



Anti-Terrorism Authority Under the Laws of the United Kingdom and the United States

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September 7, 2006

Congressional Research Service

7-5700

www.crs.gov

RL33726

CRS Report for Congress

Prepared for Members and Committees of Congress

Summary

This is a comparison of the laws of the United Kingdom and of the United States that govern criminal and intelligence investigations of terrorist activities. Both systems rely upon a series of statutory authorizations: in the case of the United States primarily the Foreign Intelligence Surveillance Act and the Electronic Communications Privacy Act; in the case of the United Kingdom, the Regulation of Investigatory Powers Act, the Police Act, the Intelligence Services Act. Among other differences, the U.S. procedures rely more heavily upon judicial involvement and supervision, while those of the UK employ other safeguards. The UK procedures afford greater latitude to arrest, detain and supervise suspected terrorists than those available in the United States.

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Introduction

This is a comparison of the law of the United States (U.S.) and United Kingdom (UK) relating to the authority to investigate terrorism.¹ It focuses primarily upon the procedures for conducting searches and seizures including the interception of communications, arresting and detaining suspected terrorists, and control orders restricting the activities of suspected terrorists.²

The most obvious difference between the laws of the two countries is that in the UK approval of extraordinary authority including the issuance of warrants often remains an executive function and in the United States the task more often falls to the courts. In addition, authority in the United States only roughly approximates at best the power of UK officials to arrest and detain suspected terrorists and to subject them to control orders. On the other hand, U.S. officials appear to enjoy greater flexibility in the use of intercepted communications for evidentiary purposes.

Many of the differences can be understood in light of the reach of the Fourth Amendment to the United States Constitution. The Fourth Amendment condemns unreasonable governmental searches and seizures. It applies where there is a justifiable expectation of privacy³ and does not apply where there is not.⁴ It does not apply to consensual searches⁵ nor to the overseas search of the property of foreign nationals with no substantial connection to the United States.⁶ The Amendment begins with the presumption that a search or seizure is unreasonable unless conducted pursuant to a warrant issued by a neutral magistrate and upon a showing of probable cause to believe a crime has been committed.⁷

There are many circumstances, however, in which a search or seizure will be considered reasonable notwithstanding the absence of a warrant or of probable cause or of both. Thus, border inspections require neither warrant nor suspicion,⁸ nor does a procedure which allows officers to stop and search parolees.⁹ Incident to a valid arrest, law enforcement officers may search a suspect without probable cause to believe the suspect possesses evidence or a weapon.¹⁰ They may arrest a suspect without a warrant when they have probable cause to believe he has committed a felony,¹¹ and may conduct a brief investigative stop with less than probable cause when, given all of the circumstances, they have “a particularized and objective basis for suspecting” an individual is engaged in or about to engage in criminal activity.¹² When acting in the interests of certain special needs, such as highway safety or student health and safety,

¹ This report has been prepared under the joint auspices of the Law Library of Congress and the Congressional Research Service.

² It does not include a discussion of the National Security Agency (NSA) activities discussed in the press, since the particulars of those activities are not publicly available.

³ *Katz v. United States*, 389 U.S. 347, 353 (1967); *see also* 389 U.S. at 361 (Harlan, J., concurring).

⁴ *Smith v. Maryland*, 442 U.S. 735, 739-41 (1979).

⁵ *Schneekloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259, 274-75 (1990).

⁷ *Katz v. United States*, 389 U.S. 347, 357 (1967).

⁸ *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004).

⁹ *Samson v. California*, 126 S.Ct. 2193, 2202 (2006).

¹⁰ *New York v. Belton*, 453 U.S. 454, 457 (1981).

¹¹ *United States v. Watson*, 423 U.S. 411, 423-24 (1976).

¹² *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005).

government officials may engage in warrantless, suspicionless searches.¹³ When acting solely in the name of national security, government officials may not engage in warrantless searches and seizures relating to a suspected *domestic* terrorist.¹⁴ Whether and to what extent they enjoy greater latitude when focused on the activities of foreign powers and their agents is less clear.¹⁵

Police Stop and Search Powers

The statutory basis for stop and searches by the police in the UK is contained in the Police and Criminal Evidence Act 1984,¹⁶ which provides the police can stop and search an individual if they have reasonable suspicion that a crime has been, is being, or is about to be committed. Statistics show that under the provisions of this Act the police stopped black people six times more frequently than white people and Asian people two times more frequently.¹⁷ The police were provided with broader authority to stop and search people under the Terrorism Act 2000 that permits officers, with authorization from a senior officer, to stop and search anyone to prevent terrorism.¹⁸ Statistically, Asian and black people are respectively four and five times more likely to be stopped than white people under this Act.¹⁹

These statistics, combined with the Code issued under the Police and Criminal Evidence Act and the Home Office Stop and Search Interim Guidelines provide that while the police must “not discriminate against members of minority ethnic groups when they exercise these powers ... [t]here may be circumstances where it is appropriate for officers to take account of a person’s ethnic background when they decide who to stop in response to a specific terrorist threat (for example, some international terrorist groups are associated with particular ethnic groups, such as Muslims).”²⁰ This Code of Practice has given rise to the claim that the British police use ethnic

¹³ *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 455 (1990); *Vernonia School District v. Acton*, 515 U.S. 646, (1995).

¹⁴ *United States v. United States District Court (Keith)*, 407 U.S. 297, 321 (1972).

¹⁵ The *Keith* Court emphasized that its opinion did not intend to express any opinion as to the President’s national security powers “with respect to activities of foreign powers or their agents.” 407 U.S. at 321-22. Congress passed the Foreign Intelligence Surveillance Act (FISA) in response to *Keith*. “Before Congress enacted FISA, virtually every circuit that addressed the issue held that there is a ‘foreign intelligence’ exception to the [Fourth Amendment’s] general warrant requirement. See *United States v. Truong*, 629 F.2d 908, 913 (4th Cir. 1980); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Butenko*, 494 F.2d 593, 605 (3^d Cir. 1974); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1974); cf. *Zweibon v. Mitchell*, 516 F.2d 594, 651 (D.C.Cir. 1997)(noting in *dicta* warrantless foreign intelligence surveillance is unlawful).” *United States v. Marzook*, 435 F.Supp.2d 778, 792-93 (N.D. Ill. 2006)(cited cases handed down after the 1978 enactment of FISA were passed on earlier law). Subsequent case law concerning warrantless foreign intelligence surveillance apart from FISA is extremely sparse and in many respects has only begun to develop. *United States v. Bin Laden*, 126 F.Supp.2d 264, 285 (S.D.N.Y. 2000); *Hepting v. AT&T Corp.*, 439 F.Supp.2d 974 (N.D.Cal. 2006); *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754 (E.D.Mich. 2006).

¹⁶ Police and Criminal Evidence Act 1984, c. 60.

¹⁷ Home Office, Statistics on Race and the Criminal Justice System 2003, 2004, available at <http://www.cre.gov.uk/Default.aspx?LocID=0hgnew04s.RefLocID=0hg00900c002.Lang-EN.htm>.

¹⁸ Terrorism Act 2000, §44. The authorization can only last up to twenty-eight days, but has reportedly been consistently renewed over the past six years. See generally Arun Kundnani, *Racial Profiling and Anti Terror Stop and Search*, IRR NEWS, Jan. 31, 2006, available at <http://www.irr.org.uk/2006/january/ha000025.html>.

¹⁹ Terrorism Act 2000, §44, Home Office, Statistics on Race and the Criminal Justice System 2003, 2004, available at <http://www.cre.gov.uk/Default.aspx?LocID=0hgnew04s.RefLocID=0hg00900c002.Lang-EN.htm>.

²⁰ Police and Criminal Evidence Act 1984, Code A: Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search, available at <http://www.homeoffice.gov.uk/docs/pacodea.pdf> and Home Office, Stop (continued...)

and religious profiling in their policing, a claim that both the government and the police have actively worked to dismiss.²¹

The government has noted that the enactment of the recent anti-terrorism laws led to “a palpable increase in stopping and searching of people of Asian origin in particular.”²² The government expressed concern that tensions with the Muslim community in particular are not exacerbated, because it is believed that the isolation and the stigmatization, perceived, or otherwise, contributes towards the disenfranchising of Muslims, providing extremists with the opportunity to recruit these individuals. An expert witness in a panel reviewing the use of anti-terrorism stop and search powers has noted “one of the biggest dangers of counter-terrorism policing must be that it will grow the very terrorism which it seeks to defeat.”²³

Against this background, in the wake of the London bombing in July 2005, the Chief Constable of British Transport Police (BTP) publicly stated: “We should not waste time searching old white ladies. [Searches are] going to be disproportionate. It is going to be young men, not exclusively, but it may be disproportionate when it comes to ethnic groups.”²⁴ The government quickly distanced itself from this remark noting that intelligence-led stop and searches should be utilized rather than stereotyping ethnic minorities²⁵ because “tackling terrorism is absolutely dependent on the confidence of these communities to feel that they can come forward, give information and be part of the fight against this threat.”²⁶

In the United States as noted earlier, the Fourth Amendment permits parolees to be stopped and searched without warrant or suspicion.²⁷ And law enforcement officers may conduct a brief investigative stop when given the circumstances they have “a particularized and objective basis for suspecting” that criminal activity is afoot.²⁸ Nevertheless invidious racial, ethnic, or religious discrimination in law enforcement is unlawful,²⁹ and the consideration of such factors standing alone “and sometimes even in tandem with other factors, does not generate reasonable suspicion for a stop.”³⁰

(...continued)

and Search Action Team: Interim Guidelines, *available at* <http://www.privacyinternational.org/issues/terrorism/library/ukstopsearchguidance2004.pdf> (last visited Apr. 12, 2006).

²¹ Mark Oliver, *Belears backs away from racial profiling*, Aug. 2, 2005, *GUARDIAN* (London) *available at* <http://www.guardian.co.uk/attackonlondon/story/0,16132,1540937,00.html?gusrc=rss>.

²² Home Office, *Race Relations and the Police*, *available at* <http://www.homeoffice.gov.uk/police/about/race-relations/> (last visited Apr. 12, 2006).

²³ Metropolitan Police Authority, *Progress report on MPA Stop and Search Scrutiny, Report 9*, by the Commissioner, Oct. 16, 2003, *available at* <http://www.mpa.gov.uk/committees/eodb/2003/031016/09.htm>. *See also* Metropolitan Police Authority, *Report of the MPA Scrutiny on MPS Stop and Search Practice*, Feb. 2004, *available at* <http://www.mpa.gov.uk/downloads/committees/eodb/eodb-040520-05-appendix01.pdf>

²⁴ Metropolitan Police Authority, *Community Engagement to Counter Terrorism, Report 9*, Chief Executive and Assistant, Jan. 26, 2006, *available at* <http://www.mpa.gov.uk/committees/mpa/2006/060126/09.htm>.

²⁵ *No Racial Profiling by Anti-Terror Police, Says Minister*, *TIMES* (London), Aug. 2, 2005, *available at* <http://www.timesonline.co.uk/article/0,,22989-1717624,00.html>.

²⁶ *Id.*

²⁷ *Samson v. California*, 126 S.Ct. 2193, 2202 (2006).

²⁸ *United States v. Arvizu*, 534 U.S. 266, 273 (2002); *United States v. Singh*, 415 F.3d 288, 294 (2d Cir. 2005).

²⁹ U.S. Const. Amends. V, XIV; 18 U.S.C. 242.

³⁰ *United States v. Swindle*, 407 F.3d 562, 569-70 (2d Cir. 2005) (*citing United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975), *inter alia*).

Police Arrest Powers

Police powers in the UK under the Terrorism Act 2000 are wide-ranging and there are concerns over opportunities for abuse. The Act permits investigations into the resources of proscribed organizations and the commission, preparation, or instigation of acts that are offenses under the Act. Police can arrest individuals without a warrant based on a reasonable suspicion that they have been involved in the preparation, instigation, or commission of acts of terrorism, regardless of whether police believe the suspect is committing or has committed a crime.³¹ The government justified this “pre-emptive power of arrest” by stating that the delay in collecting sufficient information for an arrest warrant would, in some cases, be too late to prevent the terrorist act.

There are no federal statutory provisions in the United States comparable to the British authority to arrest suspected terrorists. Under the Fourth Amendment, the hallmarks of a reasonable arrest are probable cause and a warrant issued by a neutral magistrate.³² The Amendment does allow warrantless arrests based on probable cause under some circumstances³³ and permits brief investigative stops³⁴ and border inspections³⁵ without a warrant and less than probable cause, but there is nothing the equivalent of a “pre-emptive power of arrest.”³⁶

Detention of Suspected Terrorists

The government in the UK has faced the difficult task of balancing the rights of individuals, which now have extensive statutory protection under the Human Rights Act 1998,³⁷ with the security of the state. The incorporation of the European Convention on Human Rights [the ECHR] into the domestic law of the UK by the Human Rights Act 1998³⁸ altered the legal climate of the UK and resulted in the specific prohibition of detention for the sole purpose of preventing a crime being specifically prohibited, save in certain circumstances prescribed by law.³⁹ While the ECHR is not a new doctrine of law, but merely sets out the rights that individuals in Britain have long enjoyed under the common law,⁴⁰ the impact of the ECHR on the domestic laws of the UK is evident. Cases challenging British laws are noticeable and ever increasing in number.

³¹ Terrorism Act 2000, c.11, §§ 41-43.

³² *Katz v. United States*, 389 U.S. 347, 357 (1967).

³³ *United States v. Pringle*, 540 U.S. 366, 370 (2003).

³⁴ *United States v. Arvizu*, 534 U.S. 266, 273 (2002).

³⁵ *United States v. Flores-Montano*, 541 U.S. 149, 152-53 (2004).

³⁶ *Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (“[W]e have never ‘sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes absent probable cause or judicial authorization’”) (quoting *Hayes v. Florida*, 470 U.S. 811, 815 (1985)).

³⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature Nov. 4, 1950, 213 UNTS 222.

³⁸ Human Rights Act 1998, c. 42.

³⁹ Currently, two situations to which the prohibition does not apply are the detention for treatment and assessment of individuals with diagnosed mental health disorders when they are believed to be a danger to themselves or the safety of others; and detention that is disproportionate to the offense for people convicted of crimes, when it is believed that such individuals are a threat to society.

⁴⁰ *A v Secretary of State for the Home Department*, [2004] UKHL 56 ¶ 88.

The UK has had lengthy experience in indefinitely detaining those suspected to be terrorists without trial in Northern Ireland.⁴¹ Under the Prevention of Terrorism (Temporary Provisions) Act 1984 (PTA),⁴² the Secretary of State could authorize the detention of a person for up to seven days. In 1988 the European Court of Human Rights ruled that this was a breach of article 5(3) of the ECHR unless it was judicially authorized, resulting in the government derogating from that article in order to lawfully retain this provision of the PTA.⁴³ The use of these powers was controversial and in response to increasing violence. The result of the internment of almost 2,000 predominantly Catholic men was greater civil disturbances and a “diminished respect for the rule of law in Northern Ireland.”⁴⁴ It was widely reported that the use of internment was “among the best recruiting tools the IRA ever had.”⁴⁵

It was against this background and experience that the government had to decide the most effective, least controversial, and least likely to succumb to legal challenges in which to address individuals whom the government suspects to be international terrorists or threats to national security, but whom it cannot deport. This issue was tackled during the drafting of the TA, when alternative options to derogation from the ECHR were considered. It was finally decided that individuals could be detained for up to forty-eight hours after arrest without charge.⁴⁶ Critics of the TA regarded this provision as providing for “incommunicado detention” and unnecessary because previously individuals detained under similar provisions were rarely charged with a terrorist offense.⁴⁷ Despite this criticism the period of detention permitted under the TA has been extended by successive acts—from forty-eight hours to fourteen days by the Criminal Justice Act 2003 and from fourteen days to twenty-eight days by a highly contentious provision in the Terrorism Act 2006.⁴⁸

The detention under this provision, for an initial period of forty-eight hours, is then reviewed by a judicial authority and is then renewable for seven day periods up to a maximum of twenty-eight days, with a senior judge considering applications for detainment for the final fourteen days.⁴⁹ In order to continue the period of detention the judicial authority must be satisfied that it is necessary either to obtain or preserve relevant evidence or permit completion of an examination or analysis of any relevant matter with a view to obtaining evidence. The investigation connected with the detention must also be conducted diligently and expeditiously.

Other areas of controversy under the detention powers are that police superintendents can impose a delay on the detained person without notifying others of the person’s detention or allowing them

⁴¹ Prevention of Terrorism (Temporary Provisions) Act 1984, c. 8.

⁴² *Id.*

⁴³ *Brogan and others v the UK*, (1989) 11 EHRR 117.

⁴⁴ Mary O’Rawe, *Ethnic Profiling, Policing, and Suspect Communities: Lessons from Northern Ireland, 2005*, Open Society Justice Initiative, at 92, available at http://www.justiceinitiative.org/db/resource2/fs/?file_id=15799.

⁴⁵ Former IRA Commander Jim McVeigh, quoted in M. O’Connor and C. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 *CARDOZO LAW REVIEW* 1657, 1662 (2005).

⁴⁶ Terrorism Act 2000, § 41.

⁴⁷ Former IRA Commander Jim McVeigh, *supra* footnote 45.

⁴⁸ The government initially wanted to extend the period of detention to a total period of ninety days in the Terrorism Act, but to ensure the bill passed through Parliament, the government reduced this to twenty eight days and inserted a sunset clause that this provision is to expire one year after its enactment.

⁴⁹ Terrorism Act 2000, § 41 and sch. 8, as amended by the Terrorism Act 2006, § 24.

to consult with a solicitor if there are reasonable grounds to believe that it would interfere with other investigations.⁵⁰

In the United States, authorities must advise an individual in custody of his right to have attorney present during interrogation and to have one appointed if he is unable to afford one.⁵¹ A person in custody may waive his right to the presence of counsel, but questioning must stop if the individual asks to speak to an attorney before continuing.⁵²

As to the detention of suspected terrorists, American law affords no counterpart, but the operation of the material witness statute may have the same effect in some instances. Federal law permits authorities to arrest a suspected terrorist with or without a warrant if they have probable cause to believe that he has committed a federal felony.⁵³ It also permits the issuance of an arrest warrant if there is probable cause to believe that a person is a material witness to a federal offense and will not be available when needed to testify either before the grand jury, at a trial, or in any other criminal proceeding.⁵⁴ Although an individual's proximity to a crime may make him both a legitimate witness and a legitimate suspect, the courts have said that a material witness warrant may not be used as a substitute for a criminal arrest warrant.⁵⁵

Those arrested under federal authority must be taken before a magistrate "without unreasonable delay."⁵⁶ A delay of longer than 48 hours of an individual arrested without a warrant is presumptively unreasonable as a matter of constitutional law,⁵⁷ and a delay of a period as short as two hours may be considered unreasonable if the delay is attributable to criminal investigation rather than processing of an arrestee.⁵⁸

Both those arrested on criminal charges and those arrested as material witnesses are eligible for release under federal bail laws.⁵⁹ Under the bail laws an individual arrested will either be: released on personal recognizance; released subject to certain conditions including the execution of a bail bond; temporarily detained pending parole revocation, deportation or exclusion; or detained pending trial.⁶⁰ An individual charged with one or more of the terrorist offenses listed in 18 U.S.C. 2332b(g)(5)(B) and punishable by a maximum term of imprisonment of 10 years or more may be held for a hearing to determine whether any combination of conditions will be sufficient to assure public safety and his appearance at later proceedings.⁶¹ In such cases, there is a rebuttable presumption that no combination of conditions will reasonably assure public safety or the later appearance of an individual arrested for various terrorist offenses.⁶² Although the

⁵⁰ Terrorism Act 2000, sch. 8 ¶ 8.

⁵¹ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966); *Dickerson v. United States*, 530 U.S. 428, 435-38 (2000).

⁵² *Davis v. United States*, 512 U.S. 452, 458 (1994).

⁵³ U.S.Const. Amend. IV; F.R.Crim.P. 41; *Devenpeck v. Alford*, 543 U.S. 146, 152 (2004).

⁵⁴ 18 U.S.C. 3144; *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003); *United States v. Oliver*, 683 F.2d 224, 231 (7th Cir. 1982).

⁵⁵ *United States v. Awadallah*, 349 F.3d 42, 59 (2d Cir. 2003); *In re DeJesus Berrios*, 706 F.2d 355, 358 (1st Cir. 1983)

⁵⁶ F.R.Crim.P. 5.

⁵⁷ *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991).

⁵⁸ *United States v. Rivera*, 370 F.3d 730, 734 (8th Cir. 2004).

⁵⁹ 18 U.S.C. 3142.

⁶⁰ 18 U.S.C. 3142(a).

⁶¹ 18 U.S.C. 3144(e),(f),(g).

⁶² 18 U.S.C. 3142(e).

terrorist presumption only applies to those charged with terrorist offenses, material witnesses may nonetheless be detained if the court determines no combination of conditions will assure public safety and the later appearance of the witness.⁶³

Control Orders

Various approaches to solve the problem of balancing the human rights of the individuals with the need to protect the public and national security were investigated. After acknowledging the limits of the laws in which it could act,⁶⁴ the government considered various options to replace the preventive detention scheme, including permitting the entry in court of intercepted or wiretapped evidence⁶⁵ or entering into Memorandums of Understanding between the UK and certain governments to ensure that, if the detainees were deported to their home countries, they would not be subject to the death penalty or torture upon their arrival.⁶⁶ The government ultimately decided that certain aspects of the preventive detention scheme could be achieved through control orders that would apply to both foreign and British nationals and be supplemented by Memoranda of Understanding with monitoring bodies, ensuring these countries compliance with the terms of these agreements. In arriving at this decision, the Secretary of State reasoned that:

There are cases in which we remain unable to prosecute. However, that does not mean that we should do nothing to forestall suspected terrorists or to prevent them from planning, assisting or otherwise supporting those willing to carry out attacks. The Government have therefore decided to replace the part 4 powers [of the ATCSA] with a new system of control orders. We intend that such orders be capable of general application to any suspected terrorist irrespective of nationality or, for most controls, of the nature of the terrorist activity [whether international or domestic] and that they should enable us to impose conditions constraining the ability of those subject to the orders to engage in terrorist-related activities. Control orders would be used only in serious cases. The controls imposed would be proportionate to the threat that each individual posed. Such orders would be preventive and designed to disrupt those seeking to carry out attacks [whether here or elsewhere] or who are planning or otherwise supporting such activities. They would be designed to address directly two of the Law Lords' concerns: discrimination and proportionality.⁶⁷

Control Orders were implemented through the Prevention of Terrorism Act 2005, with the aim of protecting the public from the risk of terrorism by preventing individuals named in such orders from becoming involved in, or assisting, a terrorism-related activity when prosecution of the individual for that activity, or a criminal offense is not possible.⁶⁸ The orders are preventive in nature and designed to disrupt the activity of individuals where intelligence shows them to be a

⁶³ *United States v. Awadallah*, 349 F.3d 42, 62-3 (2d Cir. 2003).

⁶⁴ 430 PARL. DEB., H.C. (5th ser.) (2005) 307 available at http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm050126/debtext/50126-04.htm#50126-04_spm0 (last visited Mar. 7, 2005). See also Lord Carlile of Berriew, Anti-terrorism, Crime and Security Act 2001 Part IV Section 28 Review 2004, ¶ 11 available at http://www.homeoffice.gov.uk/docs4/Part_IV_Feb_05.pdf (last visited Mar. 7, 2005).

⁶⁵ *Id.*

⁶⁶ 430 PARL. DEB., H.C. (5th ser.) (2005) 307. The government focused its attention on obtaining Memoranda of Understanding with key Middle Eastern and North African countries. See also *UK Plan to Deport Terror Suspects*, BBC NEWS, Jan. 19, 2005, available at <http://news.bbc.co.uk/1/hi/uk/4186457.stm> (last visited Feb. 16, 2005).

⁶⁷ 430 PARL. DEB., H.C. (5th ser.) (2005) 307.

⁶⁸ Prevention of Terrorism Act 2005, c. 2.

threat by imposing “obligations on individuals suspected of being involved in terrorism-related activity⁶⁹ [whether domestic or international] ... [to] restrict or prevent the further involvement by individuals in such activity.”⁷⁰

The 2005 Act provides for two types of orders: those that do not derogate from the UK’s obligations under the ECHR [hereinafter “non-derogating orders”] and those that do derogate from the ECHR through imposing obligations that are incompatible with an individual’s right to liberty [hereinafter “derogating orders”].⁷¹

To create the most restrictive form of order, which requires derogation from the UK’s obligations under the ECHR, the Secretary of State must file an application with the High Court. Upon receipt of the application, the High Court must hold a preliminary hearing, which may occur without notifying the named individual or allowing him to make representations before the court, to determine whether there is a prima facie case to grant the order.⁷² The court has authority to grant an order at this stage if a number of criteria are met, including that there is material present that can be relied upon to establish the individual is or has been involved in terrorism-related activity and it is reasonable to impose obligations on the individual to protect the public from the risk of terrorism.⁷³ If the court makes the derogating order in preliminary hearing, it is then required to hold a full inter partes hearing to either confirm, revoke or modify the obligations of the order. These orders can be made for up to twelve months at a time, and remade after that time period by the Secretary of State, provided the derogation from the ECHR continues.

The orders are tailored to the particular risk imposed by each individual upon the advice of the Security Service and can be modified to adjust to the changing risks that the individual might pose and subject suspected terrorists to conditions similar to bail or probation, such as electronic tagging, curfews, restrictions on communications or the use of certain facilities such as the Internet, and from associating with other individuals.⁷⁴ The obligations that can be imposed in the orders are not restricted solely to the activities that caused the original suspicion that the person was or had been involved in terrorism-related activity, but can be any obligation aimed to prevent involvement in any terrorism-related activity.⁷⁵ There are many instances in which the courts hear cases without the presence of the individual named in the order, or his legal representative.⁷⁶ If the individual subject to an order contravenes any obligations imposed by the order, he can be

⁶⁹ Section 1(9) of the Prevention of Terrorism Act 2005, c. 2 defines terrorism-related activities as “one or more of the following: (a) the commission, preparation or instigation of acts of terrorism; (b) conduct which facilitates [or gives encouragement to] the commission, preparation or instigation of such acts, or which is intended to do so; (d) conduct which gives support or assistance to individuals who are known or believed to be involved in terrorism-related activity.”

⁷⁰ Prevention of Terrorism Act 2005, c. 2, Explanatory Notes ¶ 3.

⁷¹ *Id.*, § 1(2).

⁷² *Id.*, c. 2, § 4.

⁷³ *Id.*, c. 2, § 4. The additional criteria are that “the risk arises out of, or is associated with, a public emergency in respect of which there is a designated derogation from the whole or a part of Article 5 of the Human Rights Convention; and the obligations that there are reasonable grounds for believing should be imposed on the individual are or include derogating obligations of a description set out in the designation order.”

⁷⁴ Prevention of Terrorism Act 2005, c. 2, § 1(4).

⁷⁵ Prevention of Terrorism Act 2005, c. 2, § 2(9).

⁷⁶ The 2005 Act provides that Special Advocates, who are not responsible to the parties of the case, may be appointed to represent the interests of the individual named in the order. Prevention of Terrorism Act 2005, c. 2, sch. 1 ¶ 7.

arrested without a warrant and, if found guilty of an offense, may be imprisoned for a period of up to five years and/or fined upon conviction on indictment.⁷⁷

The introduction of Control Orders was inevitably subject to considerable criticism, notably that it was the biggest threat to the civil liberty of British citizens and extension of the state's executive powers in over 300 years because, in certain circumstances, a citizen may be deprived of their liberty without knowledge of the evidence presented against them.⁷⁸ Individuals criticized the structure of the British legal system, and questioned why the government did not remove the legal constraints that prevent the prosecution of individuals for existing criminal and terrorist offenses in the courts in the first instance, such as restrictions on the use of intercept evidence in the courts.

The Labour government responded to these suggestions by stating that an extensive review had concluded that the use of intercepted evidence would only produce a "modest" increase in the number of prosecutions for serious criminal offenses but none for terrorists and argued that:

There is a widespread misconception that if we could only adduce intercept as evidence, we would be able to prosecute those detained. However, the review of intercept as evidence found no evidence to support this ... [the] Government do not intend to change the existing arrangements. Intercept provides only part of the intelligence against individuals ... it does not stand alone. Some of the material that we have in these cases is inadmissible, and other material, while technically admissible, could not be adduced without compromising national security, damaging relationships with foreign powers or intelligence agencies, or putting the lives of sources at risk.⁷⁹

Due to the highly political and sensitive nature of the subject matter of the 2005 Act, as well as the circumstances in which the bill was pushed through Parliament, a sunset clause was inserted that the provisions within the 2005 Act governing control orders will expire twelve months after the bill was passed. The Secretary of State may, after consulting with the person appointed to review the Act, the Intelligence Services Commissioner and the Director-General or the Security Service, lay an order before Parliament that must be approved by a resolution of each House of Parliament to revive the Act for an additional period of 12 months.⁸⁰

To ensure that the 2005 Act is not subject to abuse, nor contravenes individual human rights without check, the Secretary of State is required to prepare a report every three months concerning his use of control orders and appoint an individual to review the operation of the Act. The report is also to cover the implications on the Act of any proposals put forth by the Secretary of State for any law relating to terrorism, as well as the extent of the Secretary of State's use of non-derogating control orders in urgent cases without the permission of the court.⁸¹

The system of Control Orders has already been subject to an adverse ruling by the High Court, with the judge stating that the orders are "an affront to justice" and "conspicuously unfair."⁸² The

⁷⁷ Prevention of Terrorism Act 2005, c. 2, § 9.

⁷⁸ *Terror Law Row Explained*, BBC NEWS, Mar. 12, 2005 available at http://news.bbc.co.uk/1/hi/uk_politics/4288407.stm.

⁷⁹ 430 PARL. DEB., H.C. (5th ser.) (2005) 307.

⁸⁰ Prevention of Terrorism Act 2005, c. 2, § 13.

⁸¹ *Id.* § 14.

⁸² *Secretary of State for the Home Department v MB*, [2006] WLR (D) 104 (QB).

government is appealing this decision and has stated “the ruling will not limit the operation of the act ... [and] we will not be revoking either the control order which was the subject of this review, nor any of the other control orders currently in force on the back of this judgement ... Nor will the judgment prevent the secretary of state from making control orders on suspected terrorists where he considers it necessary to do so in the interests of national security in future.”⁸³ As of May 2006 there have been twenty one control orders issued, and twelve remain in force.⁸⁴

The government continues to face the unenviable and difficult task of balancing the rights of individuals and maintaining democracy whilst protecting it. Inevitably, any legislation aimed at preventing individuals from engaging in a terrorist act rather than punishing individuals for committing such an act will be subject to considerable criticism. It is not within the realm of “traditional justice” to punish an individual for an act not yet committed overtly. The government has maintained that the threat it is facing is not a traditional threat, and its use of preventive measures is necessary to maintain order and national security from an amorphous threat. The London Times has criticized the UK’s use of these provisions by drawing a parallel with:

Totalitarian states [that] have traditionally resorted to house detention as a way to silence dissent without the bad publicity of criminal proceedings, so creating a form of extralegal limbo that indicates guilt on the part of a suspect without having to go to the trouble of obtaining a conviction ... Charles Clarke has argued that house arrest is preferable to detention in Belmarsh, but that is only a difference of circumstance, not of essence.⁸⁵

The Home Secretary has continued to reiterate the paradoxical challenge that the current situation creates and has stated that he is striving to:

Protect national security and ensure the safety and security of this country. In doing so, I need to consider how we balance the rights of individuals against those of society; how we ensure safety and security within a democracy without undermining the values that are at the very heart of it.⁸⁶

The United States does not appear to recognize a procedure comparable to the UK’s control orders. The procedure is reminiscent of the conditions that may be imposed either under federal bail laws⁸⁷ or the laws governing federal probation.⁸⁸ Control orders, however, are available when there is insufficient evidence upon which to base a prosecution, while bail is predicated upon arrest based on a determination that there is probable cause to believe that the person has committed a crime⁸⁹ and probation is predicated upon conviction.⁹⁰

⁸³ Vikram Dodd and Carlene Bailey, *Terror Law an Affront to Justice-Judge: Control Orders Breach Human Rights*, GUARDIAN (London) Apr. 18, 2006, available at <http://www.guardian.co.uk/humanrights/story/0,,1752864,00.html>.

⁸⁴ *More Scrutiny of Control Orders*, BBC NEWS, May 2, 2006, available at http://news.bbc.co.uk/2/hi/uk_news/politics/4965672.stm.

⁸⁵ Ben MacIntyre, *Guilty Until Proven Guiltier*, TIMES (London), Jan. 29, 2005 available at <http://www.timesonline.co.uk/article/0,,1068-1460767,00.html>.

⁸⁶ 430 PARL. DEB., H.C. (5th ser.) (2005) 679.

⁸⁷ 18 U.S.C. 3142-3144.

⁸⁸ 18 U.S.C. 3561-3566.

⁸⁹ F.R.Crim.P 4, 5.

⁹⁰ 18 U.S.C. 3561.

Surveillance

Law enforcement and the Security Services in the UK have a broad variety of methods at their disposal to investigate crimes. These methods include the interception of communications, electronic data, and various forms of surveillance. The use of these methods are subject to a lengthy and complex legislative regime contained in the Regulation of Investigatory Powers Act 2000 (RIPA),⁹¹ the Police Act 1997,⁹² and the Intelligence Services Act 1994,⁹³ and supplemented by the protections in the European Convention on Human Rights. Additional provisions are supplied in the Covert Surveillance Code of Practice and the Interception of Communications Code of Practice, which the Secretary of State is required to publish under the RIPA.⁹⁴

The RIPA regulates most forms of surveillance and the interception of communications in the UK. It was enacted to update the laws on the interception of communications and brings them into line with technological advances. The RIPA was also enacted in anticipation of the effects of the Human Rights Act 1998, which granted individuals an enforceable right to family life and privacy and in response to a number of adverse rulings from the European Court of Human Rights. The European Court of Human Rights found that the lack of regulation of surveillance activities was in breach of article 8 of the European Convention on Human Rights (ECHR), because the interference with the complainants' right to private life had not occurred with a procedure prescribed by law.⁹⁵ Despite concerns over the lack of judicial involvement during the drafting of these laws, the issuance of warrants in the UK remains an executive act; with the government previously "explicitly reject[ing] the suggestion that the issue of a warrant should be a judicial act."⁹⁶

In the United States, law enforcement and intelligence agencies enjoy broad authority to investigate individuals and activities. That authority, however, is limited by court rule, and by statutory and constitutional safeguards designed to prevent unwarranted intrusions and abuse. The authority includes the power to conduct searches and seizures;⁹⁷ to intercept wire, oral and electronic communications;⁹⁸ to demand access to stored communications and communications records;⁹⁹ to install and use pen registers and trap and trace devices;¹⁰⁰ and to issue administrative subpoenas including those in the form of "national security letters."¹⁰¹ While law enforcement

⁹¹ Regulation of Investigatory Powers Act 2000, c. 23.

⁹² Police Act 1997, c.50.

⁹³ Intelligence Services Act 1994, c. 13.

⁹⁴ Regulation of Investigatory Powers Act 2000, c. 23, § 71; Regulation of Investigatory Powers (Interception of Communications: Code of Practice) Order 2002, SI 2002/1693; and the Regulation of Investigatory Powers (Covert Surveillance: Code of Practice) Order 2002, SI 2002/1933.

⁹⁵ *Khan v the UK* [2000] 6 EHLR 6555; *Malone v the UK* [1984] 7 EHRR 14. See also RICHARD POWELL, AN INTRODUCTION TO THE RIPA 2000, Part I, Mags. C.P. 5.1(9) (2001).

⁹⁶ Regulation of Investigatory Powers Act 2000, c. 23, § 5.

⁹⁷ U.S. Const. Amend. IV; F.R.Crim.P. 41; 18 U.S.C. 3103a; 50 U.S.C. 1821-1829.

⁹⁸ 18 U.S.C. 2510-2520; 50 U.S.C. 1801-1811.

⁹⁹ 18 U.S.C. 2701-2712.

¹⁰⁰ 18 U.S.C. 3121-3127; 50 U.S.C. 1841-1846.

¹⁰¹ 18 U.S.C. 3486; 21 U.S.C. 876; 18 U.S.C. 2709; 15 U.S.C. 1681u; 15 U.S.C. 1681v; 12 U.S.C. 3414; 50 U.S.C. 436. Federal grand juries enjoy particularly sweeping investigative authority; grand juries have been abolished in the UK; see generally, CRS Report 95-1135, *The Federal Grand Jury*, by (name redacted).

and intelligence investigators may work cooperatively, neither Foreign Intelligence Surveillance Act's (FISA) interception nor its physical search authority may be invoked solely for the purpose of a criminal investigation unrelated to a foreign intelligence offense.¹⁰²

Surveillance Under the Regulation of Investigatory Powers Act

The UK's RIPA provides a system of authorizations for three different types of surveillance: directed, intrusive, and covert human surveillance.¹⁰³ All these forms of surveillance involve an aspect of covertness, defined in the RIPA as when the surveillance is "carried out in a manner that is calculated to ensure that persons who are subject to the surveillance are unaware that it is or may be taking place."¹⁰⁴ Intrusive surveillance is defined in the RIPA as covert surveillance that is conducted either by a device or a person, in relation to events occurring inside private property or private vehicles and is the type of surveillance subject to the most stringent controls under the RIPA.¹⁰⁵ Covert human intelligence occurs when a source establishes or maintains any form of relationship with a person to obtain or access information or to disclose such information covertly, when the subject of surveillance is unaware it is occurring.¹⁰⁶ Directed surveillance occurs when the surveillance is covert, but not intrusive, and undertaken for a specific investigation or operation to obtain private information about a person.¹⁰⁷ Specifically, such surveillance involves monitoring a person's "movements, habits or activities by various means in order to obtain specific information about an individual or build a profile of their character or lifestyle" without entering onto the person's property.¹⁰⁸

The RIPA does not impose a requirement that public authorities obtain an authorization under its provisions when they wish to conduct surveillance.¹⁰⁹ However, the Code of Practice on Covert Surveillance¹¹⁰ points to the obligations that the state has under the European Convention on Human Rights to respect family and private life, strongly recommending that an authorization be obtained. The Code notes that where there is "no other source of lawful authority, the consequence of not obtaining an authorization under the RIPA may be that the action is unlawful by virtue of the Human Rights Act."¹¹¹

Due to the unique and involved nature of directed and covert human surveillance, specific requirements must be met before an authorization will be granted. For covert human surveillance, the requirements aim to ensure the source's security and welfare, as well as to provide independent oversight; that proper records are kept on the sources; and that the identity of the

¹⁰² 50 U.S.C. 1806(k), 1825(k), 1804(a)(7)(B), 1823(a)(7)(B); *In re Sealed Case*, 310 F.3d 717, 735-36 (F.I.S.Ct. Rev. 2002).

¹⁰³ Regulation of Investigatory Powers Act 2000, c. 23, § 6.

¹⁰⁴ *Id.*, c. 23, § 26(9)(a).

¹⁰⁵ *Id.*, c. 23, § 26.

¹⁰⁶ *Id.*, c. 23, § 26(7).

¹⁰⁷ *Id.*, c. 23, § 26(2) and Standing Committee F, Mar. 30, 2000, ¶ 274.

¹⁰⁸ Investigatory Powers Tribunal, Directed Surveillance, Jan., 2005, *available at* <http://www.ipt-uk.com/default.asp?sectionID=1&chapter=2.5>.

¹⁰⁹ Regulation of Investigatory Powers Act 2000, c. 23, § 80.

¹¹⁰ The Code of Practice on Covert Surveillance, Pursuant to § 71 of the Regulation of Investigatory Powers Act 2000.

¹¹¹ *Id.* at ¶ 2.2.

source is only disclosed on a “need to know” basis.¹¹² A person designated under the RIPA, which encompasses a broad variety of persons from senior members of the security services to officials from local authorities,¹¹³ can authorize directed and covert human surveillance if he believe that it is proportionate and necessary:

- in the interests of national security;
- for the purpose of preventing or detecting crime or preventing disorder;
- in the interests of the economic well-being of the UK;
- in the interest of public safety;
- for the purpose of protecting public health;
- to collect impositions, contributions or charges payable to a government department; or
- for any purpose as specified in an order made by the Secretary of State laid before Parliament and approved by a resolution in each House.¹¹⁴

Warrants for covert human surveillance continue for an initial period of twelve months, and three months for authorizations for directed surveillance.¹¹⁵

As noted above, there is no requirement for public authorities to obtain an authorization under the RIPA prior to conducting surveillance activities. The Home Office has issued non-statutory guidelines that provide only Chief Constables or Assistant Chief Constables are entitled to authorize the use of certain equipment in police surveillance operations.¹¹⁶ The Guidelines provide that authorizations should only occur when all of the following criteria are met:

- the investigation concerns serious crime;
- normal methods of investigation must have been tried and failed, or must from the nature of things, be unlikely to succeed if tried;
- there is good reason to think that the use of the equipment is likely to lead to an arrest and a conviction, or where appropriate, to the prevention of acts of terrorism;
- the use of equipment is operationally feasible; and

¹¹² Regulation of Investigatory Powers Act 2000, c. 23, § 29(5).

¹¹³ The list of persons with authority to issue a warrant for directed and covert human surveillance is extensive and contained in the Regulation of Investigatory Powers Act 2000, c. 23, §§ 28-30 and the Prescription of Offices, Ranks and Provisions Order 2000, SI 2000/2417. Local authorities and certain other authorities may now use only the powers for covert human surveillance to prevent or detect crime or disorder. Many authorities claim that this restriction has rendered the powers obsolete because they can no longer authorize covert activities in areas that are within their remit. Regulation of Investigatory Powers (Directed Surveillance and Covert Human Intelligence Sources) Order, S.I. 2003/3171. *See also* OFFICE OF SURVEILLANCE COMMISSIONERS, ANNUAL REPORT, 2005-6, H.C. 1298.

¹¹⁴ Regulation of Investigatory Powers Act 2000, c. 23, §§ 28-29.

¹¹⁵ *Id.*, c. 23, § 43.

¹¹⁶ Home Office, Guidelines of 1984, referred to in *Perry v the UK* [2003] Crim LR 281, ¶¶ 23-4.

- the degree of intrusion into the privacy of those affected by the surveillance is commensurate with the seriousness of the offense.¹¹⁷

The use of video surveillance by public authorities in public places has been subject to considerable debate amongst privacy scholars who consider that the installation of the extensive closed circuit television cameras (CCTV) in public places across the UK has eroded individual privacy and is leading to a ‘big brother’ state.¹¹⁸ There are currently no statutory regulations on the use of CCTV cameras, although the Home Office has produced a Code of Practice on their operation.¹¹⁹

The use of CCTV, and the images they record is subject to Article 8 of the ECHR.¹²⁰ The European Court of Human Rights has noted that the “recording of the data and the systematic or permanent nature of the record may give rise to [privacy] considerations ... [and] the compilation of data by security services on particular individuals even without the use of covert surveillance methods constitutes an interference with the applicants’ private lives.”¹²¹ When determining whether video surveillance has breached Article 8, the courts consider whether the complaining individual had a ‘reasonable expectation of privacy’ as an indicating factor whether the surveillance breached their human rights; for example, did the actions occur in a public place or was the information processed at a level high enough to constitute interference with the individual’s private life or the material published in a manner greater than could be reasonably foreseen.¹²² The courts have noted that even though certain acts may occur in public, there is a “zone of interaction ... in a public context, which may fall within the scope of ‘private life.’”¹²³

U.S. law treats covert human surveillance (confidential informants), directed surveillance (consensual interception of communications and lawful unplanned surveillance), and video surveillance a bit differently: no special authorization is statutorily or constitutionally required under most circumstances. The interception of wire, oral or electronic communications with the consent of one party to the communication constitutes one of the exceptions to the general statutory and constitutional prohibitions against warrantless interceptions.¹²⁴ There is no statutory restriction on government surveillance within a public place. The limitations of Fourth Amendment’s proscription on unreasonable searches and seizures only come into play when there is a justifiable expectation of privacy associated with government’s surveillance in the form of a visual or photographic seizure in a public place.¹²⁵ The First Amendment’s restrictions on governmental actions which have a prohibited chilling effect on the exercise of First Amendment rights are not offended when the government’s information gathering “is nothing more than a

¹¹⁷ In *Perry v the UK* [2003] Crim LR 281, ¶¶ 24 (referring to Home Office, Guidelines of 1984).

¹¹⁸ See for example PRIVACY INTERNATIONAL available at <http://www.privacyinternational.org> (last visited Sept. 7, 2006).

¹¹⁹ Home Office, Guidelines of 1984, referred to in *Perry v the UK* [2003] Crim LR 281, ¶¶ 23-4.

¹²⁰ The information collected by CCTV cameras is typically subject to the provisions of the Data Protection Act 1998 and must, therefore, be processed in compliance with this Act.

¹²¹ *Perry v the UK* [2003] Crim LR 281, ¶ 38 (referring to *Rotaru v. Romania* [GC], no. 28341/95, §§ 43-44, ECHR 2000-V, and *Amann v. Switzerland* [GC], no. 27798/95, §§ 65-67, ECHR 2000-II).

¹²² *Peck v the UK* (no. 44647/98), judgment of 28 January 2003, ECHR 2003 and *P.G. and J.H. v the UK*, no. 44787/98, § 56, ECHR 2001-IX.

¹²³ *P.G. and J.H. v the UK*, no. 44787/98, § 56, ECHR 2001-IX.

¹²⁴ 18 U.S.C. 2511(2)(c),(d); *United States v. White*, 401 U.S. 745 (1971).

¹²⁵ *United States v. Katz*, 389 U.S. 347, 361 (1967); *United States v. Jackson*, 213 F.3d 1269, 1280-281 (10th Cir. 2000).

good newspaper reporter would be able to gather by attendance at public meetings and the clipping of articles from publications available on any newsstand.”¹²⁶

Authorizations for Intrusive Surveillance

Due to its inherent invasiveness, the Home Office claims that this form of surveillance is only used to “catch offenders suspected of serious crimes.” Authorizations for intrusive surveillance can only be granted by the Secretary of State or senior officials designated under the RIPA.¹²⁷ The list of individuals under this provision is narrower than those designated to authorize covert or directed surveillance and includes chief constables of the police forces; designated members of the Security Service; the Provost Marshall of the Royal Air Force Police; designated customs officers; and more recently, officers of the Northern Ireland Prison Service.¹²⁸

The circumstances under which this form of surveillance can be authorized are necessarily narrower than the other types of surveillance. A warrant can be authorized if the authorizing official believes the surveillance is:

- proportionate to what it is seeking to achieve; and
- necessary in the interests of national security and for the purpose of preventing or detecting serious crime or in the interests of the economic well being of the UK; and
- the information cannot reasonably be obtained by other means.¹²⁹

The Secretary of State may also authorize intrusive surveillance upon application from a member of any of the security services; an official of the Ministry of Defence; a member of Her Majesty’s Forces; or an individual holding a position within a public authority that has been designated under the RIPA. The Secretary of State must believe that the surveillance is necessary in the interests of national security and for the purposes of preventing or detecting serious crime.¹³⁰ The Secret Intelligence Service and GCHQ can also obtain a warrant under these provisions for directed and intrusive surveillance relating to property in the British Isles, provided that the investigation is carried out in the interests of national security or the economic well-being of the UK. The Security Service may act on behalf of Secret Intelligence Service and GCHQ to obtain an authorization for a warrant in connection with a function of one of the above services provided that the activity does relate to the support of the prevention or detection of serious crime.¹³¹ These authorizations are effective for renewable periods of six months.¹³²

As a matter of U.S. law, intrusive surveillance (the surreptitious capture of activities in a private place or vehicle by person or device) is likely to implicate the Fourth Amendment unless the search or seizure involves the property of one who has no justifiable expectation of privacy.¹³³

¹²⁶ *Laird v. Tatum*, 408 U.S. 1, 9 (1972).

¹²⁷ Regulation of Investigatory Powers Act 2000, c. 23, § 32.

¹²⁸ *Id.*, c. 23, § 32; and the Regulation of Investigatory Powers (Intrusive Surveillance) Order 2003, SI 2003/3174.

¹²⁹ Regulation of Investigatory Powers Act 2000, c. 23, § 32.

¹³⁰ *Id.*, c. 23, § 41.

¹³¹ *Id.*

¹³² Regulation of Investigatory Powers Act 2000, c. 23, § 44.

¹³³ *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Minnesota v. Carter*, 525 U.S. 83, 88-91 (1998); *United States v.* (continued...)

Thus for example, without a warrant the government may not use a thermal imager to monitor activity within a home.¹³⁴

Surveillance Commissioner's Review of Warrants

Applications for authorizations under RIPA by members of the police force, members of the Serious Organised Crime Agency (SOCA, formerly the National Criminal Intelligence Service (NCIS)), or a customs officer for directed or intrusive surveillance or the use of covert human intelligence sources must also be approved by a surveillance commissioner. Written notice of this authorization be provided to the person who granted the authorization.¹³⁵

Authorizations issued upon the application of members of the police force, the SOCA or customs officers can be quashed by a Surveillance Commissioner if he is are satisfied that, "at the time the authorization was granted or at any time when it was renewed," there were no reasonable grounds for believing that the statutory criteria were met.¹³⁶ A Surveillance Commissioner can also cancel authorizations if he believes that the statutory criteria are no longer met.¹³⁷ If the Surveillance Commissioner decides to quash the authorization, he has the authority to order that any records relating to information obtained by the surveillance after the statutory requirements were no longer met be destroyed.¹³⁸ This does not apply if the records are needed for pending criminal or civil proceedings.¹³⁹

Authorizing officers have a right of appeal to the Chief Surveillance Commissioner within seven days of the decision by the Surveillance Commissioner to:

- refuse to approve an authorization for intrusive surveillance;
- quash or cancel an authorization for intrusive surveillance; or
- order the destruction of records.¹⁴⁰

The Chief Surveillance Commissioner can modify, quash or affirm the Commissioner's decision. During 2005-2006 only one appeal was lodged, based on quashing of an authorization to use an invisible marking dye to covertly mark the property of a suspect. The Commissioner quashed the appeal on the basis that it was speculative whether the suspect would commit a serious offense within the meaning of the law; his decision was in turn appealed; and that appeal subsequently dismissed.¹⁴¹

(...continued)

Corona-Chavez, 328 F.3d 974, 980 (8th Cir. 2003).

¹³⁴ *United States v. Kyllo*, 533 U.S. 27, 40 (2001).

¹³⁵ Regulation of Investigatory Powers Act 2000, c. 23, § 36. For further information about the surveillance commissioner, *see infra*, under subheading "safeguards."

¹³⁶ Regulation of Investigatory Powers Act 2000, c. 23, § 37.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Regulation of Investigatory Powers Act 2000, c. 23, § 38.

¹⁴¹ OFFICE OF SURVEILLANCE COMMISSIONERS, ANNUAL REPORT, 2005-6, H.C. 1298.

There is no comparable American procedure. The procedure in the UK, however, serves the same purposes of the U.S. requirement that warrants be issued by a neutral magistrate—a safeguard against abuse of executive power.

Wiretapping and Electronic Eavesdropping

The RIPA provides a system of authorizations in which communications can be intercepted.¹⁴² A warrant is required for the lawful interception of communications in most circumstances in the UK.¹⁴³ Circumstances in which communications can be intercepted without a warrant include those in which:

- one party to the communication has consented to the intercept;
- the provider of a postal or telecommunications service intercepts the communication;
- a person conducting a business, government department, or public authority intercepts communications on their entity's own telecommunications lines to prevent or detect crime, ascertain facts, investigate unauthorized use of the system, and monitor communications to determine whether they are business or personal;¹⁴⁴
- the intercepted communications are those in hospitals with high security psychiatric services, under regulations made by the Secretary of State for interceptions in the course of lawful business practice, under prison rules, or in state hospitals in Scotland; or
- the interception of communication occurs on a public telecommunications system outside the UK and the person providing the telecommunications service is required by the law of that country to facilitate the interception.¹⁴⁵

In the United States, a court order is required for the lawful interception of communications in most circumstances¹⁴⁶ and can be obtained either under the Electronic Communications Act (Title III)¹⁴⁷ or the Foreign Intelligence Surveillance Act (FISA).¹⁴⁸ The circumstances in which communications can be intercepted without an order under Title III include those in which:

¹⁴² Section 2 of the Regulation of Investigatory Powers Act 2000, c. 23 defines the interception of communications as when, in the course of the communications transmission by a telecommunications system, a person modifies or interferes with the system or its operation; monitors transmissions made by the telecommunications system; or monitors transmissions by wireless telegraphy to or from apparatus contained in the telecommunications system, resulting making some or all of the contents of the communication available during the transmission to a person other than the sender or the intended recipient of the communication.

¹⁴³ Regulation of Investigatory Powers Act 2000, c. 23, § 1.

¹⁴⁴ Regulation of Investigatory Powers Act 2000, c. 23, § 4 and The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000, SI 2699/2000.

¹⁴⁵ Regulation of Investigatory Powers Act 2000, c. 23, §§ 1 and 4.

¹⁴⁶ U.S. Const. Amend. IV; *United States v. Katz*, 389 U.S. 347 (1967); *United States v. United States District Court*, 407 U.S. 297 (1972); 18 U.S.C. 2511; 50 U.S.C. 1809.

¹⁴⁷ 18 U.S.C. 2510-2520 (originally enacted as Title III of the Omnibus Crime Control and Safe Streets Act of 1968).

¹⁴⁸ 50 U.S.C. 1801-1811.

- one party to the communication has consented to the interception;¹⁴⁹
- the service provider intercepts the communication incident to rendering service, or in order to protect the provider's property;¹⁵⁰
- the interception occurs through the use of telephone equipment used in the ordinary course of the interceptor's business;¹⁵¹
- there is no justifiable expectation of privacy in the intercepted oral communication;¹⁵²
- an emergency exists and approval of an application is anticipated;¹⁵³ or
- the interception of communication occurs outside of the United States and in compliance with the laws of the place where it occurs.¹⁵⁴

The circumstances in which communications can be intercepted without an order under FISA include those in which:

- the President has approved interception for up to 15 days during a time war declared by Congress;¹⁵⁵
- the President has approved interception for up to 1 year when the communications are between foreign powers (not including terrorist groups) and the communications of a U.S. person are not likely to be intercepted;¹⁵⁶
- an emergency exists and an application is anticipated;¹⁵⁷
- there is no justifiable expectation of privacy in the intercepted oral communication;¹⁵⁸ or
- the interception of communication occurs outside of the United States and in compliance with the laws of the place where it occurs.¹⁵⁹

The UK authorization process to obtain a warrant to intercept communications differs from the process to obtain surveillance warrants. Under the RIPA the Secretary of State¹⁶⁰ personally issues

¹⁴⁹ 18 U.S.C. 2511(2)(c),(d); *United States v. White*, 401 U.S. 745 (1971).

¹⁵⁰ 18 U.S.C. 2511(2)(a)(I).

¹⁵¹ 18 U.S.C. 2510(5)(a).

¹⁵² 18 U.S.C. 2510(2).

¹⁵³ 18 U.S.C. 2518(7).

¹⁵⁴ Neither Title III nor FISA applies to interceptions occurring outside of the United States, *United States v. Toscanino*, 500 F.2d 267, 279 (2d Cir. 1974); *United States v. Bin Laden*, 126 F.Supp.2d 264, 272 (S.D.N.Y. 2000). The Fourth Amendment does not apply where there is no justifiable expectation of privacy, *Smith v. Maryland*, 442 U.S. 735, 741-46 (1979). Nor does it apply to the overseas searches and seizures by United States agents of foreign property, *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1991). It does apply to the overseas searches and seizures, attributable to agents of the United States, of the property of Americans exhibiting a justifiable expectation of privacy with respect to the property, *United States v. Juda*, 46 F.3d 961, 968 (9th Cir. 1995).

¹⁵⁵ 50 U.S.C. 1809.

¹⁵⁶ 50 U.S.C. 1802.

¹⁵⁷ 50 U.S.C. 1805(f).

¹⁵⁸ 50 U.S.C. 1801(f).

¹⁵⁹ *United States v. Bin Laden*, 126 F.Supp.2d 264, 272 (S.D.N.Y. 2000).

warrants to intercept communications upon receipt of an application from the Director General of any of the Intelligence Services, the SOCA, the Chief of Defence Intelligence, Police Commissioners, Chief Constables of the Police Service in Northern Ireland, Chief Constables of Scottish Police forces, the Commissioner of Customs and Excise, or a person that is the competent authority of a country or territory outside the UK under a mutual assistance agreement.¹⁶¹ Police Chief Constables in England and Wales may make applications for warrants through the SOCA. With the exception of authorizations under international mutual assistance agreements, these people all hold office under the Crown.

Except for warrants issued in response to requests under mutual assistance agreement, or in urgent cases, the Secretary of State must personally sign the warrant. In urgent cases, a senior official designated by the RIPA can sign a warrant, although the Secretary of State must still personally authorize the warrant.¹⁶² In cases of warrants issued for mutual assistance agreements, the senior official must be satisfied that the interception subject is outside the UK or the interception is to occur in relation only to premises outside the UK.¹⁶³

In cases in which a warrant is required, to ensure that the right to privacy is not arbitrarily or unduly interfered with, the issuing authority must believe that the interception is necessary on one of the statutory grounds and is proportionate to the aim of the surveillance, as is required under the European Convention on Human Rights. The Code of Practice describes the test of proportionality as “balancing the intrusiveness of the interference, against the need for it in operational terms ... it will not be proportionate if it is excessive in the circumstances of the case or if the information which is sought could reasonably be obtained by other means.”¹⁶⁴ This test must be met in every case where an authorization for a warrant is requested.

The authorization process to obtain an order to intercept communications under either U.S. federal statute differs from the process to obtain a traditional search warrant. Under Title III, a United States District Court issues an order to intercept communications upon receipt of an application approved by a senior Justice Department official.¹⁶⁵ Under FISA, federal judges designated to act as judges of the special Foreign Intelligence Surveillance Court issue orders to intercept communications upon receipt of an application approved by the Attorney General.¹⁶⁶ In urgent cases, senior Justice Department officials may authorize emergency interception pending court approval of Title III application.¹⁶⁷ The Attorney General enjoys similar authority under FISA.¹⁶⁸ The interception orders must identify the location and nature of the facilities targeted for

(...continued)

¹⁶⁰ 2 CURRENT LAW STATUTES 2000 (Christine Beesley et al eds., 2000). *See also* INTERCEPTION OF COMMUNICATIONS IN THE UK, 1999, Cm. 4368 at 20 and 613 PARL. DEB., (H.L.) (5th ser.) 1487.

¹⁶¹ Regulation of Investigatory Powers Act 2000, c. 23, § 6.

¹⁶² Home Office, Interception of Communications Code of Practice, ¶ 2.2.

¹⁶³ Regulation of Investigatory Powers Act 2000, c. 23, § 7.

¹⁶⁴ Home Office, Interception of Communications Code of Practice, ¶ 2.5.

¹⁶⁵ 18 U.S.C. 2516, 2518. Title III also authorizes state court judges to issue interception orders upon the application of senior state law enforcement officials when empowered to do so under a state law whose requirements are at least as demanding as those of Title III, 18 U.S.C. 2516.

¹⁶⁶ 50 U.S.C. 1803, 1804.

¹⁶⁷ 18 U.S.C. 2518(7).

¹⁶⁸ 50 U.S.C. 1805(f).

interception unless the efforts to thwart identification are anticipated or, in the case of intercepted oral communications, circumstances render identification impractical.¹⁶⁹

Before the Secretary of State in the UK can authorize a warrant to intercept communications, he must believe that the conduct requested by the warrant is proportionate and necessary on the grounds of being:

- in the interests of national security;
- for the purposes of preventing or detecting serious crime;¹⁷⁰
- for the purpose of safeguarding the economic well being of the UK from the acts or intentions of individuals outside the British Isles; or
- to give effect to an international mutual assistance agreement whose purpose is equivalent to that of preventing or detecting serious crime.¹⁷¹

Before the U.S. court can authorize a Title III order to intercept communications, it must conclude that:

- there is probable cause to believe that an individual has committed, is committing, or will commit one of the serious federal crimes with respect to which an order may be authorized;¹⁷²
- there is probable cause to believe that communications relating to the crime will be obtained through the interception;¹⁷³
- that alternative procedures have proved or are likely to prove futile or too dangerous;¹⁷⁴ and
- unless thwarting efforts or impractical circumstances are anticipated, there is probable cause to believe that the targeted facilities or location are being or will be used in connection with commission of the offense, or are leased to or commonly used by the targeted individual.¹⁷⁵

Before the court can authorize a FISA order to intercept communications, it must conclude that:

- the President has authorized the Attorney General to approve applications;¹⁷⁶
- the Attorney General has approved the application submitted by a federal officer;¹⁷⁷

¹⁶⁹ 18 U.S.C. 2518(11); 50 U.S.C. 1805.

¹⁷⁰ Detecting crime is interpreted in section 81(5) of the RIPA as “establishing by whom, for what purpose, by what means and generally in what circumstances any crime was committed; and the apprehension of the person by whom any crime was committed.”

¹⁷¹ Regulation of Investigatory Powers Act 2000, c. 23, § 5.

¹⁷² 18 U.S.C. 2518(3)(a).

¹⁷³ 18 U.S.C. 2518(3)(b).

¹⁷⁴ 18 U.S.C. 2518(3)(c).

¹⁷⁵ 18 U.S.C. 2518(3)(d).

¹⁷⁶ 50 U.S.C. 1805(a)(1).

¹⁷⁷ 50 U.S.C. 1805(a)(2).

- there is probable cause to believe that the target is a foreign power or agent of a foreign power (foreign powers include international terrorist groups and agents of foreign powers include international terrorists)(except that no U.S. person may be considered based solely First Amendment protected activities);¹⁷⁸
- there is probable cause to believe that the targeted facilities or locations are or are about to be used by a foreign power or agent of foreign power;¹⁷⁹
- adequate acquisition, retention and dissemination minimization procedures will be followed;¹⁸⁰ and
- application requirements have been met.¹⁸¹

The warrant in the UK can apply to either one person or one premises and continues for a period of three months. For warrants issued on the grounds of the prevention and detection of serious crime, this period can be renewed for an additional three months; warrants issued on the grounds of national security or economic well being of the UK can be renewed for an additional six months. Warrants issued in urgent circumstances by a senior official are valid for five working days from the date of issue, and may be renewed by the Secretary of State.¹⁸² With the exception of warrants issued in urgent cases, modifications to the warrant do not affect the expiry date. The modification of warrants issued in urgent circumstances has the effect of restarting the five day period for which the warrant is valid.¹⁸³

In the United States, Title III orders expire no later than 30 days after issuance, subject to 30 day extensions.¹⁸⁴ The tenure of FISA orders varies according to the character of the target, ranging from 90 days to one year, with possible extensions of like duration.¹⁸⁵

There is no requirement under the RIPA that the subject of the interception be notified of its occurrence after the fact, with the Home Secretary noting that:

Disclosure of the fact of an interception warrant to anyone being intercepted would fundamentally undermine its effectiveness ... Secrecy enables law enforcement agencies and the intelligence agencies to best ensure protection of the public in a wide range of cases. However, the issue and execution of interception warrants is overseen by the independent Interception of Communications Commissioner.¹⁸⁶

Upon expiration of the order in the United States, Title III of federal law requires notification of individuals named in an interception order and anyone else the court finds appropriate.¹⁸⁷ FISA requires notification of an individual whose communications have been intercepted only when the

¹⁷⁸ 50 U.S.C. 1805(a)(3)(A), 1801(a), (b).

¹⁷⁹ 50 U.S.C. 1805(a)(3)(B).

¹⁸⁰ 50 U.S.C. 1805(a)(4).

¹⁸¹ 50 U.S.C. 1805(a)(5).

¹⁸² Home Office, Interception of Communications, Code of Practice, ¶ 2.11.

¹⁸³ *Id.*, ¶ 2.12.

¹⁸⁴ 18 U.S.C. 2518(5).

¹⁸⁵ 50 U.S.C. 1805(e).

¹⁸⁶ Home Office, *Home Secretary Charles Clarke's Letter to Simon Carr of the Independent*, 2006, available at <http://press.homeoffice.gov.uk/Speeches/hs-letter-simon-carr?version=1>.

¹⁸⁷ 18 U.S.C. 2518(8)(d).

government intends to enter the results of the interception into evidence in a judicial or administrative proceeding.¹⁸⁸

There are no specific prohibitions on intercepting material of a confidential nature, such as those subject to legal privilege, confidential personal information, or confidential journalistic material. The Code of Practice on the Interception of Communications details additional safeguards which provide that extra consideration should be given when an interception might involve materials of a confidential nature and that applications for surveillance that are likely to result in the acquisition of legally privileged materials should only be made in exceptional and compelling circumstances.¹⁸⁹

Neither U.S. statute, Title III nor FISA, contains a specific prohibition upon the interception of privileged or otherwise confidential communications. Both state that privileged communications do not lose their privileged status by virtue of interception.¹⁹⁰

Sharing Information Intercepted

A number of provisions in the RIPA aim to act as safeguards to ensure that any information obtained is not abused or misused. Material intercepted under the above provisions is only to be used, disclosed, and distributed as minimally as necessary for the purposes for which it was authorized.¹⁹¹ In practice, this means that the information can be shared across, and used by, law enforcement and intelligence agencies both in the UK and overseas through the cooperative intelligence and information approach in the UK, which the Home Office claims has led to “uniquely close cooperation between our law enforcement and intelligence agencies. No other country in the world even gets close to this level of inter-agency co-operation.”¹⁹² The disclosure of the information is limited to those who have the required security clearance; and the need to know principle that requires “intercepted material must not be disclosed to any person unless that person’s duties, which must relate to one of the authorized purposes, are such that he needs to know about the material to carry out those duties.”¹⁹³ Once the material is no longer needed for the authorized purposes, it must be securely destroyed.¹⁹⁴

In the case of Title III interceptions in the United States, law enforcement officers may use information obtained through an interception in the performance of any of their duties rather than merely those associated with the investigation for which the interception was authorized.¹⁹⁵ Moreover the information may be shared with other law enforcement officers—and in the case of

¹⁸⁸ 50 U.S.C. 1806(c).

¹⁸⁹ Home Office, Interception of Communications Code of Practice, ¶ 3.6.

¹⁹⁰ 18 U.S.C. 2517(4); 50 U.S.C. 1806(a).

¹⁹¹ Regulation of Investigatory Powers Act 2000, c. 23, § 15.

¹⁹² Home Office, *Use of Communications Intercept as Evidence*, available at <http://security.homeoffice.gov.uk/surveillance/interception/communications-intercept/> (last visited Sept. 1, 2006).

¹⁹³ Home Office, Interception of Communications Code of Practice, ¶ 6.4.

¹⁹⁴ Regulation of Investigatory Powers Act 2000, c. 23, § 15 and the Home Office, Interception of Communications Code of Practice, ¶ 6.8.

¹⁹⁵ 18 U.S.C. 2517(2).

foreign intelligence information, with intelligence, protective, immigration, national defense and national security officials officers—for use in their official duties.¹⁹⁶

Disclosure of information secured through a FISA interception is more circumspect, but information that is not foreign intelligence information may be shared with law enforcement officials for use in their official duties.¹⁹⁷

The UK’s RIPA also requires that the Prime Minister appoint an Intelligence Services Commissioner to review how the Secretary of State issues warrants for surveillance and how the Secretary of State exercises and performs the powers and duties granted by the RIPA in relation to the Service.¹⁹⁸ Information obtained under these procedures are also subject to the protections and requirements of the Data Protection Act 1998.

There is no exact replica of the UK safeguard under U.S. law, but similar benefits may follow as a consequence of the various required reports to the public and Congress on the use of the authority under Title III and FISA.¹⁹⁹

Parallel Police Regime Under the Police Act 1997

The police, the Royal Navy Regulating Branch, the Royal Military Police and the Royal Air Force Police, customs officers, and members of the SOCA have a separate series of legislation, augmented by the RIPA, for entry or interference with property in relation to wireless telegraphy contained in the Police Act 1997. This provides that a Chief Constable or other authority specified in the Police Act 1997 may issue an authorization permitting “such action ... in respect of [property or] wireless telegraphy”²⁰⁰ as the authorizing officer specifies and enables the authorizing officers to require the maintenance or retrieval of equipment or devices whose uses or placement has been authorized by the Police Act or the surveillance provisions of the RIPA.²⁰¹

The authorizing officer must believe that the action is necessary for the purposes of preventing or detecting serious crime,²⁰² and cannot reasonably be achieved by other means.²⁰³ Authorizing officers are Chief Constables of police force in England, Wales or Scotland; a Chief Constable or Deputy Chief Constable of the Police Service of Northern Ireland; the Commissioner or Assistant Commissioner of the Police of the Metropolis; the Commission of Police for the City of London; the Chief Constable of the Ministry of Defence Policy; the Provost Marshall of the Royal Navy Regulating Branch, the Royal Military Police, or the Royal Airforce Police; the Chief Constable of the British Transport Police; the Director General of the SOCA; and any customs officer

¹⁹⁶ 18 U.S.C. 2517(1), (6).

¹⁹⁷ 50 U.S.C. 1806(a), 1801(h); *In re Sealed Case*, 310 F.3d 717, 728-34 (F.I.S.Ct.Rev. 2002).

¹⁹⁸ Regulation of Investigatory Powers Act 2000, c. 23, § 59(1-2).

¹⁹⁹ 18 U.S.C. 2519; 50 U.S.C. 1807, 1808.

²⁰⁰ Police Act 1997, c. 50, § 93.

²⁰¹ *Id.*

²⁰² Section 93 of the Police Act 1997, c. 50 defines crime as serious when it “involves the use of violence, results in substantial financial gain or is conduct by a large number of persons in pursuit of a common purpose, or the offense or one of the offenses is an offense for which a person who has attained the age of twenty-one and has had no previous convictions could reasonably be expected to be sentenced to imprisonment for a term of three years or more.”

²⁰³ Police Act 1997, c. 50, § 93.

designated by the Commissioners of Customs and Excise.²⁰⁴ Authorizations continue for an initial period of three months and can be renewed for an additional period of three months.²⁰⁵

The Police Act provides that matters subject to legal privilege, confidential information and confidential journalistic information can be subject to an authorization that permits the police to interfere with property or wireless telegraphy.²⁰⁶ Except in cases of urgency, the authorization to interfere with property that is used as a dwelling or as office premises, or interceptions of communications that are likely to result in the knowledge of material subject to legal, journalistic or confidential personal privilege must have the written approval of a Surveillance Commissioner.²⁰⁷ The Surveillance Commissioner may only approve the authorization if he believes that there are reasonable grounds that the statutory grounds for authorizing a warrant have been met.²⁰⁸

Members of the public who believe their property or wireless telegraphy has been interfered with by the police or other authorized bodies may file a complaint with the Investigatory Powers Tribunal who may conduct an investigation on their behalf.²⁰⁹

As noted earlier, Title III governs the interception of wire, oral and electronic communications in the United States.²¹⁰ It provides a procedure for court approved interceptions for law enforcement purposes during the course of investigations of a list of specifically designated federal and state crimes.²¹¹ Here too interception orders are good for no more than ninety days, but are subject to ninety day extensions.²¹² Individuals named in an interception order and others the court considers appropriate are notified following the expiration of the order.²¹³

Authorizations for Interference with Property or Wireless Telegraphy under the Intelligence Services Act 1994

The Intelligence Service Act 1994 (ISA) granted the Secretary of State additional powers to authorize entry on and interference with property or with wireless telegraphy upon application from any of the three Intelligence Services.²¹⁴ The property that can be interfered with “covers all forms of property, including residential premises, private vehicles and personal possessions.”²¹⁵ Due to the important role that the Intelligence Services play in safeguarding the national security

²⁰⁴ *Id.*

²⁰⁵ *Id.*, c. 50, § 95.

²⁰⁶ *Id.*, c. 50, § 97.

²⁰⁷ *Id.*, c. 50, §§ 97 and 91.

²⁰⁸ *Id.*

²⁰⁹ The other bodies are: any UK police force, including PSNI and the police forces of HM Forces; the SOCA; Her Majesty's Customs and Excise; any of the intelligence services (MI5, MI6, GCHQ); the Ministry of Defence Police; or British Transport Police.

²¹⁰ 18 U.S.C. 2510-2520.

²¹¹ 18 U.S.C. 2516.

²¹² 18 U.S.C. 2518(5).

²¹³ 18 U.S.C. 2518(8)(d).

²¹⁴ Intelligence Service Act 1994, c. 13, § 5.

²¹⁵ Investigatory Powers Tribunal, *Interference with Property*, Jan. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=1&chapter=3>.

of the UK, the requirements for an authorization under the ISA are much broader than under the RIPA. The Secretary of State must believe that:

- the conduct is necessary on the ground that it is likely to be of substantial value in assisting the Security Service, Intelligence Service, or GCHQ in carrying out any of its statutory functions, although, with the exception of the Security Service, a warrant cannot be granted in support of the prevention or detection of serious crime in relation to property in the British Islands;
- the information sought cannot reasonably be achieved by other means;²¹⁶ and
- the Director General of the Service has safeguards in place, as required under the 1989 Act, which provide that only information required for the Service to carry out its functions is obtained, and that the information obtained is only disclosed as necessary or for the purpose of preventing or detecting serious crime.²¹⁷

Warrants issued by the Secretary of State under these provisions continue for a period of six months, unless issued by a senior official in urgent circumstances, in which case the warrant expires on the second working day after it was issued.²¹⁸

Warrants issued by the Prime Minister for the Intelligence Services or GCHQ may be reviewed by a Commissioner appointed by the Prime Minister. The Commissioner must hold, or have held, high judicial office and must also provide an annual report on the use of his functions to the Prime Minister, which is laid before Parliament with “matter ... prejudicial to the continued discharge of the functions of”²¹⁹ the Security Services removed.

Members of the public who believe their property or wireless telegraphy has been interfered with by the Intelligence Services may file a complaint with the Investigatory Powers Tribunal who may conduct an investigation on their behalf.

In the United States, FISA permits the Attorney General to approve applications for a FISA court order authorizing interceptions for certain foreign intelligence purposes, as noted earlier.²²⁰ The tenure of such orders ranges from ninety days to one year depending upon the target and they may be extended for equal intervals.²²¹ Those whose communications are intercepted pursuant to a FISA order are notified of that fact when the government decides to use the intercepted communications as evidence in a judicial or administrative proceeding.²²²

The Security Services and Domestic Surveillance

Prior to the enactment of the Security Service Act 1996, the Service could not obtain authorization to conduct activities in connection with supporting the police forces and law

²¹⁶ Intelligence Service Act 1994, c. 13, § 5.

²¹⁷ Security Services Act 1989, c. 5, § 2(2)(a).

²¹⁸ Intelligence Services Act 1994, c. 13, § 6.

²¹⁹ Intelligence Services Act 1994, c. 13, § 9.

²²⁰ 50 U.S.C. 1801-1811.

²²¹ 50 U.S.C. 1805(e).

²²² 50 U.S.C. 1806(c).

enforcement agencies in the prevention and detection of serious crime if the action related to property in the British Islands.²²³ This restriction was removed by the Security Service Act 1996, which granted the Service the authority to apply to the Secretary of State to obtain a warrant to interfere with property or wireless telegraphy on the British Isles under the same criteria as above if:

- the purpose is to prevent or detect serious crime;
- in support of law enforcement agencies; and
- the acts investigated constitutes an offense and involves the use of violence; or results in substantial financial gain; or are conducted by a large number of persons in pursuit of a common purpose; or the offense is one which a person over the age of twenty one with no prior convictions could be sentenced to imprisonment for three or more years for.²²⁴

The Secretary of State must also be satisfied that the Director General of the Security Services has arrangements in place for the coordination of the activities of the security services with the police and other law enforcement agencies.²²⁵ Warrants issued by the Secretary of State under these provisions continue for a period of six months, unless issued by a senior official in urgent circumstances, in which case, the warrant expires on the second working day after it was issued.²²⁶

The Security Service can also obtain a warrant to interfere with property or wireless telegraphy if it is acting on behalf of the Intelligence Service or GCHQ and the action proposed is to be “undertaken otherwise than in support of the prevention or detection of serious crime.”²²⁷

The Security Service Act 1996 was disturbing to many individuals and civil rights organizations as it essentially granted the Service, an agency considered to have a lack of oversight, transparency, and democratic accountability,²²⁸ powers that were traditionally the responsibility of the police. Lord Justice Browne-Wilkinson believed that the 1996 Act essentially granted executive warrants²²⁹ and stated:

I am not for the carrying over of powers, which are unhappily necessary in the context of national security, into a policing function enabling a member of the Executive to sanction entry onto private property without prior judicial warrant. We are not just legislating for this Government or the next ... we are actually impairing the constitutional freedoms of the individuals of this country.²³⁰

Human rights organizations further criticized the Security Services Act, notably with regard to the apparent lack of judicial oversight in the authorization process, stating that “a member of the

²²³ Intelligence Service Act 1994, c. 13, § 5(3).

²²⁴ *Id.*, § 5.

²²⁵ Security Services Act 1996, c. 35, § 1.

²²⁶ Intelligence Service Act 1994, c. 13, § 6.

²²⁷ *Id.*, § 5.

²²⁸ CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION 164 (2002).

²²⁹ Executive warrants are contrary to the constitutional principles established in *Entick v. Carrington*, 19 St. Tr. 1030 (1765).

²³⁰ 573 PARL. DEB., H.L. (5th ser.) 1044.

executive lacks the necessary independence to authorize interception by a state agency and that it offends against the concept of the separation of powers; a senior judge would be a more appropriate arbiter of the balance between the rights of the individual and the interests of the state.”²³¹

Experience in the United States was similar, but restrictions on the involvement of the intelligence officials in purely domestic law enforcement investigations remains. Before passage of the USA PATRIOT Act, FISA’s interception and physical search authority could only be invoked upon certification that the acquisition of foreign intelligence information was “the purpose” for the request.²³² After enactment of the USA PATRIOT Act, such acquisition need only be a “significant purpose” for the request,²³³ and the Act makes it clear that cooperation between intelligence and law enforcement officers does not preclude certification.²³⁴ FISA authority may not be used, however, solely for the purpose of investigating or aiding in the investigation of criminal offenses unrelated to foreign intelligence activities.²³⁵

Use of Intercepted Communications as Evidence in Court

Despite the expansive laws relating to the interception of communications, information obtained in such a manner is not usable as evidence in a court of law, even if every legal requirement has been met.²³⁶ This restriction has recently been reviewed and, despite severe criticism, notably that from the opposition government that the use of such evidence may allow the prosecution of suspected international terrorists,²³⁷ the government decided to maintain this prohibition. The government stated that the disclosure of intercepted communications could undermine the intercept capabilities and lead to their methods becoming public knowledge and thus ineffective.²³⁸ The Home Office asserts that the main use of the findings of intercepted communications is to help “intelligence agencies and law enforcement decide how best and where to deploy the techniques they use to get evidence for courts such as surveillance, eavesdropping and the use of informants.”²³⁹

A law professor in the UK has been strongly critical over the government’s decision to maintain the ban on the use of intercept evidence in the courts, opining:

The disadvantage of the exclusionary rule ... is that a number of bad and dangerous people cannot be tried for their crimes, although cogent and irrefutable evidence exists against them—a ... problem that the Home Secretary wants to solve not by abolishing the ban, but by

²³¹ JUSTICE, Regulation of Investigatory Powers Bill: Human Rights Audit, May 2000.

²³² 50 U.S.C. 1804(a)(7)(B)(2000 ed.); 1823(a)(7)(B)(2000 ed.).

²³³ 50 U.S.C. 1804(a)(7)(B); 1823(a)(7)(B).

²³⁴ 50 U.S.C. 1806(k); 1825(k).

²³⁵ *In re Sealed Case*, 310 F.3d 717, 735-36 (F.I.S.Ct. Rev. 2002).

²³⁶ Regulation of Investigatory Powers Act 2000, c. 23, § 17.

²³⁷ Professor J. R. Spencer, *Tapping into the Telephone*, N.L.J. 155.7166 (309) (2005).

²³⁸ Home Office, *Security: Surveillance*, Jan. 2005, available at <http://security.homeoffice.gov.uk/surveillance/communications-service-providers/146085> (last visited Apr. 10, 2006).

²³⁹ Home Office, *Use of Communications Intercept as Evidence*, available at <http://security.homeoffice.gov.uk/surveillance/interception/communications-intercept/> (last visited Sept. 1, 2006).

abolishing the need for trials, and giving himself the legal power to put them under house arrest without one.²⁴⁰

The former Director General of the Security Service (MI5) has publicly announced his reluctant support over the continued prohibition on the use of intercept evidence in court stating:

I have reluctantly come to the conclusion that due to the changing nature of telephone technology and the importance, during a period of change, of not sensitising terrorists and serious criminals to particular capabilities that will be important for the future, there are indeed good reasons not to remove the bar on the use of intercept in our courts.²⁴¹

The government responded to suggestions that the ban on the use of intercept evidence be removed by stating that the extensive review has concluded the use of intercepted evidence would only produce a ‘modest’ increase in the number of prosecutions for serious criminal offenses but none for terrorists.

Despite the restrictions, there are some limited circumstances in which intercept evidence can be used as evidence. Section 18(4) of the RIPA permits the use of intercepted communication as evidence if one party consented to the intercept. The courts have interpreted the prohibition on using intercept evidence narrowly, holding that it only applies to communications intercepted in the UK, permitting the admittance of intercepted communications obtained legally abroad.

Moreover, the evidentiary restrictions do not appear to extend to information obtained through electronic bugging. The police have continued to obtain information through electronic surveillance devices without proper authorization. In several instances, evidence obtained from this police ‘bugging’ has been permitted as evidence in court despite judges in each case specifically saying that the evidence was obtained in probable or direct breach of the ECHR.²⁴² In one case, evidence from two co-accused obtained through an electronic surveillance device placed in their police holding cell was permitted to be used in court, despite the fact that the co-accused had exercised their right to silence.²⁴³ The European Court of Human Rights has provided that intelligence obtained in breach of Article 8 of the ECHR through the unlawful installation of a listening device in a person’s home or covert listening devices in police stations is admissible as evidence as “any breach of Article 8 is subsumed by the Article 6 duty to ensure a fair trial.”²⁴⁴

In contrast to the law in the United Kingdom, in the United States, evidence lawfully secured pursuant to either a Title III or a FISA interception order does not become inadmissible in judicial proceedings solely by virtue of that fact.²⁴⁵ Yet as noted earlier, lawful interception does not strip privileged communications of any of the privileged status they otherwise enjoy.²⁴⁶

²⁴⁰ Professor J. R. Spencer, *Tapping into the Telephone*, N.L.J. 155.7166 (309) (2005).

²⁴¹ Sir Stephen Lander, *Tapping and Terror*, INDEPENDENT (London), Feb. 7, 2005.

²⁴² *R v Bailey* [1993] All ER 513; *R v Khan* [1997] AC 558 and *Khan v the UK* (2001) EHRR 1016.

²⁴³ *R v Bailey* [1993] All ER 513.

²⁴⁴ BLACKSTONE’S CRIMINAL PRACTICE 2006, (Peter Murphy et al. eds., 2006) 2202 referring to *Button* [2005] Crim LR 571. See also *Chalkley v the UK* [2003] Crim LR 51; *PG and JH v the UK* [2002] Crim LR 308; *Perry v the UK* [2003] Crim LR 281 and *Mason* [2002] 2 Cr App R 628.

²⁴⁵ 18 U.S.C. 2517(3); 50 U.S.C. 1806.

²⁴⁶ 18 U.S.C. 2517(4); 50 U.S.C. 1806(a).

Oversight of the Interception of Communications

The warrant process for the interception of communications is overseen by an independent Interception of Communications Commissioner (ICC). The ICC is responsible for ensuring that “authorised agencies have proper processes in place, and have considered the human rights of individuals before interception takes place;”²⁴⁷ and review the exercise and performance by the Secretary of State of the powers granted upon him regarding authorizing the interception of communications under the RIPA.²⁴⁸ The 2004 Annual Report on the use of the Regulatory Powers Act to intercept communications prepared by the ICC noted that the personnel conducting intercepts have:

... a detailed understanding of the legislation and strive assiduously to comply with the statutory criteria ... in my view, there is very little, if any, danger that an application which is defective in substance will be placed before the Secretary of State ... [the agencies] welcome the oversight of the Commissioner, both from the point of view of seeking his advice, which they do quite frequently, and as a reassurance to the general public that their activities are overseen by an independent person who has held high judicial office.²⁴⁹

Interference with property by the Intelligence Services is subject to oversight by the Intelligence Services Commissioner (ISC), currently the Right Honourable Sir Peter Gibson. Both these Commissioners are appointed by, and report to, the Prime Minister.

The Office of Surveillance Commissioners further oversees any interference with property by the Police under Part III of the Police Act 1997 as well as “surveillance and the use of Covert Human Intelligence by all organizations bound by RIPA, with the exception of the Intelligence Services”²⁵⁰ which, as noted above are overseen by the Intelligence Services Commissioner. The OSC has a budget of over one million pounds (approximately \$1.8 million) and reviews authorizations under RIPA by the Police, SOCA and Her Majesty’s Customs that involves entry on, or interference with the property or wireless telegraphy without the consent of the owner.²⁵¹ Surveillance Commissioners are appointed by the Prime Minister for a term of three years, although they may be removed earlier by a resolution from each House of Parliament that has been approved by the Scottish Parliament. The Surveillance Commissioners must either hold, or have held, a high judicial office, whilst Assistant Surveillance Commissioners either hold, or have held, office as a Crown Court or Circuit Judge; Sheriffs in Scotland or County Court Judges in Northern Ireland.²⁵²

There is no exact replica of the UK safeguard under U.S. law, but similar benefits may follow as a consequence of the issuing court’s continued authority over interception orders it issues²⁵³ and of

²⁴⁷ Home Office, *Checks on Surveillance*, available at <http://www.homeoffice.gov.uk/security/surveillance/regulations> (last visited Sept. 1, 2006).

²⁴⁸ Regulation of Investigatory Powers Act 2000, c. 23, § 57(2).

²⁴⁹ INTERCEPTION OF COMMUNICATIONS COMMISSIONER, REPORT OF THE INTERCEPTION OF COMMUNICATIONS COMMISSIONER FOR 2004, 2004-5, HC 549.

²⁵⁰ Investigatory Powers Tribunal, Additional Oversight, May. 2006, available at <http://www.ipt-uk.com/default.asp?sectionID=8>.

²⁵¹ Office of Surveillance Commissioners, *Establishment and Responsibilities*, 2003, available at https://www.surveillancecommissioners.gov.uk/about_establishment.html.

²⁵² Regulation of Investigatory Powers Act 2001, c. 23, § 65 and the Police Act 1997, c. 50, § 91.

²⁵³ 18 U.S.C. 2517, 2518.

the various required reports to the public and Congress on the use of the authority under Title III and FISA.²⁵⁴

Complaints Procedures for Interception of Communications

There is no statutory requirement for any body that has the authority to intercept communications through a warrant to disclose these activities to any person subject to the intercept. Despite the lack of requirements to notify subjects of the intercept, a body was established to address complaints by members of the public over any acts the person believes are “inappropriate interception activities by any of the intelligence services, and in some circumstances, by public authorities.”²⁵⁵ The complaints are investigated by an Investigatory Powers Tribunal (IPT),²⁵⁶ established under Part IV of the Regulation of Investigatory Powers Act 2000, and governed by the Investigatory Powers Tribunal Rules 2000.²⁵⁷ In 2004, the IPT received ninety new applications and completed investigations into forty nine applications, at no time concluding that there had been a contravention of RIPA or the Human Rights Act 1998.²⁵⁸

Members of the IPT are appointed by letters patent by the Queen for five year terms with no restriction on re-appointment and must be senior members of the legal profession, with the president and vice president either holding or previously holding high judicial office.²⁵⁹ There are currently eight members on the IPT. The RIPA further regulates: “who may be appointed a member of the Tribunal; the jurisdiction of the Tribunal; the obligations of organizations and individuals in providing information to the Tribunal; the right of the Secretary of State to make Rules regarding the Tribunal; and the disclosure of information aspects of any hearings deemed necessary by the Tribunal notification to the complainant.”²⁶⁰

The IPT’s role is not to inform complainants whether their telephones have been tapped or whether they have been subject to other forms of surveillance activity. Its role is to determine whether the relevant legislation has been complied with and whether the organizations with authority under the legislation have acted reasonably. If complaints are upheld, the IPT does have discretion to disclose the details of any conduct undertaken to the complainant; however, for those not upheld, no information is disclosed regarding whether or not the complainant has been subject to any interception or surveillance activities.²⁶¹

²⁵⁴ 18 U.S.C. 2519; 50 U.S.C. 1807, 1808.

²⁵⁵ Home Office, *Checks on Surveillance*, available at <http://www.homeoffice.gov.uk/security/surveillance/regulations> (last visited Sept. 1, 2006).

²⁵⁶ The Investigatory Powers Tribunal, PO Box 33220, London, SW1H 9ZQ, Tel: 011-44-207-035-3711 “The IPT replaced the Interception of Communications Tribunal, the Security Service Tribunal, the Intelligence Services Tribunal and the complaints provision of Part III of the Police Act 1997 (concerning police interference with property) in October 2000.” Investigatory Powers Tribunal, Legal Provisions, Jan. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=5>.

²⁵⁷ The Investigatory Powers Tribunal Rules 2000, SI 2000/2665.

²⁵⁸ INTERCEPTION OF COMMUNICATIONS COMMISSIONER, *supra* footnote 250, at ¶ 37.

²⁵⁹ Investigatory Powers Tribunal, *Structure of the Tribunal*, Jan. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=7>.

²⁶⁰ *Id.*

²⁶¹ Investigatory Powers Tribunal, FAQs, Jan. 2003, available at <http://www.ipt-uk.com/default.asp?sectionID=FAQ&Q=1>.

The IPT investigates allegations by members of the public who believe that action has been taken against themselves, their property or communications by an organization that has been granted authorization to conduct such activities by the Regulation of Investigatory Powers Act. In reality, this is the only forum in which the activities of the Security Services can be questioned by members of the public and, as such, it has a broad remit regarding the scope of conduct it can investigate.

In cases where members of the public suspect that their communications have been intercepted or that they have been subject to surveillance by certain bodies,²⁶² the IPT can investigate whether the requirements and conditions for the issuance of a warrant to intercept communications have been met; and whether that the proper authorization has been sought and approved throughout the interception process.²⁶³ Under the RIPA, the organizations responsible for issuing authorizations are required to provide the IPT with information relating to the complainant.²⁶⁴ Additionally, the IPT can “demand clarification or explanation of any information provided, order an individual to give evidence in person, inspect an organization’s files, or take any other action it sees fit.”²⁶⁵ No charge is made to complainants for the investigation of their allegations, with the IPT’s resources being provided for by the government.

If evidence from the IPT’s investigation leads to a determination, based on the principles of judicial review, that the RIPA has been contravened and that the organization has not acted reasonably it can uphold the complaint and has the discretion take “remedial measures such as the quashing of any warrants, destruction of any records held or financial compensation, may be imposed at the Tribunal’s discretion.”²⁶⁶ If the IPT does not find that the legislation has been contravened or finds that the organization has acted reasonably, it will not uphold a complaint. The IPT states that not upholding a complaint may mean that “any conduct has been properly authorised and guidelines complied with, or that the Tribunal are satisfied that the conduct complained of has not taken place.”²⁶⁷

²⁶² The bodies which might be believed to have performed activities in relation to the interception of communications are: any of the Intelligence Services; the Serious Organized Crime Agency (SOCA); the Metropolitan Police; the Police Service for Northern Ireland (PSNI); a Scottish police force; H.M. Customs & Excise (HMC&E); or one of H.M. Armed Forces. If the individual believes that his communications have been intercepted by another body, the appropriate authority to contact is the police. The bodies contacted to investigate whether activities have been committed in relation to intrusive surveillance are: any UK police force, including PSNI and the police forces of HM Forces; the SOCA; Her Majesty’s Customs and Excise; any of the intelligence services; the Ministry of Defence Police; or the British Transport Police.

²⁶³ Investigatory Powers Tribunal, *Interception of Communications*, Jan. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=1&chapter=1>. In order to commence an investigation, the IPT requires the complainants name, address, date of birth, name of the organization the claim relates to, telephone numbers, all postal and e-mail addresses (for allegations of interception of telecommunications) and various details of the conduct complained about. Only the name, address and date of birth is revealed to the organization during the IPT’s initial investigation to “to enable record searches to be made to see if any information is held.” Further information is only released if the IPT is granted permission by the complaining party to do so; however, the IPT notes that it will be unable to “conduct as thorough an investigation if [the complainant does] not consent to these details being disclosed.” Investigatory Powers Tribunal, *How to Complain to the Tribunal*, Apr. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=3>.

²⁶⁴ Regulation of Investigatory Powers Act 2000, c. 23, § 81 and the Investigatory Powers Tribunal, *How to Complain to the Tribunal*, Apr. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=3>.

²⁶⁵ Regulation of Investigatory Powers Act 2000, c. 23, § 81, and the Investigatory Powers Tribunal, *FAQ’s*, Jan. 2003, available at <http://www.ipt-uk.com/default.asp?sectionID=FAQ&Q=1>.

²⁶⁶ Investigatory Powers Tribunal, *How to Complain to the Tribunal*, Apr. 2005, available at <http://www.ipt-uk.com/default.asp?sectionID=3>.

²⁶⁷ *Id.*

In the United States, Title III requires that individuals named in an interception order be notified after the order has expired.²⁶⁸ Unlawful interception may result in suppression of any resulting evidence²⁶⁹ and unlawful interceptions may expose offenders to criminal, civil and administrative sanctions.²⁷⁰

Acquiring Communications Data

The RIPA provides for the lawful acquisition and disclosure of communications data in specified circumstances. The definition of communications data was subject to a great deal of Parliamentary debate as the requirements to obtain authorization, and the list of those who can request an authorization, are not as stringent as for surveillance or the interception of communications. Communications data does not include the content of the communication, but the information that relates to the use of a communication service, such as telephone records (including the number called, duration of the call); Internet records (including sites visited, the sender, recipient, date and time of email messages); and information on the individual using the service held by the operator, such as subscriber information.²⁷¹

An authorization to obtain communications data can only be obtained if it is necessary:

- in the interests of national security or the economic well being of the UK;
- for the purposes of preventing or detecting crime or preventing disorder;
- in the interests of public safety;
- for assessing or collecting of any tax, duty, levy or other imposition; or
- to protect public health or, in an emergency, to prevent the death, injury or damage to an individual's physical or mental health, or mitigate such damage.²⁷²

The class of officials who can grant authorization to obtain communications data is much broader than in the other areas of surveillance, and authorization can be “granted internally by an official in the relevant public authority [with] no limitation on those who may apply for authorization.”²⁷³

A controversial aspect of the RIPA is the requirement that providers of public communications services must maintain the capability to intercept communications and retain communications data.²⁷⁴ Communications providers, particularly Internet Service Providers, considered that maintaining such a capability would be costly and infringe upon the privacy of their customers. The RIPA does place a duty on the Secretary of State to make contributions, where appropriate, to the costs incurred by postal and telecommunications operators when complying with an order to

²⁶⁸ 18 U.S.C. 2518(8)(d).

²⁶⁹ 18 U.S.C. 2518(10); 50 U.S.C. 1806(g).

²⁷⁰ 18 U.S.C. 2511, 2520, 2712; 50 U.S.C. 1809.

²⁷¹ RIPA §22(4). *See also* Home Office, Security: Surveillance, *available at* <http://security.homeoffice.gov.uk/surveillance/access-to-data/definition-communications-data/> (last visited Apr. 10, 2006).

²⁷² Regulation of Investigatory Powers Act 2000, c. 23, § 22(2).

²⁷³ 2 CURRENT LAW STATUTES 2000, (Christine Beesley et al. eds., 2000) and Regulation of Investigatory Powers Act 2000, c. 23, § 22.

²⁷⁴ Regulation of Investigatory Powers Act 2000, c. 23, § 12.

retain or disclose communications data.²⁷⁵ The ATCSA further expanded these duties, requiring communications service providers to retain communications data after the period necessary for business purposes for national security and crime prevention so that it can be accessed under the Regulation of Investigatory Powers Act when necessary.²⁷⁶ The provision has been criticized as giving police the ability to obtain a “complete dossier on private life.”²⁷⁷ These requirements appear to soon become standard and more stringent with the passage of an EU Directive, spearheaded by the UK, which mandates communications providers not just provide the ability to retain but actually retain communications data for up to two years as a law enforcement aid.²⁷⁸

The comparable provisions under the laws of the United States permit law enforcement and intelligence access to such communications data—and in some instances to stored communications content—under several schemes. The procedural requirements for law enforcement access to stored wire or electronic communications and transactional records deal with two kinds of information—often in the custody of the telephone company or some other service provider rather than of any of the parties to the communication—communications records and the content of electronic or wire communications. Law enforcement officials are entitled to access:

- with the consent of the one of the parties;²⁷⁹
- on the basis of a court order or similar process under the procedures established in Title III/ECPA;²⁸⁰
- in certain emergency situations;²⁸¹ or
- under one of the other statutory exceptions to the ban on service provider disclosure.²⁸²

Section 2703, which affords law enforcement access to the content of stored wire and electronic communications, distinguishes between recent communications and those that have been in electronic storage for more than six months. Government officials may gain access to wire or electronic communications in electronic storage for less than 6 months under a search warrant issued upon probable cause to believe a crime has been committed and the search will produce evidence of the offense.²⁸³

²⁷⁵ *Id.*, § 24.

²⁷⁶ *Id.*, § 102.

²⁷⁷ *Britain’s Al Qaeda Connections*, Jan. 29, 2002, available at <http://news.bbc.co.uk/1/hi/uk/1775683.stm>, and *supra* footnote 153, at 157.

²⁷⁸ Wendy M. Grossman, *Will logging your email combat terrorism in Europe?* *GUARDIAN* (London) Jan. 12, 2006, available at <http://technology.guardian.co.uk/weekly/story/0,16376,1683944,00.html>.

²⁷⁹ 18 U.S.C. 2702(b)(3),(c)(2).

²⁸⁰ 18 U.S.C. 2702(b)(2), (c)(1).

²⁸¹ 18 U.S.C. 2702(b)(8),(c)(4).

²⁸² 18 U.S.C. 2702(b)(1),(4),(5),(6),(7); (c)(3).

²⁸³ 18 U.S.C. 2703(a). The 21st Century Department of Justice Appropriations Authorization Act, 116 Stat. 1822 (2002), amended section 2703 to permit execution of the warrant by service providers and others without requiring the presence of a federal officer, 18 U.S.C. 2703(g) (“Notwithstanding section 3105 of this title, the presence of an officer shall not be required for service or execution of a search warrant issued in accordance with this chapter requiring disclosure by a provider of electronic communications service or remote computing service of the contents of communications or records or other information pertaining to a subscriber to or customer of such service”), see *United States v. Bach*, 310 F.3d 1063 (8th Cir. 2002)(the Fourth Amendment does not require the presence of a federal officer (continued...))

The government must use the same procedure to acquire older communications or those stored in remote computer storage if access is to be afforded without notice to the subscriber or customer.²⁸⁴ If government officials are willing to afford the subscriber or customer notice or at least delayed notice, access may be granted under a court order showing that the information sought is relevant and material to a criminal investigation or under an administrative subpoena, a grand jury subpoena, a trial subpoena, or court order.²⁸⁵ Under the court order procedure, the court may authorize delayed notification in ninety day increments in cases where contemporaneous notice might have an adverse impact.²⁸⁶ Government supervisory officials may certify the need for delayed notification in the case of a subpoena.²⁸⁷ Traditional exigent circumstances and a general inconvenience justification form the grounds for delayed notification, i.e.:

- danger to life or physical safety of an individual;
- flight from prosecution;
- destruction of or tampering with evidence;
- intimidation of potential witnesses; or
- seriously jeopardizing an investigation.²⁸⁸

Comparable, if less demanding, procedures apply when the government seeks other customer information from a service provider (other than the content of a customer's communications). The information can be secured:

- with a warrant;
- with a court order;
- with customer consent;
- with a written request in telemarketing fraud cases; or
- with a subpoena in some instances.²⁸⁹

Most customer identification, use, and billing information can be secured simply with a subpoena and without customer notification.²⁹⁰

Intelligence investigators have access to customer communications data under two procedures. First, there is the FISA business record or tangible item authority.²⁹¹ Prior to the USA PATRIOT Act senior FBI officials could approve an application to a FISA judge or magistrate for an order

(...continued)

when technicians execute a search warrant on a service provider's server).

²⁸⁴ 18 U.S.C. 2703(a), (b)(1)(A), (2).

²⁸⁵ 18 U.S.C. 2703(b)(1)(B), (d).

²⁸⁶ 18 U.S.C. 2705(a)(1)(A), (4).

²⁸⁷ 18 U.S.C. 2705(a)(1)(B), (4).

²⁸⁸ 18 U.S.C. 2705(a)(2), (b).

²⁸⁹ 18 U.S.C. 2703(c)(1),(3).

²⁹⁰ 18 U.S.C. 2703(c)(2),(3).

²⁹¹ 50 U.S.C. 1861.

authorizing common carriers, or public accommodation, storage facility, or vehicle rental establishments to release their business records based upon certification of a reason to believe that the records pertained to a foreign power or the agent of a foreign power.²⁹² The USA PATRIOT Act and later the USA PATRIOT Improvement and Reauthorization Act temporarily rewrote the procedure.²⁹³ In its temporary form, it requires rather than authorizes access; it is predicated upon relevancy rather than probable cause; it applies to all tangible property (not merely records); and it applies to the tangible property of both individuals or organizations, commercial and otherwise.²⁹⁴ It is limited, however, to investigations conducted to secure foreign intelligence information or to protect against international terrorism or clandestine intelligence activities.²⁹⁵

Recipients are prohibited from disclosing the existence of the order, but are expressly authorized to consult an attorney with respect to their rights and obligations under the order.²⁹⁶ They enjoy immunity from civil liability for good faith compliance.²⁹⁷ They may challenge the legality of the order and/or ask that its disclosure restrictions be lifted or modified.²⁹⁸ The grounds for lifting the secrecy requirements are closely defined, but petitions for reconsideration may be filed annually.²⁹⁹ The decision to set aside, modify or let stand either the disclosure restrictions of an order or the underlying order itself is subject to appellate review.³⁰⁰

As addition safeguards, Congress:

- insisted upon the promulgation of minimization standards;³⁰¹
- established use restrictions;³⁰²
- required the approval of senior officials in order to seek orders covering the records of libraries and certain other types of records;³⁰³
- confirmed and reenforced reporting requirements;³⁰⁴ and
- directed the Justice Department’s Inspector General to conduct an audit of the use of the FISA tangible item authority.³⁰⁵

²⁹² 50 U.S.C. 1862 (2000 ed.).

²⁹³ Under section 102(b) of the USA PATRIOT Improvement and Reauthorization Act, the FISA tangible items provisions revert to their pre-USA PATRIOT Act form on December 31, 2009, except with regard to foreign intelligence investigations initiated before that date or “any particular offense or potential offense that began or occurred before” that date, P.L. 109-177, §102(b), 120 Stat. 195 (2006).

²⁹⁴ 50 U.S.C. 1861(a),(b),(c).

²⁹⁵ 50 U.S.C. 1861(a).

²⁹⁶ 50 U.S.C. 1805(d).

²⁹⁷ 50 U.S.C. 1861(e).

²⁹⁸ 50 U.S.C. 1861(f)(1), (2)(A), (2)(B).

²⁹⁹ 50 U.S.C. 1861(f)(2)(C), (D).

³⁰⁰ 50 U.S.C. 1861(f)(3),(4),(5).

³⁰¹ 50 U.S.C. 1861(g); see also 50 U.S.C. 1861(c)(1).

³⁰² 50 U.S.C. 1861(h).

³⁰³ 50 U.S.C. 1861(a)(3).

³⁰⁴ 50 U.S.C. 1862.

³⁰⁵ P.L. 109-177, §106A, 120 Stat. 200-2 (2006).

The second, and perhaps more likely, avenue affords access to communications records through a “national security letter.”³⁰⁶ The national security letter procedure allows senior Federal Bureau of Investigation (FBI) officials and the heads of FBI field offices to request service providers to supply the name, address, length of service, and local and long distance toll billing records of a person or entity upon certification that the information is relevant to an investigation to protect against international terrorism or espionage.³⁰⁷ The letter may include a ban on disclosure of the fact the information has been requested, and the letter’s demands are judicially enforceable and reviewable.³⁰⁸ Additional safeguards include periodic reports to Congress and an audit by the Department of Justice’s Inspector General.³⁰⁹

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³⁰⁶ 18 U.S.C. 2709.

³⁰⁷ 18 U.S.C. 2709(b).

³⁰⁸ 18 U.S.C. 2709(c); 28 U.S.C. 3511.

³⁰⁹ 18 U.S.C. 2709(e); P.L. 109-177, §§118, 119, 120 Stat. 217, 219 (2006).

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