

# Search Warrant Guide



*North Dakota  
State Library*

**NOTE:** The North Dakota State Library Search Warrant Guide is not intended as legal advice, but as a blueprint for developing a guide for your library. You should contact the library's legal counsel for advice to adapt the guide to your local library. (Revised 09/30/2019).

## TERMS AND DESCRIPTIONS

### SEARCH WARRANT

A judge's written order authorizing a law enforcement officer to conduct a search of a specific place and to seize evidence. (Black's Law Dictionary, 2014)

A search warrant is a court order issued by a judge or magistrate. It can be federal, state, or local. Unlike subpoenas, in which there is time to contact an attorney, search warrants are immediately executable.

### FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

A 1978 federal statute that established new procedures and courts to authorize electronic surveillance of foreign intelligence operations in the United States. This act established the Foreign Intelligence Surveillance Court and the Foreign Intelligence Surveillance Court of Review. It allows the Attorney General to obtain warrants that authorize electronic surveillance of suspected foreign intelligence operatives without public disclosure and without showing probable cause that criminal activity is involved. (Black's Law Dictionary, 2014)

If the library is served with a search warrant issued by the Foreign Intelligence Surveillance Act Court (FISA) under the USA Patriot Act, the library and library staff are forbidden by law to disclose to anyone that the warrant was served, what records were produced, or the identity of the person being investigated. **Only an FBI agent can seek a search warrant under the USA Patriot Act.**

### PATRIOT ACT

A statute enacted in response to the terrorist attacks on Sept. 11, 2001, giving law enforcement agencies broader authority to collect information on suspected terrorists, to share that information among domestic and foreign intelligence agencies, to make the country's borders more secure, to detain suspects on new types of criminal charges using new criminal procedures, and to investigate and regulate financial institutions that participate in foreign money laundering. (Black's Law Dictionary, 2014)

### SUBPOENA

Writ or order commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. (Black's Law Dictionary, 2014)

A subpoena is handled differently from a search warrant. A subpoena does not require immediate compliance. With a subpoena, library administration can request a review from legal representation prior to responding to it. Also, a subpoena is challengeable in court. (The Library's Legal Answer Book, 2003)

## **SUBPOENA DUCES TECUM**

Subpoena Duces Tecum is a subpoena ordering a witness to appear and to bring specified documents, records or things. (Black's Law Dictionary, 2014)

### **NORTH DAKOTA LIBRARY RECORDS**

NDCC 40-38-12. Library records - Open records exception

Any record maintained or received by a library receiving public funds, which provides a library patron's name or information sufficient to identify a patron together with the subject about which the patron requested information, is considered private and is excepted from the public records disclosure requirements of section 44-04-18. These records may be released when required pursuant to a court order or a subpoena.

#### History

Source: S.L. 1985, ch. 464, § 1.

## PROCEDURES FOR NORTH DAKOTA STATE LIBRARY STAFF

These policies and procedures apply to any law enforcement agency whether local, state, or federal. If a staff member is presented with a court order (a search warrant or subpoena), that staff member should:

1. Ask the officer if you can call the State Librarian or Assistant State Librarian.
2. If no, follow these procedures:
  - a. Immediately ask for identification.
  - b. Ask for a copy of the search warrant. A copy of the search warrant is essential, as the search must comply with the terms.
  - c. If you are not given a copy of the search warrant, ask to see a copy of the search warrant.
  - d. If the officer does not have a search warrant compelling the production of records, the officer should be informed of the Library records—Open records exception. North Dakota Century Code 40-38-12.
  - e. If the officer has a search warrant, library records identified in the warrant that are readily available must be given to the officer.
  - f. The officer may not direct the staff member to compile information that is not readily available or not identified in the warrant. The library will be asked to “preserve evidence” while the process unfolds.
3. If the requested information is not accessible to you, the agent or officer may be directed to the State Librarian or Assistant State Librarian to gather the information.

**Staff members will treat the officers with courtesy and respect -- be courteous, cooperative, and quiet.**

If a staff member is questioned by anyone, including the press, friends, patrons, or family, the reply will be “no comment.” All inquiries from the press should be directed to the office of the State Librarian.

If a search warrant is issued for any State Library records, there may be more than one law enforcement officer in the building. The officers will secure the building. To secure the building the officers will: 1) See that no one will either enter or leave the building, and 2) ensure that no documents are being destroyed. There could be three or more officers in the building. A search warrant will be hand delivered. A search warrant that is delivered by a Burleigh County Sheriff’s officer will usually be issued through the State’s Attorney office. You may not be able to place phone calls to family if you feel that you will be later than normal arriving home for lunch or at the end of the day. **Do not make any phone calls unless you have been given permission from the officer in charge to do so.** A subpoena could be issued through the mail

to the State Librarian. The subpoena may give the State Librarian a number of hours to produce the requested information. The court order that we are most likely to receive is the SUBPOENA DUCES TECUM.

## **MONITORING STAFF DUTIES**

Staff will be delegated by the State Librarian to take notes of the search. If law enforcement agents split into groups, additional staff may be needed to monitor each group.

**The monitoring staff member(s) should not do anything that may be interpreted as obstruction. Be courteous, cooperative and quiet.** If the law enforcement agent directs the monitoring staff to stop following and taking notes, the staff members will go back to their regularly assigned duties.

Sometimes searches can get chaotic, therefore, calm monitoring and note taking can be helpful to recall what took place. Note down what questions were asked, such as where certain items can be found.

Agents sometimes number the rooms that they enter. Record the numbering scheme. Record an inventory of the type and location of all evidence seized. Your inventory will make more sense to you later than the inventory that the law enforcement officers give you. Try to observe the agents' conduct, the places searched, and the time involved in each part of the search. The agents will probably be patient with this note taking and identification process. They are not likely, however, to slow down the process or allow staff to interfere with the search in any way.

# FIRST STEPS FOR THE STATE LIBRARIAN OR ASSISTANT STATE LIBRARIAN

## 1. State Librarian should ask for identification

a. Identification consists of the badge number and identification card of the law enforcement officer.

i. **Verification: FBI:** Call the Bismarck Office at 701-223-4875. There are two FBI agents in Bismarck. Give the name of the agent to the person who answers the phone. If no one is available at the Bismarck office call the Minneapolis office at 612-376-3200.

ii. **Verification: State's Attorney Office:** Call Burleigh County Sheriff's office at 701-222-6651 or North Dakota Highway Patrol at 328-2450 (State's Attorney Office—222-6672.)

iii. **Verification: Bismarck Police Department:** Call 701-223-1212. Give the name and badge number of the officer.

iv. You may call the ND Highway Patrol to verify any law enforcement officer 701-328-2450.

2. **Ask for time to contact the library's legal counsel.** Law enforcement has the discretion to grant this brief delay, or to execute the warrant immediately. As long as records are not in the process of being destroyed, and the library is an "innocent third party," it is likely that a brief delay will be granted. The library will be asked to "preserve evidence" while the process unfolds.

3. If the State Librarian is not available, the Assistant State Librarian will be notified and will meet with the officer and legal counsel if necessary.

4. **Contact library's legal counsel, 328-4896.** If the library's legal counsel cannot be contacted, call 328-2210. Ask the receptionist to contact the library's legal counsel or be transferred to an attorney in the Bureau of Criminal Investigation.

5. If the officer presents a search warrant or subpoena compelling the production of records or equipment, the library's legal counsel will review the legality of the document. The Counsel will inform the officer of this procedure. The library's legal counsel will provide assistance on site during the search.

## **SECOND STEPS: THE ATTORNEY ROLE**

The steps outlined here are a recommended blueprint for State Librarian/Attorney discussions *before* a search warrant is served. If the State Librarian is not experienced in criminal matters, it is advisable to have an attorney available (even by phone). If time is of the essence and the attorney is not yet present, the State Librarian will want to be as familiar as possible with these steps.



**The Attorney will ask to speak to the agent-in-charge or lead government attorney handling the matter (by phone if necessary).**

The attorney will emphasize that the library will do everything it can to ensure that the search proceeds smoothly, but that she/he would like for them to wait until she/he arrives (and the appropriate personnel, such as the State Librarian, Information Technology Coordinator, etc.) to make sure that everything is in order.

7. **The Attorney will make sure the warrant is signed by a judge or magistrate. If there is a discrepancy, notify the officer-in-charge of the search effort.**
8. **The Attorney may ask for a delay long enough for the library to litigate the warrant's validity.**

This is an unusual request, but it was successfully made in the recent Colorado Supreme Court [\*Tattered Cover\*<sup>\[2\]</sup>](#) case. In that case, the "innocent third party" status of the bookstore helped the court determine that an adversarial hearing (instead of a search warrant, which does not use the adversarial process) was required before law enforcement could request bookstore records, to avoid "chilling" the public's right to read. If the library acts quickly, it may be possible to persuade the District Attorney or U.S. Attorney to direct the law enforcement officer not to execute the warrant until the library can litigate the validity of the warrant.

9. **The Attorney will examine the search warrant to see if it is narrowly tailored.**

Note the exact premises to be searched, exactly what is to be seized, who issued the warrant, and any time limits for executing the warrant. Targeting the specific records needed goes a long way toward protecting innocent patrons' privacy. ***Make sure the search conducted does not exceed the terms of the document.***

10. **Delegate someone (other than the principal library team members) to take notes of the search. If law enforcement agents split into groups, additional staff may be needed to monitor each group.**

**The monitoring staff member(s) should not do anything that may be interpreted as obstruction -- be courteous, cooperative, and quiet.** If the law enforcement agent directs the monitoring staff to stop following and taking notes, the staff members will go back to their regularly assigned duties. Sometimes searches can get chaotic, therefore, calm monitoring and note taking can be helpful to recall what took place. Note down what questions were asked, such as where certain items can be found.

Agents sometimes number the rooms that they enter. Record the numbering scheme. Record an inventory of the type and location of all evidence seized. Your inventory will make more sense to you later than the inventory that the law enforcement officers give you. Try to observe the agents' conduct, the places searched, and the time involved in each part of the search. The agents will probably be patient with this note taking and

identification process. They are not likely, however, to slow down the process or allow staff to interfere with the search in any way.

11. **If law enforcement goes beyond the scope of the warrant, the attorney may ask them to desist. No one should grant consent to go beyond the scope of the warrant.**

The attorney may call the District Attorney or U.S. Attorney to try to stop this. **Do not, however, impede or obstruct.** Take notes or even photos/videos if this occurs.

12. **The attorney will request backup copies of all documents (photocopies) and computer disks that are seized.**

Better yet, ask if you may keep the originals and turn over the photocopies. Copies of the documents may not be given to the State Library staff member immediately. Copies of the documents could be sent to the State Library at a later date. If the agent refuses you copies, record in further detail all items that are seized.

13. **The attorney will get an inventory of any items that are seized.**

This is important in recovering the items later. You are entitled to an inventory of all items seized. **Do not sign anything verifying the contents or accuracy.**

## **FOLLOW-UP STEPS FOR THE STATE LIBRARIAN OR ASSISTANT STATE LIBRARIAN**

14. **Keep track of expenses.**

In some cases the library may be able to be compensated, e.g. if the library must rent computers to replace those seized.

15. **Double check to see if a gag order has been included with the court order.**

You will be told if there is a gag or "sealed" order. If so, you must comply with the terms of the order. For example, Section 215 of the Patriot Act (and other sections of the Foreign Intelligence Surveillance Act) states that "No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the FBI has sought or obtained tangible things under this section."

Necessary persons will include an attorney and essential staff up the chain of command, but not nonessential staff, spouses etc. Keep records of the incident in a secured location.

**16. Apprise the Superintendent of Public Instruction.**

Although it is unlikely that there will be time to apprise the Superintendent of Public Instruction before or during the search, brief the Superintendent as soon as possible. The Superintendent may be called by the press.

**17. Draft "talking points" if the press calls.**

Stick to talking points. If you are bound by a gag order, talk to the attorney to help draft an appropriate "no comment" statement. Make sure that staff is briefed on these points or that they routinely refer all press inquiries to the State Librarian.

## Works Cited

Bryan A Garner, E. i. (2014). Black's Law Dictionary. St Paul, MN: Thompson Reuters.

Mary Minow has given libraries in North Dakota permission to use and adopt her document Sample of Search Warrant Procedures for Libraries to meet the needs of local libraries.

Web site to Mary's article: <https://www.llrx.com/2003/05/features-sample-search-warrant-procedures-for-libraries>

Mary received an A.M.I.S. from the University of Michigan, Ann Arbor, and a J.D. from Stanford University.

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## DEFINITIONS

Affidavit:	A voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths. (1)
FISA:	Foreign Intelligence Surveillance Act.
National Security Warrants:	Under the PATRIOT Act, national search warrants (also known as "single jurisdiction search warrants") are authorized, complicating verification and greatly increasing the reach of a single warrant. If foreign intelligence is involved, the threshold is much lower: there need only be probable cause that the target is a foreign agent. (2)
Order:	A written direction or command delivered by a court or judge. Also termed court order; judicial order. (1)
Search Warrant:	A judge's written order authorizing a law-enforcement officer to conduct a search of a specified place and to seize evidence. Also termed search-and-seizure warrant. (1)
Section 215:	Allows access to library and bookstore records and other items under the USA Patriot Act.
Subpoenas:	A writ commanding a person to appear before a court or other tribunal, subject to a penalty for failing to comply. (1) Negotiation may be possible. Usually allows time to gather documents.
Subpoena Duces Tecum:	A subpoena ordering the witness to appear and to bring specified documents or records (1)
USA Patriot Act:	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. An act to deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes. (2)
Warrant:	An order from a federal, state, or local judge.

1. Black, Henry Campbell, Brian A Garner (Ed). Black's Law Dictionary, 7<sup>th</sup> ed. (1999). West Group: St. Paul, Minnesota.
2. Minow, Mary. Sample of Search Warrant Procedures for Libraries, (2003). <http://www.llrx.com/features/draftsearch.htm>.

**EXAMPLE OF SUBPOENA DUCES TECUM**

IN THE MATTER OF:            )

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SUBPOENA  
DUCES TECUM

RE: Our File No.

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TO:

The Attorney General of North Dakota having determined that it is in the public interest that an investigation be made to ascertain whether or not has engaged in, is engaging in, or is about to engage in any practice declared to be unlawful under North Dakota Century Code (N.D.C.C.) ch. 51-15, commonly referred to as the Consumer Fraud Law, and believing that you have information which is relevant STATE OF NORTH DAKOTA

OFFICE OF ATTORNEY GENERAL CONSUMER  
PROTECTION AND ANTITRUST DIVISION

to the activities of in the state of North Dakota, and pursuant to authority granted to the Attorney General of North Dakota by N.D.C.C. ch. 51-15,

YOU ARE HEREBY SUBPOENAED AND REQUIRED TO appear and be examined under oath and to produce for inspection and copying the documents or tangible objects described in the attached schedule at the following time and place:

DATE AND TIME OF EXAMINATION AND PRODUCTION:

PERSON TO WHOM PRODUCTION IS TO BE MADE:

Assistant Attorney General  
(701) 328-2811

PLACE OF EXAMINATION AND PRODUCTION:

Office of Attorney General  
Consumer Protection and Antitrust Division  
State Capitol, 17th Floor  
Bismarck, ND 58505-0040

[ALTERNATE ¶] In the alternative, you may comply with this subpoena by sending legible copies of the requested documents together with any other information requested by the subpoena to the above-named assistant attorney general at the place of examination and production. If you have any questions regarding compliance with this subpoena, you may call the above-named assistant attorney general at the number indicated.

Failure to comply with this subpoena will result in the petitioning of the district court for relief and remedy pursuant to the provisions of N.D.C.C. § 51-15-06.

[ALTERNATE ¶] YOU ARE REQUESTED NOT TO DISCLOSE THE EXISTENCE OF THIS SUBPOENA TO YOUR \_\_\_\_\_ [SUBSCRIBER/CUSTOMER/CLIENT/ETC.]. ANY SUCH DISCLOSURES COULD IMPEDE THE INVESTIGATION BEING CONDUCTED, AND THEREBY INTERFERE WITH THE ENFORCEMENT OF THE LAW.

Dated this \_\_\_\_ day of , 200.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: \_\_\_\_\_

Assistant Attorney General  
State Bar ID No.  
Consumer Protection and Antitrust  
Division  
600 E Boulevard Ave, Dept. 125  
Bismarck, ND 58505-0040

**EXAMPLE OF AFFIDAVIT OF SERVICE BY  
MAIL**

STATE OF NORTH

DAKOTA OFFICE OF

ATTORNEY GENERAL

CONSUMER PROTECTION AND ANTITRUST  
DIVISION

IN THE MATTER OF:

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AFFIDAVIT OF SERVICE  
BY MAIL

RE: Our File No.

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STATE OF NORTH DAKOTA )  
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COUNTY OF BURLEIGH )

\_\_\_\_\_ states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the \_\_\_\_\_ day of , 200, I served the attached SUBPOENA DUCES TECUM upon , by placing a true and correct copy thereof in an envelope addressed as follows:

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.



Subscribed and sworn to before me  
this \_\_\_\_ day of , 200.

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NOTARY PUBLIC

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**EXAMPLE OF SUBPOENA STATE OF NORTH DAKOTA**

OFFICE OF ATTORNEY GENERAL

CONSUMER PROTECTION AND ANTITRUST DIVISION

IN THE MATTER OF:

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SUBPOENA

RE: Our File No.

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TO:

Pursuant to the provisions of North Dakota Century Code (N.D.C.C.) ch. 51-15, you are herewith served with this Subpoena to appear and answer questions under oath. Pursuant to the receipt of inquiries and/or complaints, the Attorney General of the state of North Dakota believes it to be in the public interest that an investigation be made to ascertain whether, in fact, the above-named has engaged in any act, use or employment of any deceptive act or practice, fraud, false pretense, false promise or misrepresentation declared unlawful by said chapter, commonly known as the Consumer Fraud Law.

Pursuant to the authority given by N.D.C.C. ch. 51-15, you are directed and ordered to appear at the Office of Attorney General, 17th Floor of the State Capitol, Bismarck, North Dakota, at o'clock .m., on the day of , 200, to then and there answer under oath such questions as the Attorney General or his designee shall put to you in connection with the sale or advertisement of any merchandise, as those terms are defined by N.D.C.C. ch. 51-15.

You are further ordered to bring with you all documents relating to .

Failure to comply with this subpoena will result in the petitioning of the district court for an Order suspending your business activities in the state of North Dakota, including

enjoining the sale or advertisement of any objects, wares, goods, commodities, intangibles, real estate, or services until compliance is obtained, and such other further relief as may be required.

Dated this day of , 200.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: \_\_\_\_\_

Assistant Attorney General  
State Bar ID No.  
Consumer Protection and  
Antitrust Division  
Office of Attorney General  
600 E Boulevard Ave, Dept. 125  
Bismarck, North Dakota 58505-0040

**SEARCH WARRANT**

[North Dakota Supreme Court Rules N.D.R.Crim.P.](#) ▲?  
[N.D. Supreme Court](#)

**FORM 10. (RULE 41, N.D.R.Crim.P.)**

STATE OF NORTH DAKOTA IN \_\_\_\_\_

(name of Court)

\*County of \_\_\_\_\_ Judicial District\*\*

**SEARCH WARRANT**

To any peace officer of this State:

Affidavit having been made before me by [name of affiant] that he has reason to believe that on [premises known as] [the person of] [name or describe with particularity] City of \_\_\_\_\_ in the County of \_\_\_\_\_, State of North Dakota, there is now being concealed property, namely [describe the property with particularity] which [was stolen or embezzled] [was used in the commission of a crime] [is in the possession of a person with the intent to use it as a means of committing a public offense] [constitutes or may constitute evidence of a criminal offense in violation of the laws of this state] [indicate other basis or grounds for seizure]; and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the [premises] [person] above-described.

\*City of \_\_\_\_\_

\*\*Before \_\_\_\_\_

(name of Judge)

**SEARCH WARRANT**

YOU ARE HEREBY COMMANDED, To search, within ten [10] days after receiving this warrant, the [premises] [person] named for the property specified; serving this warrant and making the search [in the daytime] [at any time, day or night (indicate reason for search at a time other than daytime)], and if the property is found there, to seize it, leaving a copy of this warrant and a receipt for the property seized, and prepare a written inventory of the property seized and bring the property before me.

Given under my hand, with the seal of said court affixed, this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

\_\_\_\_\_

Magistrate

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## PATRIOT ACT'S KEY PROVISIONS

Knight Ridder/Tribune News Service, Sept 6, 2002 pK5079

Patriot Act's key provisions. (Knight Ridder Newspapers) [Frank Davies](#).

Full Text: COPYRIGHT 2002 Knight-Ridder/Tribune News Service

These are key provisions of the USA Patriot Act:

- Federal agents can obtain court orders to monitor Internet use and e-mails using a relatively low legal standard, an assertion of relevance.
- Surveillance warrants are expanded to catch up with technology with roving wiretaps on cell phones, pagers and other equipment.
- Investigators can secretly search property owned or occupied by suspected terrorists without giving notice before or after the search.
- The FBI can share with the CIA information collected in domestic criminal investigations and given to a grand jury.
- The FBI can compel disclosure of medical, educational, computer and library records from institutions and businesses with a warrant that requires a lower legal standard than before.
- The Treasury Department has expanded authority to require reports from financial institutions on "suspicious activity," particularly with foreign entities and suspected terrorist groups.
- Federal officials can seize assets of an individual or group that participates in terrorism or assists terrorist groups.
- The Justice Department can detain a non-citizen seven days without charges. If a suspect cannot be deported, he can still be detained if the attorney general certifies every six months that national security is at stake.
- Legal residents can be deported for associating with terrorist organizations.
- Immigration officials can bar entry to any foreign nationals who "endorse or espouse terrorist activity."
- The Federal Intelligence Surveillance Court is expanded from seven to 11 judges to meet anticipated requests for more search warrants.

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*Congressional Research Service ~ The Library of Congress* **CRS**

# Report for Congress

Received through the CRS Web

## **The USA PATRIOT Act: A Sketch**

Charles Doyle Senior  
Specialist American  
Law Division

### **Summary**

*Congressional Research Service ~ The Library of Congress*

April 18, 2002

Congress passed the USA PATRIOT Act (the Act) in response to the terrorists' attacks of September 11, 2001. The Act gives federal officials greater authority to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. It vests the Secretary of the Treasury with regulatory powers to combat corruption of U.S. financial institutions for foreign money laundering purposes. It seeks to further close our borders to foreign terrorists and to detain and remove those within our borders. It creates new crimes, new penalties, and new procedural efficiencies for use against domestic and international terrorists. Although it is not without safeguards, critics contend some of its provisions go too far.

Although it grants many of the enhancements sought by the Department of Justice, others are concerned that it does not go far enough. The Act originated as H.R.2975 (the PATRIOT Act) in the House and S.1510 in the Senate (the USA Act). S.1510 passed the Senate on October 11, 2001, 147 *Cong. Rec.* S10604 (daily ed.). The House Judiciary Committee reported out an amended version of H.R. 2975 on the same day, H.R.Rep.No. 107-236. The House passed H.R. 2975 the following day after substituting the text of H.R. 3108, 147 *Cong.Rec.* H6775-776 (daily ed. Oct. 12, 2001). The House version incorporated most of the money laundering provisions found in an earlier House bill, H.R. 3004, many of which had counterparts in S.1510 as approved by the Senate. The House subsequently passed a clean bill, H.R. 3162 (under suspension of the rules), which resolved the differences between H.R. 2975 and S.1510, 147 *Cong.Rec.* H7224 (daily ed. Oct. 24, 2001). The Senate agreed to the changes, 147 *Cong.Rec.* S10969 (daily ed. Oct. 24, 2001), and H.R. 3162 was sent to the President who signed it on October 26, 2001.

This is an abbreviated versions of *The USA PATRIOT Act: A Legal Analysis*, CRS

Report RL31377, stripped of its citations and footnotes.

## **Criminal Investigations: Tracking and Gathering Communications**

Federal communications privacy law features a three tiered system, erected for the dual purpose of protecting the confidentiality of private telephone, face-to-face, and computer communications while enabling authorities to identify and intercept criminal communications. Title III of the Omnibus Crime Control and Safe Streets Act of 1968 supplies the first level. It prohibits electronic eavesdropping on telephone conversations, face-to-face conversations, or computer and other forms of electronic communications in most instances. It does, however, give authorities a narrowly defined process for electronic surveillance to be used as a last resort in serious criminal cases. When approved by senior Justice Department officials, law enforcement officers may seek a court order authorizing them to secretly capture conversations concerning any of a statutory list of offenses (predicate offenses). Title III court orders come replete with instructions describing the permissible duration and scope of the surveillance as well as the conversations which may be seized and the efforts to be taken to minimize the seizure of innocent conversations. The court notifies the parties to any conversations seized under the order after the order expires.

Below Title III, the next tier of privacy protection covers telephone records, e-mail held in third party storage, and the like, 18 U.S.C. 2701-2709 (Chapter 121). Here, the law permits law enforcement access, ordinarily pursuant to a warrant or court order or under a subpoena in some cases, but in connection with *any* criminal investigation and without the extraordinary levels of approval or constraint that mark a Title III interception.

Least demanding and perhaps least intrusive of all is the procedure that governs court orders approving the government's use of trap and trace devices and pen registers, a kind of secret "caller id.", which identify the source and destination of calls made to and from a particular telephone, 18 U.S.C. 3121-3127 (Chapter 206). The orders are available based on the government's certification, rather than a finding of a court, that use of the device is likely to produce information relevant to the investigation of a crime, any crime. The devices record no more than identity of the participants in a telephone conversation, but neither the orders nor the results they produce need ever be revealed to the participants.

The Act modifies the procedures at each of the three levels. It:

- permits pen register and trap and trace orders for electronic communications (*e.g.*, e-mail);
- authorizes nationwide execution of court orders for pen registers, trap and trace devices, and access to stored e-mail or communication records;
- treats stored voice mail like stored e-mail (rather than like telephone conversations);

- permits authorities to intercept communications to and from a trespasser within a computer system (with the permission of the system's owner);
- adds terrorist and computer crimes to Title III's predicate offense list;
- reinforces protection for those who help execute Title III, ch. 121, and ch. 206 orders;
- encourages cooperation between law enforcement and foreign intelligence investigators;
- establishes a claim against the U.S. for certain communications privacy violations by government personnel; and
- terminates the authority found in many of these provisions and several of the foreign intelligence amendments with a sunset provision (Dec. 31, 2005).

## Foreign Intelligence Investigations

The Act eases some of the restrictions on foreign intelligence gathering within the United States, and affords the U.S. intelligence community greater access to information unearthed during a criminal investigation, but it also establishes and expands safeguards against official abuse. More specifically, it:

- permits "roving" surveillance (court orders omitting the identification of the particular instrument, facilities, or place where the surveillance is to occur when the court finds the target is likely to thwart identification with particularity);
- increases the number of judges on the Foreign Intelligence Surveillance Act (FISA) court from 7 to 11;
- allows application for a FISA surveillance or search order when gathering foreign intelligence is *a significant* reason for the application rather than *the* reason;
- authorizes pen register and trap & trace device orders for e-mail as well as telephone conversations;
- sanctions court ordered access to any tangible item rather than only business records held by lodging, car rental, and locker rental businesses;
- carries a sunset provision;
- establishes a claim against the U.S. for certain communications privacy violations by government personnel; and
- expands the prohibition against FISA orders based solely on an American's exercise of his or her First Amendment rights.

## Money Laundering

In federal law, money laundering is the flow of cash or other valuables derived from, or intended to facilitate, the commission of a criminal offense. It is the movement of the fruits and instruments of crime. Federal authorities attack money laundering through regulations, criminal sanctions, and forfeiture. The Act bolsters federal efforts in each area.

**Regulation:** The Act expands the authority of the Secretary of the Treasury to regulate the activities of U.S. financial institutions, particularly their relations with foreign individuals and entities. He is to promulgate regulations:

- under which securities brokers and dealers as well as commodity merchants, advisors and pool operators must file suspicious activity reports (SARs);
- requiring businesses, which were only to report cash transactions involving more than \$10,000 to the IRS, to file SARs as well;
- imposing additional “special measures” and “due diligence” requirements to combat foreign money laundering;
- prohibiting U.S. financial institutions from maintaining correspondent accounts for foreign shell banks;
- preventing financial institutions from allowing their customers to conceal their financial activities by taking advantage of the institutions’ concentration account practices;
- establishing minimum new customer identification standards and recordkeeping and recommending an effective means to verify the identity of foreign customers; encouraging financial institutions and law enforcement agencies to share information concerning suspected money laundering and terrorist activities; and
- requiring financial institutions to maintain anti-money laundering programs which must include at least a compliance officer; an employee training program; the development of internal policies, procedures and controls; and an independent audit feature.

**Crimes:** The Act contains a number of new money laundering crimes, as well as amendments and increased penalties for earlier crimes. It:

- outlaws laundering (in the U.S.) any of the proceeds from foreign crimes of violence or political corruption;
- prohibits laundering the proceeds from cybercrime or supporting a terrorist organization;
- increases the penalties for counterfeiting;
- seeks to overcome a Supreme Court decision finding that the confiscation of over \$300,000 (for attempt to leave the country without reporting it to customs) constituted an unconstitutionally excessive fine;
- provides explicit authority to prosecute overseas fraud involving American credit cards; and
- endeavors to permit prosecution of money laundering in the place where the predicate offense occurs.

**Forfeiture:** The Act creates two types of forfeitures and modifies several confiscation related procedures. It allows confiscation of all of the property of any individual or entity that participates in or plans an act of domestic or international

terrorism; it also permits confiscation of any property derived from or used to facilitate domestic or international terrorism. The Constitution's due process, double jeopardy, and ex post facto clauses may limit the anticipated breath of these provisions. Procedurally, the Act:

- establishes a mechanism to acquire long arm jurisdiction, for purposes of forfeiture proceedings, over individuals and entities;
- allows confiscation of property located in this country for a wider range of crimes committed in violation of foreign law;
- permits U.S. enforcement of foreign forfeiture orders;
- calls for the seizure of correspondent accounts held in U.S. financial institutions for foreign banks who are in turn holding forfeitable assets overseas; and
- denies corporate entities the right to contest a confiscation if their principal shareholder is a fugitive.

## **Alien Terrorists and Victims**

The Act contains a number of provisions designed to prevent alien terrorists from entering the United States, particularly from Canada; to enable authorities to detain and deport alien terrorists and those who support them; and to provide humanitarian immigration relief for foreign victims of the attacks on September 11.

## **Other Crimes, Penalties, & Procedures**

**New crimes:** The Act creates new federal crimes for terrorist attacks on mass transportation facilities, for biological weapons offenses, for harboring terrorists, for affording terrorists material support, for misconduct associated with money laundering already mentioned, for conducting the affairs of an enterprise which affects interstate or foreign commerce through the patterned commission of terrorist offenses, and for fraudulent charitable solicitation. Although strictly speaking these are new federal crimes, they generally supplement existing law by filling gaps and increasing penalties.

**New Penalties:** The Act increases the penalties for acts of terrorism and for crimes which terrorists might commit. More specifically it establishes an alternative maximum penalty for acts of terrorism, raises the penalties for conspiracy to commit certain terrorist offenses, envisions sentencing some terrorists to life-long parole, and increases the penalties for counterfeiting, cybercrime, and charity fraud.

**Other Procedural Adjustments:** In other procedural adjustments designed to facilitate criminal investigations, the Act:

- increases the rewards for information in terrorism cases;
- expands the Posse Comitatus Act exceptions;

- authorizes “sneak and peek” search warrants;
- permits nationwide and perhaps worldwide execution of warrants in terrorism cases;
- eases government access to confidential information;
- allows the Attorney General to collect DNA samples from prisoners convicted of any federal crime of violence or terrorism;
- lengthens the statute of limitations applicable to crimes of terrorism;
- clarifies the application of federal criminal law on American installations and in residences of U.S. government personnel overseas; and
- adjust federal victims’ compensation and assistance programs.

A section, found in the Senate bill but ultimately dropped, would have changed the provision of federal law which requires Justice Department prosecutors to adhere to the ethical standards of the legal profession where they conduct their activities (the McDade-Murtha Amendment), 28 U.S.C. 530B.



North Dakota State Library  
604 East Boulevard Avenue-Dept. 250  
Bismarck, ND 58505-0800

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