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## Land of the Free

# LAND OF THE FREE?

Professor Mell's forthcoming article discusses how the USA Patriot Act erodes traditional protections afforded American citizens against invasion of privacy by the government. by Joseph H. Lusk

The USA Patriot Act ("Act") changes the existing legal landscape by, among other things, amending both the Foreign Intelligence Surveillance Act<sup>2</sup> ("FISA") and the "Wiretap Statute."<sup>3</sup>

Traditionally, Congress and the courts have limited the CIA's investigative authority to non-domestic issues, and its surveillance power to outside the United States.<sup>4</sup> According to Mell, these restrictions were enacted to protect American citizens from the scrutiny of the CIA, because Congress "recognized the potential for abuse by an organization with authority to pursue clandestine surveillance."<sup>5</sup> Mell explains that the Act's FISA amendments diminish the protections traditionally afforded U. S. citizens by allowing the CIA to conduct domestic surveillance.<sup>6</sup>

Additionally, Mell describes how the Act is vague and overbroad.<sup>7</sup> For example, the Act's "crimes of Domestic Terrorism and Harboring a Terrorist" may include "such legitimate activist activity as anti-abortion rights, animal rights, environmentalists, striking union members in vital industries, civil rights protesters, and the G-4 protesters . . . ."<sup>8</sup>

Mell also traces the history of law enforcement surveillance abuse, which led to FISA's enactment.<sup>9</sup> Before FISA, law enforcement, notably the FBI, used a "national security" justification in conducting surveillance that would have otherwise been

disallowed.<sup>10</sup> When enacted, FISA created a "scheme of surveillance oversight" which balanced the government's desire to institute surveillance with the target's civil liberties. This scheme protected the subject of a criminal investigation from the government's abuse of its surveillance authority.<sup>11</sup> Similarly, the Wiretap Statute created an oversight scheme in the unique area of wiretapping.<sup>12</sup> Mell explains how the Act's amendments to both FISA and the Wiretap Statute allow for potential abuses the original acts sought to prohibit.<sup>13</sup>

In addition to the potential for abuse in the FISA and Wiretap Statute amendments, the Act also enhances the CIA-FBI information sharing partnership. This same type of agreement resulted in the compilation of intelligence dossiers on citizens involved in legitimate protests during the 1970s.<sup>14</sup> The CIA-FBI partnership, coupled with the Act's loosened restrictions on gaining information obtained in CIA-conducted surveillance, has the potential to intrude on Americans' political activity, business relationships, and personal lives.<sup>15</sup>

Thus, Mell concludes that the Act generally removes critical "checks and balances on governmental action" which "could have the effect of diminishing the already waning protection afforded by the Fourth Amendment."<sup>16</sup>

Patricia Mell is professor of law at Michigan State University-Detroit College of Law in East Lansing, Michigan, where she teaches courses in criminal law, corporate law, rights in art, and white-collar crime.

Professor Mell earned her bachelor's degree with honors from Wellesley College in 1975 and her JD from Case Western Reserve University in 1978. While in law school, she was on the Moot Court Board and was advisor to the Jessup Moot Court Team.

From 1978-1983, Professor Mell was an assistant attorney general for the state of Ohio, working as a trial attorney in the Consumer Frauds and Crimes Section and in the Charitable Foundations Section. In 1983, she joined the Ohio secretary of state's office, where she was chief administrator and legal counsel for the Corporations Section as well as legal advisor to the Uniform Commercial Code Section.

Professor Mell began her teaching career at Capital University Law School. She subsequently taught at

the University of Toledo College of Law and Widener University School of Law. She joined the MSU-Detroit College of Law faculty in 1992 and served as associate dean from 1998-2001. She is the author of several scholarly articles focusing on privacy and computers.

Joe is a recent graduate of the University of Denver College of Law and plans to sit for the Colorado Bar Examination in July, 2002. Joe works as a Senior Law Clerk with Merrill Lynch, Pierce, Fenner & Smith Incorporated.