripple a company with a short-fuse demand for a wide range of documents. Indeed, it can bring a city to its knees, as Las Vegas learned in December 2003. According to a Nov. 10, 2005, article in *Business-Week Online*, the feds flooded Vegas in 2003 with scores of NSLs, hitting hotels, casinos, car rental agencies and other businesses with demands for financial records involving hundreds of thousands of tourists.

Document sweeps under §§215 and 505 are only a small part of the paperwork demands and compliance costs of the Patriot Act. While such a sweep can sucker-punch a business once or twice, the act’s day-to-day recordkeeping burdens will, in the long run, take a greater toll.

Like a §215 order, an NSL can cripple a company with a short-fuse demand for a wide range of documents.

The Patriot Act saddled “financial institutions” (broadly defined to include banks, credit unions, insurance companies, pawn shops, title companies, jewelry stores, travel agencies and a host of other types of businesses) with staggering paperwork demands. One beleaguered banker claimed, in a Nov. 28, 2005, *WSJ.com* article, that her



31-employee institution spends up to \$150,000 a year, or 15 percent of its operating budget, on Patriot Act compliance.

Hey, Mr. Businessman, your outrage is overdue.

During the showdown over renewing the sunset provisions of the Patriot Act, a new player appeared at the table: big business. Thus, the debate is no longer just about civil liberties and librarians; now it’s about hard currency and multinational conglomerates, as well. Which explains why groups that usually back this administration — including the National Association of Manufacturers, the U.S. Chamber of Commerce and the National Association of Realtors — have stepped up their criticisms of the Patriot Act.

Even though the president gained the upper hand when he renewed the 16 sunset provisions, the book is not closed on the Patriot Act. Already, several influential senators, including Arlen Specter, R-Pa., chairman of the Senate Judiciary Committee, are pushing for legislative fixes. When the chips are down, don’t bet against the librarians. ELA

Paul Coggins is a principal in Fish & Richardson in Dallas and the former U.S. attorney for the Northern District of Texas.