Foreword: The Future of Internet Surveillance Law

Orin S. Kerr
Berkeley Law

Follow this and additional works at: https://scholarship.law.berkeley.edu/facpubs
Part of the Law Commons

Recommended Citation
Foreword: The Future of Internet Surveillance Law

Orin S. Kerr*

One week after the attacks of September 11, 2001, the Bush administration introduced antiterrorism legislation that offered to revamp the Internet surveillance statutes in several significant ways. Newspapers and magazines were filled with discussions of proposed amendments to a set of esoteric laws including the Stored Communications Act, the Pen Register and Trap and Trace Device Act, the Electronic Communications Privacy Act, and the Foreign Intelligence Surveillance Act. In October 2001, Congress enacted a modified version of the administration's proposal in the form of the USA Patriot Act. Since that time, the Patriot Act and Internet surveillance law have remained hot button topics in the press. With several key surveillance provisions of the Patriot Act set to expire by 2006, the public controversy over Internet surveillance laws seems likely to continue.

Despite the importance and high profile of Internet surveillance law, the field has been virtually ignored by legal scholars. The primary culprit is the heavy focus among American legal scholars on the work of the courts, and specifically, judicial interpretations of the Constitution. To many law professors, the Supreme Court's docket of constitutional cases provides the essential guide to important issues in contemporary American law. If a field of law is primarily statutory, or if the courts have not addressed it in any depth, most law professors are inclined to ignore it. Internet surveillance law has had a hard time grabbing scholarly attention in this environment. Judicial interpretations of the Fourth Amendment have so far allowed Internet surveillance law to develop as a primarily statutory field. Further, the absence of a statutory suppression remedy for most violations of the Internet surveillance laws has resulted in few legal challenges to surveillance practices and few judicial decisions on the books. Without judicial opinions to study, law professors mostly have declined to wade into the statutory morass to try to explain and critique the field.

* Associate Professor, The George Washington University Law School.

7 Id. § 224.
The absence of expert guidance has had an unfortunate effect on the public and scholarly debate about Internet surveillance law and practice. Reporters often find themselves unable to locate experts who understand the latest developments, leading to poor media coverage. Interested citizens have few sources of legal scholarship that can explain the law and its purposes. And in Washington, D.C., congressional staffers can surf Westlaw and Lexis all day but find little to explain the law or provide thoughtful perspectives from which to evaluate legislative proposals. The situation is no better for law professors, practitioners, and law students with more academic interests. Even the briefest research into the statutory surveillance laws quickly exhausts existing resources.

This issue of The George Washington Law Review is designed to address the gap in existing scholarship. The Law Review invited leading scholars and practitioners in the field of Internet surveillance law to Washington, D.C., on October 23, 2003, and asked them to address an important aspect of the Internet surveillance statutes. Participants were asked to focus their efforts in two ways. First, participants were invited to explain the existing statutory law in their area of interest. Second, participants were asked to articulate concrete proposals for legislative change that Congress could use as a point of departure in future debates. Within these broad guidelines, contributors were free to focus on whatever aspect of the statutory Internet surveillance laws that they wished. The goal was to advance the scholarship within the field of Internet surveillance law by presenting descriptive and normative scholarship that recognizes the statutory nature of the field.

The resulting symposium issue has exceeded my expectations and the expectations of the editors at the Law Review. The contributions encompass a remarkably broad range of perspectives from academics, privacy advocates, current and former prosecutors, and former legislative aides. Several of the contributions offer macroscale thematic perspectives on the field of Internet surveillance law. Others offer detailed analysis of individual statutes such as the Stored Communications Act and the Foreign Intelligence Surveillance Act. One contribution focuses on how the laws are implemented in practice, and another offers a comparative international perspective. Others analyze specific recurring issues, such as the uses and misuses of commercial


databases\textsuperscript{14} and threats from nongovernmental surveillance.\textsuperscript{15} Finally, the former General Counsel of the Senate Judiciary Committee offers a remarkable first-hand recollection of the passage of the Patriot Act.\textsuperscript{16}

Taken individually, each essay in this issue tackles a difficult and important issue. Viewed collectively, the essays span and even help define the field of Internet surveillance law. The contributions offer rich and thoughtful analysis of many important issues that have never been addressed in the pages of law reviews. I am confident that they will serve as a valuable resource for scholars, legislators, and the public alike.


SURVEILLANCE LAW:
RESHAPING THE FRAMEWORK

Seven Weeks: The Making of the USA PATRIOT Act
Beryl A. Howell
1145

A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It
Orin S. Kerr
1208

Evaluating Telecommunications Surveillance in Germany: The Lessons of the Max Planck Institute’s Study
Paul M. Schwartz
1244

Reconstructing Electronic Surveillance Law
Daniel J. Solove
1264

The System of Foreign Intelligence Surveillance Law
Peter P. Swire
1306