

CALL Public Affairs Committee

Margaret A. Schilt

Faculty Services Librarian

D'Angelo Law Library

The University of Chicago Law School

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USA PATRIOT ACT

**Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct
Terrorism Act of 2001**

Issues for Law Libraries

The USA PATRIOT Act, P. L. 107-56, (the Act) was signed into law by President Bush on October 26, 2001 in response to the tragic events of September 11, 2001. Those charged with the responsibility of prosecuting terrorists for acts already committed and preventing further acts of terrorism argued forcefully that some of the legal restrictions placed upon the law enforcement and intelligence communities by current law were no longer appropriate given the nature and extent of the terrorist threat. The changes made by the Act have been extensively analyzed and discussed elsewhere, and a full discussion will not be included here. Rather this report will focus on the issues likely to pertain to law libraries. For those wanting a more complete discussion of the Act and its ramifications, this report is followed by an annotated bibliography of commentary on the Act.

The USA PATRIOT Act changes the search and seizure requirements in law enforcement investigations and foreign intelligence investigations. It is a difficult statute to understand because it is structured as amendments to previous statutes, requiring a thorough understanding of previous law in order to see the effects of the amendments. The Act covers several topics, including money laundering and immigration law. This report will focus on the law regarding surveillance of suspicious persons as those provisions will be of most interest to universities, law schools and libraries.

Generally, the legal requirements for collecting information about a person vary depending upon the status of the person who is the subject of the investigation and the purpose of the investigation.

Criminal Investigations. Legal requirements for surveillance of persons in a criminal law enforcement investigation are contained primarily in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510-2522 (Title III). Title III contains a general prohibition on electronic eavesdropping on conversations (both face-to-face and telephone) and computer and other electronic communications. This prohibition is lifted in specific circumstances, provided certain specific requirements are met. Title III court orders or warrants require a showing of probable cause to believe that the suspected person is engaged or about to be engaged in the commission of an offense contained on a statutory list of offenses. Certain types of records – telephone records and email records held in third party storage

- may be obtained with a lesser showing in any type of a criminal investigation: reasonable grounds to believe that the information being sought is relevant to a criminal investigation rather than the showing of probable cause required for a warrant. The third and least restrictive level of Title III protection is extended to court orders for use of so-called trap and trace devices and pen registers. These devices permit investigators to monitor the source and destination of phone calls made to and from a particular telephone. An order for such a device may be obtained upon the government's certification that the use of the device is likely to produce information relevant to the investigation of any crime. No court finding is required.

The USA PATRIOT Act varies these requirements as follows:

1. Section 216 of the Act widens the existing law regarding pen register and trap and trace devices (used to monitor incoming and outgoing telephone calls) to authorize the installation of devices to record all computer routing, addressing and signaling information. While the pen registers and trap and trace devices collected information only about phone numbers, devices under Section 216 can collect computer routing, addressing and signaling information potentially providing more information about the content of the communication, most obviously the screen name and ISP of the recipient. While content of the email messages is not to be retrieved under this section, whether the information contained in the subject line of emails may be is unclear. The court order for the installation of the devices (obtained from the court with jurisdiction over the crime under investigation) may be executed anywhere in the United States; however, it can be challenged only in the court in which it is issued.
2. Section 209 of the Act treats stored voicemail, like stored email, as subject to the second level of Title III protections, rather than, like a telephone communication, subject to the warrant requirements of the first level of Title III protections.
3. Section 213 of the Act extends the authority to delay notification of execution of any warrant or order for search of electronic communications in the custody of a third party upon a showing that an "adverse result" would be created if notification were made.

Foreign Intelligence Surveillance. Legal requirements for surveillance of persons for the purpose of obtaining foreign intelligence are set out in the Foreign Intelligence Surveillance Act, 50 U.S.C. Section 1801 et seq. (FISA). Under FISA prior to the USA PATRIOT Act, an application for authority for a surveillance order had to state that the purpose of the investigation was to obtain foreign intelligence information, as distinct from obtaining information for a domestic criminal investigation. The application was made to a special court, the Foreign Intelligence Surveillance Court (FISC), and did not have to show probable cause that a crime had been committed, only that the primary purpose was intelligence gathering and that the target was a foreign power or an agent of a foreign power, including international terrorist groups.

The USA PATRIOT Act varies these requirements as follows:

1. Section 218 provides that the application for authority for a surveillance order need only demonstrate that obtaining foreign intelligence information is a "significant purpose" of the investigation, not "the purpose." This is an important amendment because the prior provision was intended to preserve a clear distinction between investigations of domestic criminal activity and investigations for obtaining foreign intelligence information. Acknowledging that obtaining foreign intelligence information need only be a significant purpose means that the surveillance may have another significant purpose – investigation to procure evidence for a domestic criminal prosecution without a Title III warrant. Civil libertarians argue that this could signal a resurgence of the misuse of foreign intelligence and surveillance for political purposes.
2. Section 215 of the Act includes amendments to the Foreign Intelligence Surveillance Act (FISA) stating that the FBI may apply for an order 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, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment....” Under FISA, court proceedings to obtain the order are sealed. The primary intent of this provision is access to ISP records of user billing information, but the provision is by no means limited to those records, and can easily extend to library records such as sign-in sheets or circulation records. Section 215 further provides that “No 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 tangible things under this section.” The question has been raised as to whether this provision acts as a bar to obtaining legal counsel prior to compliance with the order; it has not been so interpreted. It has been speculated, however, that the gag order would extend to any court proceedings contesting any such searches. See Nat Hentoff, *Legal Times*, March 18, 2002, contained in the Annotated Bibliography below.

How are these provisions possibly troublesome for libraries? Libraries may be served with an order for production of records with respect to a particular patron or for production of all records with respect to usage of library computers by patrons. Traditionally, librarians have recognized and protected a strong right of patron privacy with regard to materials selected and checked out at libraries, based upon applicable state statute and professional ethics spelled out in the ALA policies of confidentiality. This right of privacy extends to selection of online materials. Section 215 does limit its amendments to FISA by adding “...provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution,” however the interpretation of “solely” is likely to be problematic, and this explicit provision is limited to the FISA amendments. There is no such limitation for “non-U.S. persons.”

Libraries can expect to encounter many more surveillance orders and should prepare procedures for responses to them. The American Library Association has published “Guidelines for Librarians on the U.S.A. Patriot Act: What to do before, during and after a “knock on the door?” and “Confidentiality and Coping With Law Enforcement Inquiries: Guidelines for the Library and Its Staff.” Both of these documents are available electronically at <http://www.ala.org/alaorg/oif/> .

Academic libraries are in a somewhat different position than public libraries, in that surveillance technology to retrieve email and internet usage records is likely to be placed, not at the library level, but at the level of the university or law school network. Where the academic library needs to be prepared is in the area of orders to divulge sign-in records, email records and records of encounters with patrons, and circulation records if the academic law library maintains its own. Law firm libraries are in a possibly more protected position; to the extent that library records are created under client numbers, it is arguable that those records should be protected by attorney-client privilege. Firm libraries seeking to rely on this argument should thoroughly research the issue and be prepared to defend their position. It does not appear that this argument would protect records as to attorneys consulting library materials for their own use.

Developments Since Passage

Investigations. It is difficult to gauge the effect the USA PATRIOT Act has had upon federal surveillance of persons suspected of terrorist activity, for the reason that much of the surveillance is not required to be disclosed. In response to inquiries from two members of the House of Representatives, Assistant Attorney General Daniel Bryant sent four letters to the House Committee of the Judiciary in July of 2002. While he declined to answer several of the questions on the basis that the answers involved classified information, he did reveal that the provisions permitting service of warrants in jurisdictions other than the jurisdiction issuing the warrant have been extensively used. On August 21, 2002, the American Booksellers Foundation for Free Expression, the ACLU and the Electronic Privacy Information

Center joined in a FOIA request to learn how many subpoenas have been issued to libraries, bookstores and newspapers under the Act. The Justice Department granted expedited status to the request, but had not responded as of October 24, 2002. Suit was filed on that date in the US District Court in Washington, D.C.

Attorney General's Guidelines on General Crimes, Racketeering and Terrorism. On May 30, 2002 the Attorney General released new guidelines for the FBI's surveillance and data collection under FISA. Guidelines have been used since 1976, when Attorney General Edward Levi first issued the FBI Domestic Security Guidelines. The changes made by the new guidelines are analyzed in the Center for Democracy & Technology's Guide to the FBI Guidelines: Impact on Civil Liberties and Security – The Need for Congressional Oversight, found at <http://www.cdt.org/wiretap/020626guidelines.shtml> .

New legislation. On June 5, 2002, S. 2586 was introduced in the Senate by Senator Charles Schumer (D-NY). The purpose of the bill, if passed into law, is to permit FISA to apply to any person “other than a United States person” engaged in international terrorism or activities in preparation therefor. Current law requires that the government establish probable cause that the person is an agent or member of an international terrorist organization before allowing FISA to be used. A hearing was held on July 31, 2002 on this bill, consolidated with S. 2659. S. 2659, introduced on June 20, 2002 by Senator Mike DeWine (R-OH), would amend FISA to change the standard required for FISA surveillance or search of non-United States persons from probable cause to reasonable suspicion that the non-U.S. person is an agent of a foreign power, and the facilities, places, premises or property against which electronic surveillance or search is to be directed is used or about to be used by the target. Testimony of the witnesses at the hearing is available at <http://intelligence.senate.gov/0207hr/020731/witness.htm> . The witnesses raise questions of the constitutionality of both provisions, as well as raising the issue that lowering standards for FBI surveillance would not address the principal problem faced by terrorism investigations right now, which is analysis of the huge amounts of intelligence data already collected. Congress adjourned without taking any further action on the bills, which will have to be re-introduced in the 108th Congress in order to receive further consideration.

Revised intelligence sharing and minimization procedures. The problems in data analysis led the Department of Justice to move the Foreign Intelligence Surveillance Court for approval of revised intelligence sharing and minimization procedures early this year. In a rare publicly revealed opinion, in which all 7 judges concurred, the Court rejected the procedures advocated by the Department of Justice. The Memorandum Opinion is available online at <http://fas.org/irp/agency/doj/fisa/fisc051702.html> . The Department of Justice has appealed the ruling and the Foreign Intelligence Surveillance Court of Review has permitted the filing of an amicus brief by public interest groups. A hearing was held on the Department of Justice's appeal by the Senate Committee on the Judiciary on September 10, 2002. Statements of witnesses can be found at <http://judiciary.senate.gov/hearing.cfm?id=398> summarizing views on both sides of the issues. On November 18, 2002, the United States Foreign Intelligence Surveillance Court of Review issued its opinion “On Motion for Review of Orders of the United States Foreign Intelligence Court, which can be found at <http://www.cadc.uscourts.gov/> . The Court reversed the FISA Court's orders and remanded with instructions to grant the applications of the Department of Justice as submitted. The Court held that “... FISA, as amended by the USA PATRIOT Act supports the Government's position, and that the restrictions imposed by the FISA Court are not required by FISA or the Constitution.” In a departure from previous case law, the Court finds, as the Government argued, that

the limitation of FISA that restricts the Government from using foreign intelligence information in criminal prosecutions was not contained in the original statutory language of FISA and, even if it had been, the amendments made by the USA PATRIOT Act would vitiate it. In reaching that conclusion, the Court distinguishes *U.S. v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) on the basis that it was not a FISA decision but rather a decision on the constitutional boundaries of the President's executive authority. The only test the Government must meet in order for the surveillance to meet the purpose test is that the Government must "...entertain[s] a realistic option of dealing with the agent other than through criminal prosecution." (P. 34) Further, FISA orders will pass the Fourth Amendment test because "...in many significant respects the two statutes [Title III and FISA] are equivalent, and in some, FISA contains additional protections," and the line drawn by the *Truong* case between foreign intelligence concerns and criminal investigations is not constitutionally required. (P. 49)

Teleconference in December. A satellite teleconference is to be held December 11, 2002 entitled "Safeguarding our Patrons' Privacy: What Every Librarian Needs to Know About the USA PATRIOT Act & Related Anti-Terrorism Measures" sponsored by the ALA, the ARL, the Medical Library Association and the SLA. The Chicago Library System is hosting a site for this teleconference; further information may be obtained on the web at

<http://www.ll.georgetown.edu/aallwash/pr09222002.html>

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Selected Bibliography

CRS Report for Congress

Doyle, Charles, Senior Specialist, American Law Division, Congressional Research Service, "CRS Report for Congress, The USA PATRIOT Act: A Legal Analysis," April 15, 2002, Order Code RL 31377, available in .pdf format at <http://www.fas.org/irp/crs/>, accessed November 15, 2002.

This is a 75-page in-depth analysis of the provisions of the USA PATRIOT Act, organized topically. One of the difficulties in understanding the Act is that many of its major provisions are structured as amendments to existing law. A reading of the Act must be supplemented by wide knowledge of the underlying statutory provisions. Because of this, Mr. Doyle has chosen to address the issues in topical fashion rather than following the organization of the Act itself. His penchant for citation of the provision being amended rather than the provision of the Act doing the amending renders the report more difficult for the non-specialist, but this is the most complete analysis readily available. A shorter version, shorn of citations and footnotes and titled "The USA PATRIOT Act: A Sketch," is available through the same web page.

Law Review Articles Regarding the USA PATRIOT Act

Evans, Jennifer C., "Comment: Hijacking Civil Liberties: The USA PATRIOT Act of 2001," 33 *Loy. U. Chi. L. J.* 933 (Summer, 2002).

This article contains an excellent review of governmental powers for surveillance of individuals both before and after the enactment of the USA PATRIOT Act and makes four recommendations for Congressional oversight of the actions of the Attorney General and the Director of the CIA.

McCarthy, Michael T., "Recent Development: USA PATRIOT Act," 39 *Harvard Journal on Legislation* 435 (Summer, 2002).

This article notes that the expansion of government authority granted by the USA PATRIOT Act has made it "...a focal point for the ongoing national debate over balancing protection against terrorism with preserving civil liberties." (435) The author takes the position that the effects of the Act should not be judged on what it possibly empowers the

government to do, but on what the government actually does with the authority given it.

Osher, Steven A., "Essay: Privacy, Computers and the Patriot Act: The Fourth Amendment Isn't Dead, But No One Will Insure It," 54 Fla. L. Rev. 521 (July, 2002)

This essay places the USA Patriot Act in the context of the history of legislation passed in atmospheres of crisis to address threats to national security at the expense of limiting civil liberties. Part I gives a capsule account of the passage of the USA Patriot Act. Part II summarizes the provisions of the Act as they relate to surveillance powers in wiretaps, search warrants and subpoenas in the area of telecommunications. Part III includes a short history of crisis legislation, beginning with the Alien Enemies Act of 1798 and ending with the Communist Control Act of 1954. The author's conclusion characterizes the USA Patriot Act as a serious assault on privacy rights, the most recent mistake in a sorry history.

Pikowsky, Robert A., "An Overview of the Law of Electronic Surveillance Post September 11, 2001," 94 Law Library Journal 601 (Fall 2002).

Mr. Pikowsky, electronic services librarian at the University of Idaho Law Library, covers the USA PATRIOT Act changes to the law of wiretapping, physical searches, access to educational records and the impact of the Act on educational institutions and libraries.

Rackow, Sharon H., "Comment: How the US Patriot Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of 'Intelligence' Investigations," 150 U. Pa. L. Rev. 1651 (2002)

This Comment focuses on "...the broad expansion of the government's right to engage in electronic surveillance." (1654) It begins with a useful review of Fourth and First Amendment rights and surveillance law before the USA Patriot Act and then turns to a consideration of Sections 218, 206 and 802 of the Act. Section 218 amends the Foreign Intelligence Surveillance Act of 1978 to require that a "significant purpose" of the investigation be to obtain foreign intelligence information rather than that being the "purpose" of the investigation. This opens the door to the greater latitude afforded FISA investigations being used for domestic criminal investigations. Section 206 expands "roving wiretap" authority to FISA investigations without the Title III requirement that the target be within a "reasonable proximity" of the particular telephone. Finally, Section

802 of the USA Patriot Act creates a new crime of "domestic terrorism" which is broadly defined, raising the possibility that "...many acts of political dissent and activism now will be characterized as 'domestic terrorism.'" (1689)

Librarians Respond to the USA PATRIOT Act

American Library Association, Resolution Reaffirming the Principles of Intellectual Freedom in the Aftermath of Terrorist Attacks, adopted by the ALA Council, January 23, 2002, available at <http://www.ala.org/alaorg/oif/usapatriotact.html> , accessed November 15, 2002.

American Library Association, Guidelines for Librarians on the U.S.A. PATRIOT Act: What to do before, during and after a "knock at the door?", January 19, 2002, available at <http://www.ala.org/alaorg/oif/usapatriotact.html> , accessed November 15, 2002.

American Library Association, Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff, April, 2002, available at <http://www.ala.org/alaorg/oif/guidelineslibrary.html>, accessed November 15, 2002.

Minow, Mary, "Library Records Post-Patriot Act (Federal Law)" LLRX.com, <http://www.llrx.com/features/libraryrecords.htm>, accessed November 1, 2002.

Ms. Minow has compiled a chart with the following headings: Court Orders, Type of Info, Legal Standard: Note that these are listed in descending level of threshold, Legal Authority, and Notes and Sample Orders. The chart contains a wealth of information, however a good background in the issues is necessary to make it most accessible and useful. A wonderful guide to the statutory authority, it should be read with the U.S.C. close at hand.

Monitoring of USA PATRIOT Act Operation

Free Expression Newswire, "ABFFE Files Freedom of Information Request with Justice Dept.," August 21, 2002, available at http://www.freeexpression.org/newswire/0821_2002.htm, accessed November 11, 2002.

Free Expression Newswire, "ABFFE Sues Justice Dept. for Data on Patriot Act Subpoenas," October 24, 2002, available at http://www.freeexpression.org/newswire/1024_2002.htm, accessed November 14, 2002.

Attorney General's Guidelines

Center for Democracy and Technology, "CDT's Guide to the FBI Guidelines: Impact on Civil Liberties and Security – The Need for Congressional Oversight," available at <http://www.cdt.org/wiretap/020626guidelines.shtml>, June 26, 2002, accessed November 11, 2002.

Contains an overview, historical summary on the significance of the Guidelines and the role of Congress in overseeing them, a statement on the justification for the new Guidelines and a survey of how they are expected to operate in practice, major concerns with them, and proposals for Congressional oversight.

Electronic Privacy Information Center, "The Attorney General's Guidelines," available at <http://www.epic.org/privacy/fbi/>, last updated October 10, 2002, accessed November 11, 2002.

Short discussion of the Attorney General's guidelines with links to .pdf files of the guidelines themselves and statements of Attorney General Ashcroft, supplemented by a lengthy list of resources on the guidelines, on past guidelines, news, other resources, and case law.

S. 2586 and S. 2659, 107th Congress, 2nd Session

Senate Select Committee on Intelligence, Foreign Intelligence and Surveillance Act (FISA) S. 2586 and S. 2659, hearing held July 31, 2002, Witness List and Prepared Statements, available at <http://intelligence.senate.gov/0207hrq/020731/witness.htm>, accessed November 12, 2002.

DOJ Request to Foreign Intelligence Surveillance Court for Broader Surveillance Power

In Re All Matters Submitted to the Foreign Intelligence Surveillance Court, Docket Numbers: Multiple, Memorandum Opinion (As Corrected and Amended) dated May 17, 2002, available at <http://fas.org/irp/agency/doj/fisa/fisc051702.html>, accessed on November 12, 2002.

In re: Sealed Case No. 02-001, Consolidated with 02-002, On Motions for Review of Orders of the United States Foreign Intelligence Surveillance Court, opinion dated November 18, 2002, available at <http://www.cadc.uscourts.gov/>, accessed November 22, 2002.

Senate Judiciary Committee hearing: "The USA PATRIOT Act in Practice: Shedding Light on the FISA Process," September 10, 2002, available at <http://judiciary.senate.gov/hearing.cfm?id+398>, accessed November 12, 2002.

Center for Democracy & Technology, "A Briefing on Public Policy Issues Affecting Civil Liberties Online," CDT POLICY POST Volume 8, Number 20, September 20, 2002, available at http://www.cdt.org/publications/pp_8.20.shtml, accessed November 12, 2002.

Satellite Conference

American Association of Law Libraries, "Teleconference on Libraries and Anti-Terrorism Measures," Washington Affairs Office Press Release dated September 2002, available at <http://www.il.georgetown.edu/aallwash/pr09222002.html>, accessed November 7, 2002.

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