

TEACHING STATUTORY RESEARCH WITH THE USA PATRIOT ACT

BY KAY M. TODD

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There is an old aphorism that defines a camel as a horse designed by a committee.¹ That concept could be as aptly ascribed to the USA Patriot Act of 2001,² enacted in the chaotic weeks after September 11, 2001. It was the product of hasty negotiations between Republicans and Democrats and the House and Senate, conducted in the harsh light of media attention. From that process has come a statute that is a nightmare for statutory interpretation—unclear internally as to effective date and application. As such it offers an effective teaching tool in a legal research curriculum.³

The USA Patriot Act is divided into 10 titles and covers a range of terrorism-related issues including surveillance, border protection, and intelligence gathering; however, Title III—the International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001—can be used on its own as a teaching tool. Title III has the additional virtue of having its own name, and including within it a subtitle that addresses the Bank Secrecy Act. This Pirandello-esque “act-within-an-act” situation is not uncommon in federal enactments and it provides a good learning opportunity.

My own experience with the USA Patriot Act came from a research assignment to prepare an interpretive memorandum on the changes that the Act made to the prior Bank Secrecy Act provisions,

including the effective date of Title III’s provisions and the rulemaking activity that could be anticipated. In tracking the changes and evaluating their applicability and effective date, I soon realized that this is a statute that tests statutory interpretation skills. The Act’s strengths for this purpose are: (1) there are multiple effective dates; (2) its provisions affect multiple titles of the U.S. Code; (3) the U.S. Code changes are scrambled within the Act rather than following the title arrangement of the Code; (4) definitions appear in several sections and some are so similar as to be confusing; (5) the Act is not carefully drafted, leading to confusion as to its provisions.

Effective Dates

The USA Patriot Act was enacted on October 26, 2001, and there is no effective date clause for either the whole act or for all of Title III. There is a provision that provides that Title III will terminate on or after January 1, 2005, if Congress passes a joint resolution to that effect (§ 303(a)). Within Title III itself, there are sections that take effect “within 270 days” (§ 312); “60 days after enactment” (§ 313); and “180 days after enactment” (§ 352). One section suggests retroactive application: § 358 applies with respect to records and reports filed or maintained on, before, or after the date of enactment of the Act. To further complicate matters, there are specific rulemaking deadlines as well: 180 days (§ 312); 120 days (§ 314); by July 1, 2002 (§ 356); and within six months (§ 365). As if this were not complex enough, several sections require other actions as of a particular date, such as various reports to Congress (see, e.g., §§ 356, 359, and 366).

Multiple U.S. Code Titles Affected

Title III of the USA Patriot Act has three subparts, related to international money laundering, bank secrecy, and currency crimes. The majority of its provisions affect Title 31 of the U.S. Code—Money and Finance. However, Title III also amends sections of Title 12, Banks and Banking; Title 15, Commerce and Trade; Title 18, Crimes and Criminal Procedure; Title 21, Food and Drugs; and Title 28, Judiciary and Judicial Procedure. In

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¹ Credited to Sir Alec Issigonis (1906–88), British automobile designer who created the Mini and the Morris Minor, by the London *Guardian* in 1991.

² Pub. L. No. 107-56, 115 Stat. 272 (October 26, 2001).

³ The best sources to assign students are the slip law or *U.S. Code Congressional and Administrative News*[®] and the *United States Code* (2000). *United States Code Annotated*[®] promptly issued a replacement volume for Title 31 that blurs the intricacy of the Act’s provisions.

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addition, some sections of Title III include amendments to more than one title. Thus, § 358 of the Act includes amendments to U.S. Code Titles 12, 15, and 31.

Internal Organization of Amending Sections

Title III is not organized to facilitate a review of its changes to existing law. The statute would be easier to interpret if the amendments to the Code were in the numeric order of the U.S. Code titles. However, this is not the case, and furthermore, not all the USA Patriot Act changes to a single section of the U.S. Code appear in the same or adjacent sections. For instance, 31 U.S.C. § 5318 is amended by USA Patriot Act §§ 312, 313, 325, 326, 356, 358, and 359. Analyzing the impact of the changes on § 5318 therefore requires more than the usual cutting and pasting.

Language Amendatory of Existing Sections

The easiest statutory interpretation occurs for new statutes that establish entirely new sections of the U.S. Code. This is not true of the USA Patriot Act, where the amendments are principally to existing sections of the Bank Secrecy Act and the Criminal Code. These amending sections often change some of the wording, but do not replace the text, and the new amendments include additional subsections.

Definitions—Who Is Covered by the Act?

The amendments to the Bank Secrecy Act must be carefully reviewed to determine their application to various institutions. Prior to the USA Patriot Act, the term “financial institution” included a broad range of entities from banks to pawnbrokers to travel agencies (31 U.S.C. § 5312 (2000)). The 2001 Act clarified the applicability of the Bank Secrecy Act provisions to commodities traders and credit unions (§ 321), but generally left the lengthy list of institutions unchanged. The confusion arises over the Act’s new provisions that apply only to a subset of financial institutions, as is the case with § 313 that defines and applies to covered financial institutions as defined in § 5312 subparagraphs (A) through (G), thereby excluding the travel agencies and other peripheral entities.

Drafting Issues

There are several problems in interpreting the USA Patriot Act that relate to the details of its draftsmanship, and are perhaps due in part to the short legislative process. In one clear drafting error, Title III enacted two subsections (l) for 31 U.S.C. § 5318. Section 326 adds subsection (l) on “Identification and Verification of Accountholders,” and § 359(c) adds subsection (l) on “Applicability of Rules.”

Another question that arises from the wording of the statute relates to effective dates. Does a section that requires the promulgation of regulations take effect when those regulations are issued? Or does it take effect regardless of whether regulations are promulgated? Section 326 does not explicitly require financial institutions to do anything, but it does require the secretary of the Treasury to promulgate regulations related to verification and identification of new accountholders. That section carries no effective date but the regulations are required to be in place within one year. The Office of Thrift Supervision has equated this to an effective date for the provision of October 24, 2002, but this is not clear in the text, which says only that final regulations “shall take effect before the end of the 1-year period.”

A substantial number of Title III sections will not be codified in the U.S. Code. In many cases these sections relate to policy statements or reporting requirements, but at least one section establishes a crime, but does not amend Title 18 to add a new crime there. Section 329 makes it a crime for federal officials and employees to accept anything of value in return for being influenced in their enforcement of the Act. It cites chapter 227, Title 18, but that is merely the chapter that includes sentencing provisions for all crimes.

Conclusion

This article highlights the difficulties in interpreting Title III of the USA Patriot Act. These interpretative challenges—multiple effective dates, provisions affecting multiple titles, definitional confusion, and the absence of careful drafting—make Title III a particularly rich and useful teaching tool. One can safely assume that other, equally perplexing examples can be found in the other nine titles of the USA Patriot Act.

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