

ACRL/NY Symposium Report by Janet Clarke
Operation Intellectual Freedom: Librarians on the front line
November 21, 2003
New York City

There were four speakers in the morning: Judith Krug, Director of ALA's Office for Intellectual Freedom; Lee Strickland, Senior Intelligence Officer with the US Federal Government; Daniel Lyons, Associate Division Counsel for the New York Office of the FBI; and Siva Vaidhyanathan, Professor of Culture and Communication, NYU. In the afternoon, Rick Karr of National Public Radio moderated the Roundtable discussion.

Judith Krug spoke on "Intellectual Freedom, the Patriot Act and the Impact on Libraries and Librarians." She stated that there are 15 acts that make up the USA Patriot Act, which passed without Congressional hearing. This law gives broad new powers to federal agencies regarding the Fourth Amendment. What it means for libraries, according to Krug, is that FBI agents with a search warrant are allowed searches of library circulation records. Search warrants are executable immediately. Subpoenas, which give a time frame for compliance of search requests, are not necessary under the Patriot Act. There is a gag order provision; however, libraries still have right of counsel. Libraries can call the Freedom to Read Foundation, the legal arm of the Office of Intellectual Freedom, and speak to legal counsel if presented with a search warrant. While the Fourth Amendment (which prohibits unreasonable search and seizure) still exists, this protection can be trumped by section 215 of the Patriot Act (which applies to libraries). In states that have confidentiality clauses in their statutes (48 states do, including NY), libraries have a legal responsibility to protect privacy. Krug advises every library to have a policy on any kind of legal order, not just for the Patriot Act. It should state that *only* the head librarian can respond to the legal order so that an unknowing student worker, for example, will not have to handle the order. The procedure should be to copy down the badge information and name of agent/officer and then to contact the head librarian immediately. Also, Krug advised libraries to destroy sign-in logs for computer use on a daily basis.

Lee Strickland, a visiting professor of Information Studies and the Scholars Program at the University of Maryland, is an attorney by training and a senior intelligence officer with the CIA. Strickland, whose interests are law of information, intellectual property, First and Fourth Amendments, and government intrusion, spoke about the government's need to balance national security with individual privacy. He put the USA Patriot Act in the historical context of events that gave rise to laws regarding foreign intelligence, surveillance, and search and seizure. Strickland suggested that Krug's criticisms of the Patriot Act have to be tempered by the realities of terrorism. The Fourth Amendment rights on unreasonable search and seizure are never absolute and require the test of reasonableness. In times of "national threat," Strickland explained, we generally see an increase in government power and decrease in civil liberties. The question is whether this creates a new baseline of government power after the threat is removed, or whether there appropriate measures to conduct a review of government power. Strickland cited the Alien and Sedition Acts of 1798 as a starting point for qualifying the Fourth Amendment as it applied to national security. Other events or cases he highlighted included the Civil War period in which habeas corpus—the right to object to detention or imprisonment--was suspended three times; World War I when the Sedition Act of 1918 was enforced in convicting more than 2000 people for speech-

violations; the Palmer Raids of 1918-21 involving massive arrests of union members and “leftists” in opposition to government; the Rockefeller and Church Committee Reports of 1973 and 1974, which marked a watershed moment for CIA intelligence activities; the Handschu Guidelines of 1972 which severely limited police investigations of political activity; and FISA (Foreign Intelligence Surveillance Act) of 1978 which was the first effort to regulate foreign intelligence activities. Strickland explained that, while FISA requires a two-pronged standard of probable cause and agent of foreign power, Section 215 of the Patriot Act provides for a lesser standard for the same activities.

Technology has also complicated the issue of privacy. For example, while ECPA (Electronic Communications Privacy Act) of 1986 initially provided for government acquisition/interception of telephone communication, it now applies to cell phones and computers. Because of information available on computers, the government has the ability to initiate data-mining on individuals. Strickland noted that, since the law tends to lag behind advances in technology, there is currently no clear standard for initiating a data-mining. Furthermore, while ECPA and other laws focused on restricting *government* invasion of privacy, individuals are now also concerned about *commercial* invasion of individual privacy, e.g., identity theft.

The need for public security should be balanced with the need for individual privacy, and it is a complicated balancing act. Strickland pointed to an example from the UK as a model the US might adopt: the UK has established an independent tribunal to hear citizen complaint of overreaching by government agencies. He also cited several cases to watch regarding government invasion of privacy that are before the Supreme Court currently: USA v. Padilla (“dirty bomb” suspect); Hamdi v. Rumsfeld (president’s war-making power vs. civil liberties); the case on foreign national detainees in Guantanamo Bay; and Hiibel v. Nevada (right to anonymity).

Daniel Lyons of the FBI pointed out that Attorney General Ashcroft swore under testimony that Section 215 of the USA Patriot Act had never been used, though several symposium participants wondered how we could ever know the truth given the gag order provision. He gave a brief explanation of how the FBI “starts a case,” indicating that it doesn’t begin a case by looking at library records. Lyons echoed Strickland’s caution that Section 215 should not be viewed in a vacuum, but rather that it should be considered in the context of previous laws.

Siva Vaidhyanathan, a cultural historian and media scholar, is the director of the undergraduate program in Communication Studies in the department of Culture and Communication at New York University. He may be best known for his book, *Copyrights and Copywrongs: The Rise of Intellectual Property and How it Threatens Creativity*. He gave an engaging talk about the restrictiveness of the Digital Millennium Copyright Act five years after enactment, the security problems of electronic voting, and other issues related to libraries and other digital environments. One example of the tensions between intellectual property and public access was the Diebold case against Swarthmore and ISPs that allowed postings critical of Diebold’s electronic voting machines. In this case, Diebold invoked the DMCA to stop these critical postings on the internet. Vaidhyanathan’s point was that DMCA is not just about illegal copying of movies or music, but has far-reaching implications on public information. For more information, see <http://www.sccs.swarthmore.edu/users/06/nelson/scdc/home.php>. See also www.cryptome.org and www.cartome.org, which are public archives of “sensitive” information the federal government doesn’t want public.