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Patriot Act and Your Therapist

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How Confident Are You That Your Medical And Mental Health Records Are Confidential?

You have decided to check in with your physician because of some recent symptoms such as headache, backache, and general tension and when your tests all come back negative your physician suggests that your symptoms may be caused by stress, anxiety or depression. You admit that you have been feeling upset lately and he then offers you a referral to a psychotherapist.

It occurs to you that the policies and actions of your government have been weighing on you, morally and spiritually, and it wouldn't surprise you if your reaction to what seems to be an arrogant, senseless political direction of militancy and injustice has been affecting your health and well-being. Perhaps it would help to talk to someone who could show you how to deal with your emotions in a better way. Even just being able to talk freely about your fears, anger and helplessness and share how discouraging it feels to be living in a country whose tactics are reminiscent of dictatorships might be of some use.

You recall how in the 1970s Dr. Lewis Fielding was found to be well within his rights in refusing to hand over Daniel Ellsberg's psychiatric records to the FBI and that when the "White House Plumbers" burglarized his office to get them it helped lead to the downfall of Richard Nixon. 1 The government learned its lesson on respecting confidentiality that time, you figure, so you are confident that you can freely express yourself to your therapist. You have a patient's right to confidentiality, right?

Well, not exactly.

As you probably know, just 45 days after September 11, Congress passed the "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act," or what is commonly referred to as the USA PATRIOT Act. 2

What you might not know is that, among its other violations of our civil liberties, Section 215 of the USA PATRIOT Act slices away at your confidentiality rights. Section 215 allows the FBI to obtain "tangible things (including books, records, papers, documents, and other items) for investigation to protect against international terrorism or clandestine intelligence activities." This includes medical, psychiatric, and other health care records. 3

Under Section 215, the FBI agent need not demonstrate probable cause to the Foreign Intelligence Surveillance Court (FISC) judge that the person under investigation is engaged in criminal activity~only that "records concerned are sought for an authorized investigation." 4 There does not need to be individualized suspicion of a crime.

Additionally, and perhaps most appalling, a gag order prevents the holder of the record from telling anyone about any transfer of records. Your therapist is legally prohibited from letting you know if your records have been seized.

The patient's right to privacy has always been the cornerstone of the physician-patient relationship. It is even more critical for those seeking mental health care. The 1999 Surgeon General's Report on Mental Health concluded in part that:

--People's willingness to seek help is contingent on their confidence that personal revelations of mental distress will not be disclosed without their consent. --Although confidentiality issues are common to health care in general, there are special concerns for mental health care and mental health care records because of the extremely personal nature of the material shared in treatment. 5

Clearly, Section 215 of the USA PATRIOT Act undermines this right to privacy.

The question often asked is whether any records have actually been seized. The answer is that we don't know--because it is illegal to report it. But, regardless of whether or not records have been taken to date, it is unacceptable to have this breach of confidentiality legitimized as law, with the potential to be used by law enforcement at any time.

After the PATRIOT Act was passed Daniel Ellsberg said, "The things that Nixon did against me, which were illegal at that time and always have been up until now, would be legal under this new Act.... Like the burglary in the psychoanalyst's office, the wiretaps would now be almost surely regarded as legal under this PATRIOT Act. Therefore, a new President would not have the need to conceal criminal acts of bribery and obstruction of justice, which are among the acts that brought Richard Nixon down...the PATRIOT Act would make them legal." 6

Some mental health associations have spoken out against the loss of civil liberties. The National Association of Social Workers (NASW) has supported legislation aimed at reversing the most objectionable portions of the PATRIOT Act. It has also encouraged its members to advocate for community resolutions against the Act. 7 Groups such as Therapists for Social Responsibility (TSR) and Therapists for Peace and Justice (TPJ) (see website www.therapistsforsocialresponsibility.org) and The California Society for Clinical Social Work (CSCSW) have been lobbying their organizations for wider disclosure of this information to other therapists through their ethics classes and to the general public in confidentiality statements. All four groups have petitioned the California Board of Behavioral Sciences, the state licensing board, to address this in their role as a consumer protection agency. The petition and comments, discussed briefly at the BBS meeting in November, 2004, will be further considered in 2005. Also, the California Association of Marriage and Family Therapists (CAMFT) recently published a statement by their legal counsel regarding the problems with Section 215 in their magazine.

The purpose of this article is not to cause you additional stress or to discourage you from making a therapy appointment and speaking freely. It is to inform you about how your confidentiality has been compromised and to increase awareness of Section 215.

Here are some ways that you may want to address the problem of confidentiality with your therapist, whether you have been, are currently in, or plan to be in therapy:

- If your therapist has not disclosed the conflict between Section 215 and your right to confidentiality, ask him about it; he may not even be aware of it
- Ask your therapist not to document any political or religious data, as some therapists have agreed to do.
- Do not let the PATRIOT Act prevent you from getting the support you need.

And we encourage everyone to take action against the USA PATRIOT Act, particularly some of the worst provisions, as many communities and some states have. 8

--Insist that Congress pass legislation that will scale back objectionable portions of the Patriot Act. Such legislation has been introduced in the Senate as S1709, the Security and Freedom Ensured (SAFE) Act. 9

-- Insist that Congress not renew the objectionable provisions of the Patriot Act in 2005. 10

1 http://americanhistory.si.edu/presidency/2c3_a.html (accessed 1/11/05) In 1971, the "White House Plumbers", led by G. Gordon Liddy and E. Howard Hunt, broke into the Beverly Hills office of Dr. Lewis Fielding. Daniel Ellsberg had just released the Pentagon Papers, the secret government history of the Vietnam War. In an attempt to find information that would discredit Ellsberg, the FBI requested his psychiatric records from Dr. Fielding. When the doctor refused to release these records, the White House Plumbers burglarized his office. The government case against Ellsberg collapsed in 1973 after the break-in was revealed. This revelation became part of the Watergate scandal, which led to Nixon's disgraceful exit from the White House. 2 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf 3 <http://www.aclu.org/Privacy/Privacy.cfm?ID=12747&c=27> (accessed 1/11/05) 4 http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ056.107.pdf (accessed 1/11/05) 5 <http://www.surgeongeneral.gov/library/mentalhealth/chapter1/sec4.html#chap7> (accessed 1/11/05) 6 http://www.buzzflash.com/interviews/03/02/20_Ellsberg.html (accessed 1/11/05) 7 <http://www.socialworkers.org/advocacy/alerts/2003/100203.asp> (accessed 1/11/05) 8 <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=11294&c=207> (accessed 1/11/05) 9 <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:s.01709>: (accessed 1/11/05) 10 www.aclu.org/safeandfree (accessed 1/11/05) In addition to the records provisions under this legislation, the government can: Search your home without telling you Take away property without a hearing Monitor your e-mails and the Internet sites you visit Spy on innocent Americans Wiretap you under a warrant that does not need to have your name on it Label you a "terrorist" if you belong to an activist group (i.e. domestic groups that engage in certain types of civil disobedience could be labeled "terrorists") Place immigrants in jail indefinitely

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