

The Patriot Act and Academic Freedom
by Cynthia Vroom
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Gary Watson: Cynthia Vroom is a member of the Office of the General Council at UCOP and will speak on matters related to the Patriot Act and the University. She is a graduate of Stanford Law School and taught law as a visiting professor in France, where she also gave a paper on the U.S. Patriot Act at an international symposium. We are very grateful to you for being here.

It's a pleasure to be here and an honor to be invited to speak with this very distinguished group of people. I have talked to a wide variety of groups on a various campuses about the Patriot Act. A lot has been written and said about civil liberties concerns and the Patriot Act, but there is also a lot of misinformation out there. The objectionable civil liberties provisions of the Patriot Act—increased government surveillance and greater ease with which the government can obtain wiretaps and surveillance orders—is not something of special concern to academicians; it is of special concern across society. When the Act was first passed, there were fears that there would be massive roundups of Middle Eastern people on campuses, that the FBI would be carting off computers and circulation records from libraries and that there would be a wholesale trampling of First Amendment rights. It's important to realize in the year and eight months since the Patriot Act was passed that none of this has happened, although the potential effects remain a concern.

In considering the connection of the Patriot Act to academic freedom, I realized that the Patriot Act itself does not have a very substantial effect on academic freedom, so the topic of my talk can more accurately be described as “The Fight Against Terrorist and Academic Freedom,” because it is this larger world of regulations and policies that is giving rise to concerns. I'd like to talk about the effect of anti terrorism laws and regulations on research, on freedom of speech and on freedom of association.

Academia in general has been a target of the new security laws and regulation. This particularly impacts UC because of the extraordinary amount of research we do on the campuses and at the labs and medical centers. There is a concern in the university community about these new laws limiting freedom of inquiry and open access to research. Eugene Skolnikoff, who is MIT Professor Emeritus of Political Science, put it well; “This involves a fundamental clash of values between university openness and national security interests in clamping down.”

With respect to campus research, the aspects of the Patriot Act people are most concerned about are the Bioterrorism Provision and increased regulation of foreign students. The Bioterrorism Provision is only one paragraph out of a 166-page law, but it has given rise to a veritable Frankenstein of federal regulation and subsequent laws and policy. Another key concern in the research community is that the government has been developing a category of sensitive information for non-classified research owned by the government, called SUTI. It's sort of the intermediate category between classified and public. The government is trying to impose disclosure and publication restrictions on this new category of information. The concern is that this could have a chilling effect on the ability to do research freely and publish results.

The Patriot Act imposes stricter review of foreign students and the ability to obtain a visa, which is key in University research where a substantial number of researchers come from abroad. Special attention is now being paid to where foreign students come from and what they are coming here to

do. Once they get here, they're monitored very closely. A lot of you already know about the SEVIS program, which imposes a monitoring system for foreign students once they're here. An interagency government panel was recently established to scrutinize visa applications of students applying for advanced studies in fields involving weapons development. The access of foreign scholars to sensitive research has always been restricted—in the space program for example—so the concept is not really new. What is new is that this has extended into the biological sciences. This is the first time the biological sciences have been confronted with severe restrictions on access to research. Many people in the research community believe the monitoring of foreign students is conceptually not a bad idea, but are concerned that these increased controls will impact UC's ability to get the best and the brightest.

Another concern is the Bioterrorism Preparedness Act, which is an outgrowth of the Patriot Act that requires a much higher level of scrutiny of anyone having access to biohazardous materials. This affects a lot of people at the university. Background checks are now required for anyone working with any of a select list of pathogens, which has had a substantial impact on UC because we have been forced to cut off access of nationals from a list of six countries to any kind of biohazardous research. That list of countries is growing and is making it difficult for universities to pursue certain kinds of biohazardous research. We have to do background checks on every person who has a remote chance of coming in contact with these materials, down to the truck drivers and janitors. Last summer there was the first arrest under this provision for unlawful possession of anthrax. It involved a graduate student at the University of Connecticut who came across some anthrax while he was cleaning out freezers. His first instinct was never throw away a specimen, so he put it in one of his freezers and somehow the FBI found out about it and arrested him. He is now on a watch list and a marked man forever. There are obviously arguments back and forth as to whether it's a good idea to keep these kinds of controls on materials such as anthrax. It's undeniable that there needs to be a balance between research freedom and openness and making sure that these kinds of materials don't get into the hands of the wrong people. We all saw the effect of these miniscule amounts of anthrax being put in envelopes and sent to people. If you need to have a way to control biohazardous materials, it's difficult to find a balance without some intrusion on research freedom. Researchers and the government are struggling with that balance. With respect to censorship in university labs, the Department of Defense issued a draft directive last summer proposing criminal sanctions for the open discussion of certain types of research on campus. The directive was too controversial even within the Pentagon and was buried, which is saying something. But these things are being thought about and discussed. So there are issues related to the climate, the times and the general need and desire to fight terrorism that are now coming from a variety of sources.

The second thing I'd like to talk about is freedom of speech. With respect to academia, there has been a suggestion—and again, this goes way beyond the Patriot Act—that an intolerance for dissent since 9/11 is having a chilling effect on the comfort level people have about speaking out on politically unpopular topics. It's not a problem limited to universities, but the university is such a bastion of free speech that it's felt very strongly here. At UC we've had only one incident that I know of. There was a student group called Ché Café in San Diego, a student cooperative committed to radical social change and equality. They were on the UCSD website and they hosted a website called BURN, using the UCSD domain name. This website had link to several radical organizations, one of which was a violent Columbian organization called FARC. When the administration found out about the web link, it ordered the students to remove it. The administration was concerned that the web link could be grounds for prosecution under the provision of the Patriot Act prohibiting material support to terrorists and that merely referring to a website could be construed as giving material support to terrorists. The students raised First Amendment concerns, and somebody made the point in a newspaper article that the New York

Times has the same link. The matter was referred to our office, and we concluded that it was not reasonable to claim that a link to another website was material support. But it was an interesting incident because it illustrated the climate of fear, and maybe a willingness to override some speech rights out of fear of prosecution. In the end Ché Café permanently removed that web link, so you could make the argument that free expression has been chilled as a result of that incident. It seems in times of national crisis there is diminishing public support for the broad concept of academic freedom. The concern we have at the University is that if academic freedom is going to prevail, it is important that institutions defend the rights of individuals to speak out on politically unpopular subjects.

The most infamous provision of the Patriot Act is Section 215, which allows the FBI to get a special court order asking for any type of document from any institution relating to a terrorism investigation or a specific person suspected of being a terrorist. The institution is also prohibited from disclosing that they even received the order. Theoretically a librarian would be prohibited from letting the target of the investigation know that their records have been sought and handed over to the FBI. This provision has created a furor among librarians who are angry and fearful. But this needs to be kept in perspective for a couple of reasons. First, the fear that the FBI is going to come into libraries and cart off computers and circulation records has not happened. We are not aware of any campus receiving one of these orders. Second, some of the more objectionable provisions including section 215 are going to expire on December 31, 2005 unless Congress makes a special effort to renew them.

Question: *You said you're not aware of any cases, but would you be?*

CV: We have made it clear that you are allowed to consult Counsel if such an order is received.

There have been a number of reports about universities where members of the campus police force have been assigned to report to the FBI after pressure from the Federal Government. I wonder what the status of the University of California is in regard to this. Also, it seems that the whole category of terrorism is unclear. As you pointed out, the real concern is not so much the Patriot Act but the larger atmosphere of pressure that opens up having to do with a war on terrorism. If we don't know exactly what terrorism is, it seems to me that raises concerns.

CV: There is some concern that anything bad that happens now is being called an act of terrorism, and a lot of these new laws and regulations are being justified by sweeping anything bad that happens into that category. Regarding campus police and the FBI, I am not aware of this happening, but I would like to think that if it did we would take the position that we would not offer any assistance. In any case, our office would not be responsible for developing a directive about that because we typically allow the campuses to form their own responses. Mike, have you heard anything?

Mike Smith, UC Berkeley counsel reported that at some colleges, campus police have been asked to cooperate with the FBI in arranging interviews with foreign students who were invited voluntarily to come in for the interviews. UC has had no such requests, and the UCB Chancellor has asked if we get such a request that he be consulted before a response is made.

CV: Again, that's a good example of something that's not a Patriot Act issue that gets swept into the public perception of the Patriot Act. It's a completely unrelated regulation of the INS that was promulgated by the Attorney General.

How much scientific input has there been into which biological agents are restricted and how they're restricted? For instance, there's no differentiation between an infectious agent and the product of an infectious agent. Can we have some scientific input into this because it's rampant and people are having a lot of trouble doing their work.

CV: My understanding is that a number of university people are working hand and hand with the government on these regulations and about what should and shouldn't be included.

UC Berkeley bars classified research from our campus because restricted laboratories are inconsistent with our public service and educational mission. From what you said, select agent restrictions in the Patriot Act appear to be in conflict with existing UC policy. Does this kind of research remain compatible with the basic principles of academic freedom at UC or should it be treated as if it's classified research?

Mike Smith: So far the conclusions have been that no one is working with these agents in sufficient quantity to fall under the restrictions of the law.

Lawrence Coleman, Vice Provost for Research. There is actually no UC policy banning classified research with the exception of the Berkeley campus, which has one. The UC policy says that our research should always be publishable.

I want to discuss one more topic; something that in my mind is the most substantial nexus between the anti terrorism issues and academic freedom. It involves the professor at the University of South Florida, Sami Al-Arian, who is so far the only faculty member in academia who has been dismissed as a result of what happened on 9/11. It relates directly to the effect of the anti terrorism policies and climate of the times on freedom of speech and freedom of association in the university.

Mr. Al-Arian was a professor of computer science who had been under investigation for about a decade before 9/11 because they thought he had connections with Palestinian terrorist groups, but could never prove it. It started to unravel for him on September 26 when he appeared on the O'Reilly Factor and was asked about some incendiary comments he had made years earlier. They had videos of him appearing at rallies and cursing Israel. He also advocated armed resistance; violence and killing civilians, calling them fair game and legitimate targets. He appeared before an immigration judge and took the 5th Amendment when asked if he had ever raised funds for a terrorist organization. He had also established a think tank at USF and used the USF name to arrange political conferences where money was raised for Islamic Jihad. He explained his comments as an exercise of free speech and said he doesn't really advocate violence against civilians. He equated his comment about Death to Israel to Reagan's calling the Soviet Union the "Evil Empire." He said that in his world, his comments meant down with the occupation.

Within a few days of the O'Reilly show, Mr. Al-Arian was put on paid leave and told not to come back to campus. A month later, the USF Board of Regents voted to recommend his dismissal, citing circumstantial evidence of his involvement with terrorist organizations. They said there had to be a balance created between his First Amendment rights and the university's right to achieve its purpose of education. The faculty union filed a grievance contesting his suspension for such a long time with no outcome. On February 21, 2003 he was accused of conspiracy to commit murder via suicide attack in Israel. The indictment also accused him of using USF as a cover for Islamic Jihad fundraising. About a week after the indictment, John Ashcroft said publicly that the Patriot Act had made it possible because it removed the firewall between criminal and intelligence investigations. After the Patriot Act was passed, the FBI was allowed for the first time to disclose to the criminal investigators the wiretaps and his phone conversations and financial transactions

with Islamic Jihad. Within five days of the indictment, more than a year after he had been suspended, he was fired. The notice of termination said he had used USF's name and resources for illegal and improper purposes.

There were divided opinions about the legitimacy of the termination. The American Association of University Professors sent a committee to investigate and concluded that USF had violated Al-Arian's due process rights by firing him before he had had a chance to defend himself in court and suggested that if the full membership of the AAUP supported it, they could censor USF. USF responded that "the courts will decide criminal guilt; we decide if using our resources to support terrorism violates him employment." The question was raised whether the university had deliberately waited until the indictment came down to fire him because the university itself had a weak case and felt it could not prevail on a termination without the extra ammunition of the indictment. There is an eloquent editorial written by a graduate professor from Buffalo saying that Al-Arian had breached the limits of acceptable conduct of university faculty and pointing out that academic freedom also entails academic responsibility coinciding with the academician's special position in the community. The Buffalo professor felt that there is another side to the privilege of academic freedom. "Academics owe the institution something in return. They owe professional behavior, honesty, commitment to the academic calling, careful work, responsible teaching and responsible behavior in the community." The USF president said, "This is not about academic freedom. It's not about tenure. It's not about free speech. It's about disruption and safety."

Mr. Al-Arian is now awaiting trial and has filed a grievance challenging his termination. I think his saga is an extraordinary example of where the rubber meets the road in terms of academic freedom and the struggle against terrorism.

To conclude, the problem of academic freedom extends far beyond the Patriot Act. It has to do more with the mentality of the times than any one particular law. I was struck last night watching CNN. They were talking about the military tribunals established to try the Guantanamo prisoners. They were interviewing one of the generals about the procedures, and what he said for me captured this entire issue in a nutshell. He was justifying the special treatment of these prisoners in not allowing them the full range of due process through American courts and he said, "We're talking about terrorism here, not just any war crime." I think as long as the fear of terrorism predominates, there are a substantial number of people in our society who are going to be willing to trade some liberty for increased security, and academic freedom may be just one casualty of that tradeoff.