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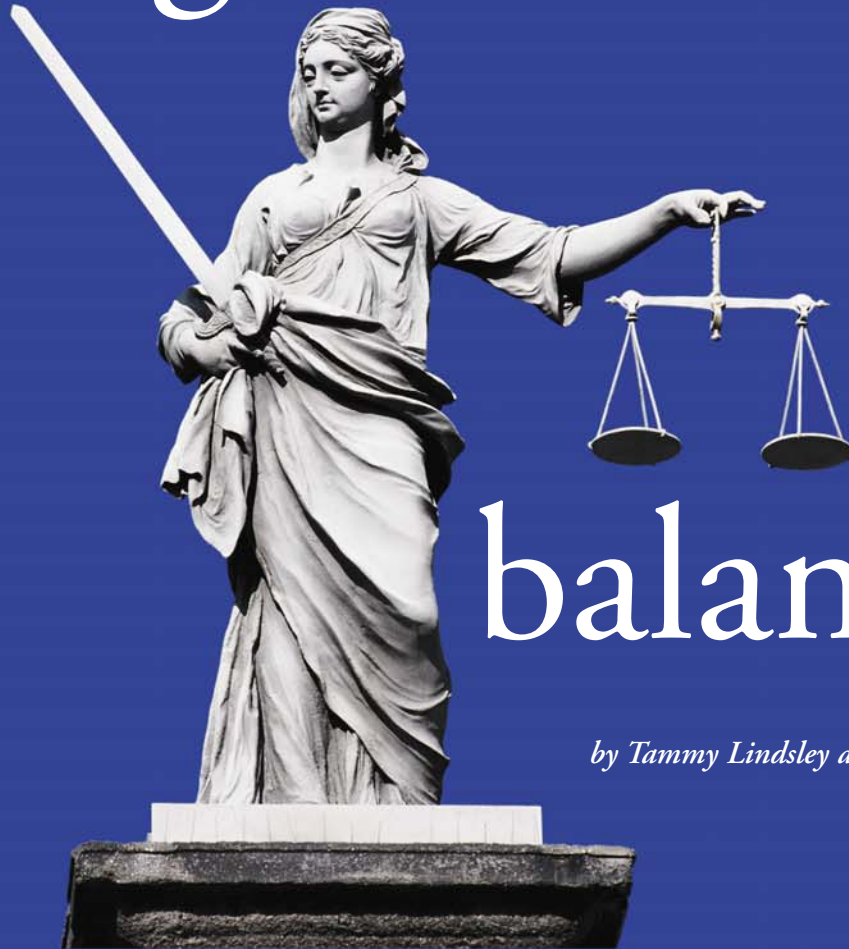
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striking a



balance

by Tammy Lindsley and Emily LeDuc

how title III supports law enforcement while maintaining a citizen's right to privacy

In 1968, the Omnibus Crime Control and Safe Streets Act was enacted, governing—among other things—the use of electronic surveillance for law enforcement agencies. The portion of the act commonly referred to as Title III outlines specific guidelines for the use of electronic surveillance for crime investigation. The original legislation attempts to balance the need for latitude in crime investigations while maintaining citizens’ Fourth Amendment rights. The Fourth Amendment prohibits unreasonable searches and seizures, and requires a warrant to be issued by a judge for searches – except in the case of an emergency.

Title III allows for and regulates interceptions of communications in three categories:

- private face-to-face conversations (oral communications)
- communications over the telephone network (wire communications)
- certain data transmissions (electronic communications)

In an effort to ensure that citizens’ rights to privacy are being protected and that these provisions are not being abused, there are a number of conditions that law enforcement must meet in order to justify electronic surveillance of these types of communications:

- The Attorney General (or his/her designee) must approve every application for a court ordered intercept.
- Applications may only be made to investigate certain offenses set forth in Title III.
- The application must provide sufficient facts for the court to make a three-tiered finding of probable cause regarding the commission of crimes by certain persons, the use of

facilities or premises to be monitored by those persons, and the use of those facilities or premises by the persons in connection with the crimes under investigation.

- The application must state that other investigative procedures have been tried and failed, or are impractical or dangerous.
- The agents executing the Title III warrant must minimize the interception of communications not pertinent to the investigation, and privileged communications.
- Court orders for electronic surveillance are to be used only for the time needed to achieve the objective for the search, and in no event longer than 30 days. Extensions beyond 30 days can be granted upon submission of a new application, meeting all of the requirements of the initial application.
- Records and recordings from the surveillance must be properly sealed and stored.
- Evidence seized in violation of Title III may be challenged and suppressed.

These protections were devised to ensure that a person’s right to privacy was not jeopardized, but at the same time gave law

enforcement an effective tool to fight and prevent crime, consistent with the Constitution. The Federal government has utilized Title III in investigations with great success. James P. Fleissner, Assistant Professor of Law at Mercer University School of Law, testified before Congress in 1996 about the discretion with which the government uses Title III. He stated,

“Although the use of Title III in Federal criminal investigations has had a major impact, the government’s use of the statute has been marked by discretion and caution. In 1992, there were 340 court orders for interception obtained by the Federal government under Title III. Of those, 226 were issued in narcotics cases and 38 were issued in racketeering cases. These figures are put in perspective when one considers that in 1992 over 51,000 defendants were convicted in Federal courts. Not only has the Federal government’s use of Title III been limited in scope, it has also been deliberate and careful. Deliberation and care regarding sustaining and executing Title III orders are institutionalized in the Department of Justice.”

The Patriot Act

After the events of 9/11, Title III legislation was revisited to address the threat of terrorist activities taking place within our borders. The new legislation, part of the Patriot Act, expands the flexibility of law enforcement to obtain warrants and addresses the explosion of communication technology including cellular communications, voice mail, e-mail, and the Internet. As stated by President George W. Bush upon signing the new legislation into law,

“We’re dealing with terrorists who operate by highly sophisticated methods and technologies, some of which were not even available when our existing laws were written.”

Attorney General John Ashcroft told the Senate Judiciary Committee that the new laws were necessary “to perform two related critical tasks: First, prevent more terrorism, and second, to bring terrorists to justice.”

This Act clearly defines the authority of law enforcement to intercept email and cellular communications, by permitting law enforcement now to utilize what Attorney General Ashcroft has called new “technologically neutral” standards for intelligence gathering. The Act also allows authorities to secure warrants that transcend local districts into which investigations may extend.

Ashcroft went on to say that because “technology has dramatically outpaced our statutes” the Act represents “long overdue improvements in our capacity to prevent terrorism.”

Law enforcement requires effective tools to grapple with the fact that terrorists often use multiple means of communication, change phones frequently, and route e-mail through different sources to avoid detection. Prior laws were not written for these types of circumstances. The Act also eases the burden on law enforcement and intelligence to secure a court order authorizing various kinds of surveillance activities.

Changes to standards specifically addressed in the Patriot Act include:

- Wiretap Orders
- Search Warrants
- Court Orders
- Administrative Subpoenas
- Voluntary Disclosure
- Grand Jury Disclosures

Concerns and Questions

Many concerns have been raised by independent groups in the United States over what is thought to be the erosion of our civil liberties by the enactment of the Patriot Act. A source for public debate, the Act has been highly criticized by a number of groups including the American Civil Liberties Union (ACLU). According to an article written by Alan Charles Raul and Amanda L. Tyler from the Washington, D.C. Law Office of Sidley, Austin, Brown and Wood,





“The ACLU attributes the passage of the USA Patriot Act to the faulty assumption that safety must come at the expense of civil liberties.” The organization believes that the Act erodes the longstanding distinction between domestic law enforcement and foreign intelligence collection by permitting the sharing of information between agencies serving distinct purposes. In the same vein, the ACLU argues that the new and expanded law enforcement powers, broad as they are, can and likely will be used against American citizens in routine criminal investigations completely unrelated to terrorism and will be used to dilute Fourth Amendment protections under domestic criminal laws and may also be used to do surveillance of citizens who are not under criminal investigation.”

In addition, other groups are concerned that the Act’s provisions limit judicial review of government surveillance procedures, and may in effect result in the loss of the power of independent review and may open up the door to exploitation and abuse.

As a means to quell such concerns, there are “Sunset” provisions written into the Patriot Act. This means that in four years, the expanded surveillance provisions would automatically lapse. Congress must take requisite action to renew those provisions.

Other Benefits

The Act has also opened the door to a more efficient way of fighting computer and intellectual property crimes, and allows for Federal monitoring of electronic crimes. The Secret Service’s New

York Electronic Crimes Task Force is being expanded to include a unit in each U.S. Attorney’s office, and is a cooperative effort between Federal, state, and local entities as well as private industry.

Overall, the Patriot Act, although controversial, represents a necessary update to legislation that, although still relevant, did not address many of the changes in technology our country has experienced. It also aids law enforcement in addressing the challenges it faces in today’s world, from computer hackers to terrorist cells, while still providing the necessary checks and balances to ensure a citizen’s right to privacy.

GSA and Title III Support

GSA Language Services Schedule 738 II furnishes Title III support within a multi-lingual

environment. GSA has linguist/specialist contractors on schedule with extensive experience and appropriate background in interception, interpretation, and analysis of critical information. Our schedule contractors provide interception of oral, wire, and electronic communications services. These services are offered on behalf of, or in conjunction with, investigative and law enforcement authorities conducting investigations or surveys relating to national and homeland security. Title III services supported by GSA Language Services Schedule 738 II includes multilingual support including monitoring and transcription. These services provide for:

GSA - Supporting Law Enforcement Efforts

Electronic surveillance is one of the most effective weapons law enforcement agencies have in suppressing drug traffic and associated money laundering.

Many times in the course of electronic surveillance, language translation is required. GSA supports law enforcement agencies by providing services under Language Services Schedule 738 II. The Federal Agency defines its needs and asks three or more contractors to submit binding cost estimates for thirty days of linguistic support. The contractor selected dispatches personnel to the site, usually a Federal office or a “safe house,” where they go through a “minimizing” procedure. A U.S. Attorney is present while they read the affidavit and the judge’s order. Personnel are instructed to be particularly sensitive (i.e., not to listen) to calls that are privileged between a husband and wife; client and attorney; or doctor and patient, and to “minimize” those and other calls that do not relate to the case. This process is intended to assure compliance with Federal privacy laws.

The monitors are now ready to work. They listen to intercepted calls, even as these are recorded on audio tape or CDs, and they alert the case agent of any pertinent developing information. They also prepare English-language summaries/synopses of the important details of a call shortly after its interception. These detailed summaries are useful not only in alerting the case agent but also in persuading a judge to extend the intercept for another thirty days, if deemed necessary.

Monitors are expected to transcribe and translate the recorded conversations into English whenever the wiretap does not require their full attention. They are also responsible for maintaining the case records; for passing on to the next shift workers any useful information about the case; and for updating a glossary of coded terms used by the suspects.

Once the recorded conversations have been transcribed and translated, they are reviewed against the original recording by another case monitor – a step called “Quality Control” – and then signed and delivered to the case agents. The transcripts are then often used as compelling evidence against the suspects in court proceedings.

Post-Wiretap Linguistic Support

Law enforcement agencies know that self-incriminating evidence, such as that gathered on tape during legal wiretaps of suspected criminals, provides highly persuasive arguments in securing indictments and convictions. The suspects and their lawyers have the right to examine this evidence, which is submitted to court in the form of a verbatim transcript in the foreign language, generally side by side with its English translation. Because the suspects’ lawyers often challenge the accuracy of the transcription and/or translation, as well as invasion of privacy issues, law enforcement agencies go to great lengths to ensure that their transcripts will withstand any such challenge.



This is where transcribers become a vital part of the prosecutorial process. Transcribers are almost always native speakers of the suspect’s language, and are sent by a GSA language contractor to the site of a state or Federal agency to monitor voice intercepts in a foreign language. In time they become intimately familiar with the cast of characters and have no difficulty recognizing their voices—an important distinction. The transcription must include every stutter, every cough, every snicker, every pause. It must also identify unintelligible words or passages, which are listened to again and again in the hope that a full sentence might emerge. Body wires are particularly difficult to transcribe because they may have been taped in noisy restaurants or on busy streets.

The translation of the transcript is then assigned to an experienced translator with excellent English writing skills, who has also worked as a monitor or supervisor on that particular wiretap. The English version is generally printed side by side with the

foreign language text, using a format that simplifies the subsequent “Quality Control” operation.

In this quality control step, still another monitor from the same project listens to the original tapes and reads both the foreign language transcript and the English translation. Any errors, omissions, or typos discovered at that time are shown to the original transcriber and the original translator who discuss the recommended changes with

the reviewer and eventually finalizes the transcript. The document is packaged, signed, dated, and delivered electronically to the case agent along with a paper copy.

In the case of busy wires that prevented heavy inroads into transcription, the language contractor is often asked to do post-project transcription and quality control of wire taps, sometimes weeks or months after the wiretap. This is less efficient than on-site transcription because the original monitors may be working on other assignments and it takes a while for the new transcribers to familiarize themselves with the case and with the voices.



GSA Language Schedule contractors are also called upon to provide expert witnesses. This helps U.S. Attorneys defend against in-court challenges by the opposing attorneys, involving predominantly the faithfulness of the transcription or translation. These witnesses are frequently state or Federal court certified. They come to the court well prepared and their testimony plays an important part in the outcome of the case.

GSA is proud to support law enforcement in their efforts to monitor and prosecute individuals involved in criminal activity. For more information on GSA's Language Services Schedule, please contact:

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For more information on Title III and the Patriot Act, go to:
<http://www.sidley.com/cyberlaw/features/patriot.asp>

You can access Title 18 USC, Part I, Chapter 119, and Sections 2510 – 2521 of the U.S. Code, “Wire and Electronic Communications Interception and Interception of Oral Communications” at:

<http://www.thecre.com/fedlaw/default.htm>

Sources for 'Striking A Balance'

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