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Foreign Intelligence Surveillance Act: Selected Legislation from the 108th Congress

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Foreign Intelligence Surveillance Act: Selected 108th Congress Legislation

Summary

The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, (FISA) as passed in 1978, provided a statutory framework for the use of electronic surveillance in the context of foreign intelligence gathering. In so doing, Congress sought to strike a delicate balance between national security interests and personal privacy rights. Subsequent legislation expanded federal laws dealing with foreign intelligence gathering to address physical searches, pen registers and trap and trace devices, and access to certain business records. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, made significant changes to some of these provisions. Further amendments to FISA were included in the Intelligence Authorization Act for Fiscal Year 2002, P.L. 107-108, and the Homeland Security Act of 2002, P.L. 107-296. In addressing international terrorism or espionage, the same factual situation may be the focus of both criminal investigations and foreign intelligence collection efforts. The changes in FISA under these public laws facilitate information sharing between law enforcement and intelligence elements. In its Final Report, the 9/11 Commission noted that the removal of the pre-9/11 “wall” between intelligence and law enforcement “has opened up new opportunities for cooperative action within the FBI.”

In the 108th Congress, a variety of bills have been introduced with provisions related to the FISA. The FISA provisions of some of these measures are part of larger intelligence reform proposals. Some of these pre-dated the release of *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States* (W. W. Norton 2004) (*Final Report*), while others have emerged since the release of the *Final Report*. Still others are more narrowly focused measures that would also impact FISA investigations in the post-9/11 environment. This report will briefly discuss the FISA-related aspects of these proposals. For purposes of this report, the bills addressed will be divided generally into two categories: intelligence reform or reorganization proposals that have FISA provisions, including H.R. 10, H.R. 4104, H.R. 5040, H.R. 5150, S. 6, S. 190, S. 1520, S. 2811, S. 2840, S. 2845, and Senator Pat Roberts’ draft bill; and other FISA-related bills, including H.R. 1157, H.R. 2242, H.R. 2429, H.R. 2800, H.R. 3179, H.R. 3352, H.R. 3552, H.R. 4591, H.Amdt. 652 to H.R. 4574, S. 113, S. 123, S. 410, S. 436, S. 578, S. 1158, S. 1507, S. 1552, S. 1709, S. 2528, and S.Amdt. 536 to S. 113. For a more detailed discussion of FISA, see CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial Decisions*, by Elizabeth B. Bazan.

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Foreign Intelligence Surveillance Act: Selected 108th Congress Legislation

The Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, (FISA) as passed in 1978, provided a statutory framework for the use of electronic surveillance in the context of foreign intelligence gathering. In so doing, Congress sought to strike a delicate balance between national security interests and personal privacy rights. Subsequent legislation expanded federal laws dealing with foreign intelligence gathering to address physical searches, pen registers and trap and trace devices, and access to certain business records. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56, made significant changes to some of these provisions. Further amendments to FISA were included in the Intelligence Authorization Act for Fiscal Year 2002, P.L. 107-108, and the Homeland Security Act of 2002, P.L. 107-296. In addressing international terrorism or espionage, the same factual situation may be the focus of both criminal investigations and foreign intelligence collection efforts. The changes in FISA under these public laws facilitate information sharing between law enforcement and intelligence elements. In its Final Report, the 9/11 Commission noted that the removal of the pre-9/11 “wall” between intelligence and law enforcement “has opened up new opportunities for cooperative action within the FBI.”¹

In the 108th Congress, a variety of bills have been introduced with provisions related to the FISA. The FISA provisions of some of these measures are part of larger intelligence reform proposals. Some of these pre-dated the release of *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States* (W. W. Norton 2004) (*Final Report*), while others have emerged since the release of the *Final Report*. Still others are more narrowly focused measures that would also impact FISA investigations in the post-9/11 environment. This report will briefly discuss these proposals. For purposes of this report, the bills addressed will be divided generally into two categories: intelligence reform or reorganization proposals that have FISA provisions and other FISA-related bills. For a more detailed discussion of FISA, see CRS Report RL30465, *The Foreign Intelligence Surveillance Act: An Overview of the Statutory Framework and Recent Judicial Decisions*, by Elizabeth B. Bazan.

¹ *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States*, Ch. 13, Sec. 13.5, at 424 (W. W. Norton 2004) (*Final Report*).

FISA Provisions which are Part of Intelligence Reform or Reorganization Proposals

While not all of the intelligence reform or reorganization proposals introduced in the 108th Congress have addressed FISA, a number have FISA provisions, including:

H.R. 10. 9/11 Recommendations Implementation Act. Introduced by Representative J. Dennis Hastert on September 24, 2004, and referred to House Permanent Select Committee on Intelligence, and in addition to the House Committees on Armed Services, Education and the Workforce, Energy and Commerce, Financial Services, Government Reform, International Relations, the Judiciary, Rules, Science, Transportation and Infrastructure, Ways and Means, and Select Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. Sec. 1011 of the bill, among other things, creates a new Sec. 102A of the National Security Act of 1947, dealing with the responsibilities and authorities of the newly created National Intelligence Director. Sec. 102A(f) states, in pertinent part, that “Nothing in this act shall be construed as affecting the role of the Department of Justice or the Attorney General with respect to applications under the Foreign Intelligence Surveillance Act.” Under Sec. 1071(e) of the measure, “Director of Central Intelligence” is replaced with “National Intelligence Director” in each place in which it appears in FISA. Sec. 2001 of the bill as introduced would amend Sec. 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1), to add to the list of categories of persons, other than U.S. persons, who are considered “agents of a foreign power” for purposes of FISA. Under Sec. 2001 as introduced, any person, other than a U.S. person, who “engages in international terrorism or activities in preparation therefor” would be considered an agent of a foreign power. This language would not require the government to establish that the person was connected with an international terrorist organization, foreign government or group. During mark-up of H.R. 10 by the House Judiciary Committee, an amendment offered by Representative Howard Berman was agreed to by voice vote which would replace Sec. 2001 as introduced with a new Sec. 2001. The new language would create a new Sec. 101A of FISA, 50 U.S.C. § 1801A, which would provide, “Upon application by the Federal official applying for an order under this Act, the court may presume that a non-United States person who is knowingly engaged in sabotage or international terrorism, or activities that are in preparation therefor, is an agent of a foreign power under section 101(b)(2)(C).” The amendment would also make the new language subject to the sunset provision in Sec. 224 of the USA PATRIOT Act, P.L.107-56, including the exception provided in subsection (b) of Sec. 224. Therefore, Sec. 2001 as amended would sunset on December 31, 2005, except with respect to any foreign intelligence investigation begun before that date or any criminal offense or potential offense that began or occurred before that date.

H.R. 4104. Intelligence Transformation Act of 2004. Introduced April 1, 2004, by Representative Jane Harman, and referred to House Permanent Select Committee on Intelligence. Sec. 101 of the bill would, in pertinent part, amend the National Security Act of 1947 to strike the existing Section 103 of the act and replace it with new language. Under new Section 103(b)(6), a newly created Director of National

Intelligence would have responsibility to “establish requirements and priorities for foreign intelligence information to be collected under [FISA] and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 502 of H.R. 4104, “Director of Central Intelligence” is to be replaced with “Director of National Intelligence” in each place in FISA in which it appears.

H.R. 5040. 9/11 Commission Report Implementation Act of 2004. Introduced September 9, 2004, by Representative Christopher Shays, and referred to House Permanent Select Committee on Intelligence, and in addition to the House Committees on Armed Services, International Relations, Government Reform, Judiciary, Rules, Transportation and Infrastructure, Energy and Commerce, Ways and Means, and House Select Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. Under Sec. 132(a)(6), the National Intelligence Director established by the bill would have responsibility to “establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 172(e) of the bill, “National Intelligence Director” is to replace “Director of Central Intelligence” in every place where it appears in FISA.

H.R. 5150.² National Intelligence Reform Act of 2004. Introduced September 24, 2004, by Representative Christopher Shays, for himself and Representative Carolyn Maloney, and referred to the House Permanent Select Committee on Intelligence. In Sec. 112(a)(7) of the bill, a newly established National Intelligence Director would have responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 302(e) of the bill, “National Intelligence Director” would replace “Director of Central Intelligence” in each place in which it appears in FISA.

² The Government Printing Office version of this bill was unavailable at the time this report was prepared. This discussion is taken from the prepublication version of the bill as available on the GPO website on September 27, 2004, at [<http://www.congress.gov/billtext/househtml/hr5150.ih.html>].

S. 6. Comprehensive Homeland Security Act of 2003. Introduced January 7, 2003, by Senator Thomas Daschle, and referred to Senate Committee on the Judiciary. Under Sec. 10002 of the bill, a new Sec.103(b)(6) of the National Security Act of 1947, a newly established Director of National Intelligence would have the responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Pursuant to Sec. 10005(f), “Director of Central Intelligence” would be replaced with “Director of National Intelligence” in every place it appears in FISA.

S. 190. Intelligence Community Leadership Act of 2003. Introduced January 16, 2003, by Senator Dianne Feinstein, and referred to the Senate Select Committee on Intelligence. Section 2 of the bill would replace the existing Sec. 103 of the National Security Act of 1947 with a new Sec. 103, subsection 103(b)(6) of which would give the new Director of National Intelligence responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 4(f) of the bill, “Director of Central Intelligence” would be replaced with “Director of National Intelligence” in each place in FISA in which it appears.

S. 1520. 9-11 Memorial Intelligence Reform Act. Introduced July 31, 2003, by Senator Bob Graham, and referred to the Senate Select Committee on Intelligence. Sec. 2 of the bill would create a new Sec. 103 of the National Security Act of 1947. Under the new Sec. 103(b)(6), the newly established Director of National Intelligence would have responsibility to “establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Section 8(a)(1) of the bill would direct the Attorney General, in consultation with the Director of the FBI, to “provide detailed training to appropriate personnel of the FBI, and to appropriate personnel of other elements of the intelligence community, on the availability and utilization of the authorities provided by [FISA] to address terrorist threats to the United States.” Section 8(b) requires the Attorney General and the Director of the FBI to “jointly take appropriate actions to ensure that the information acquired through electronic surveillance, searches, and other activities under [FISA] is disseminated on a timely basis to appropriate personnel within the [FBI], and appropriate personnel in other elements of the intelligence community, in order to facilitate the use of such information for analysis and

operations to address terrorists threats to the United States.” Under Section 8(c), the Attorney General and the Director of the FBI must “jointly develop a plan to utilize the authorities under [FISA] to provide for the full assessment of the threats posed to the United States by international terrorist groups operating within the United States, including the determination of the extent to which such groups are funded or otherwise supported by foreign governments.” In the context of enhanced counterterrorism training for intelligence community personnel, Subsections 10(1)(A) and (C) of the bill direct the Director of National Intelligence to expand such training to improve and enhance (A) “intelligence sharing between and among intelligence personnel and law enforcement personnel; . . . [and] (C) the utilization of the authorities under [FISA].”

S. 2811. Intelligence Reformation Act of 2004 or 9/11 Act. Introduced September 15, 2004, by Senator Arlen Specter, and referred to Senate Committee on Governmental Affairs. Under Sec. 132(a)(5), the newly established Director of Intelligence has responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 402(e), “Director of Intelligence is to replace “Director of Central Intelligence” in each place it appears in FISA.

S. 2840. National Intelligence Reform Act of 2004. Introduced September 23, 2004, by Senator Susan Collins, reporting an original bill from the Committee on Governmental Affairs. In Sec. 112, the bill outlines the responsibilities of the new National Intelligence Director. In Sec. 112(a)(7), the Director is given responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 302(e) of the bill, “National Intelligence Director” replaces “Director of Central Intelligence” in each place in which it appears in FISA.

S. 2845. National Intelligence Reform Act of 2004. Introduced September 23, 2004, by Senator Susan Collins, for herself and Senator Joseph Lieberman, reporting an original bill from the Committee on Governmental Affairs. In Sec. 112, the bill outlines the responsibilities of the new National Intelligence Director. In Sec. 112(a)(7), the Director is given responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise

authorized by statute or Executive order.” Under Sec. 302(e) of the bill, “National Intelligence Director” replaces “Director of Central Intelligence” in each place in which it appears in FISA.

Senator Pat Roberts’ Draft Bill, dated August 23, 2004. 9-11 National Security Protection Act. Sec. 102 of the bill would create a new Sec. 102A of the National Security Act of 1947. Under Sec. 102A(b)(8), the newly established National Intelligence Director would have responsibility “to establish requirements and priorities for foreign intelligence information to be collected under [FISA], and provide assistance to the Attorney General to ensure that information derived from electronic surveillance or physical searches under that act is disseminated so that it may be used efficiently and effectively for foreign intelligence purposes, except that the Director shall have no authority to direct, manage, or undertake electronic surveillance or physical search operations pursuant to that act unless otherwise authorized by statute or Executive order.” Under Sec. 221(e) of the bill, “National Intelligence Director” would replace “Director of Central Intelligence” in each place where it appears in FISA.

Other FISA-Related Bills in the 108th Congress

The FISA-related measures which do not involve intelligence reform or reorganization appear to be more varied in their focus and approach. These include the following bills:

H.R. 1157. Freedom to Read Protection Act. A bill to amend the Foreign Intelligence Surveillance Act to exempt bookstores and libraries from orders requiring the production of any tangible things for certain foreign intelligence investigations, and for other purposes. Introduced on March 6, 2003, by Representative Bernard Sanders. Referred to House Judiciary Committee and the House Permanent Select Committee on Intelligence for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned, on March 6, 2003. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee on May 5, 2003. Among other things, Sec. 2 of the bill amends Section 501 of FISA, 50 U.S.C. § 1861, to preclude an application for an order seeking or having the effect of searching for or seizing records of a bookseller or library documentary materials concerning personally identifiable information regarding a patron of the library or bookstore. It does not preclude a physical search for such documentary materials under another provision of law. Sec. 3 of the bill amends 50 U.S.C. § 1862, with respect to reporting requirements for the Attorney General to make to the House Judiciary Committee, Senate Judiciary Committee, House Permanent Select Committee on Intelligence and Senate Committee on Intelligence. Also requires the Attorney General, consistent with protection of U.S. national security, to make public the information reported to these committees.

H.R. 2242. Tribal Government Amendments to the Homeland Security Act. A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security and for other purposes. Introduced on May 22, 2003, by Representative

Patrick J. Kennedy. On May 22, 2003, referred to the Committee on Resources and, in addition, to the House Committee on the Judiciary, the House Committee on the Budget, the House Permanent Select Committee on Intelligence, and the House Select Committee on Homeland Security, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee on June 25, 2003. Sec. 12(g)(1) would amend Section 106(k)(1) of FISA, 50 U.S.C. § 1806(k)(1), to permit federal officers who conduct electronic surveillance to acquire foreign intelligence information under FISA to consult, among others, with law enforcement personnel of an Indian tribe. Sec. 12(g)(2) would also amend Section 305(k)(1) of FISA, 50 U.S.C. § 1825(k)(1), to permit federal officers who conduct a physical search under FISA to consult, among others, with law enforcement personnel of an Indian Tribe.

H.R. 2429. Surveillance Oversight and Disclosure Act of 2003. A bill to amend the Foreign Intelligence Surveillance Act of 1978 to improve the administration and oversight of foreign intelligence surveillance, and for other purposes. Introduced on June 11, 2003, by Representative Joseph M. Hoeffel. On June 11, 2003, referred to the House Judiciary Committee, the House Permanent Select Committee on Intelligence, and the House Financial Services Committee, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. Referred to the Subcommittee on Financial Institutions and Consumer Credit of House Committee on Financial Services for a period to be subsequently determined by the Chairman, on June 23, 2003. Referred to Subcommittee on Commercial and Administrative Law of House Judiciary Committee on June 25, 2003. Among other things, authorizes Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Court of Review (Court of Review) to establish rules and procedures and to take actions necessary to administer FISA. Requires reporting of such rules and procedures and any modifications thereof to all of the judges of the FISC and the Court of Review, the Chief Justice of the United States, the House Judiciary Committee, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence and the Senate Committee on Intelligence. Establishes certain public reporting requirements with respect to electronic surveillance, physical searches, pen registers, and business records production under FISA.

H.R. 2800. Foreign Operations, Export Financing, and Related Programs Appropriations Act, 2004. A bill making appropriations for foreign operations, export financing, and related programs for the fiscal year ending September 30, 2004, and for other purposes. Introduced/originated in the House on July 21, 2003. On that day, the House Committee on Appropriations reported an original measure, H.Rept. 108-222, by Representative Jim Kolbe. Passed the House, amended, on July 24, 2003, by Yeas and Nays, 370-50 (Roll no. 429). Received in the Senate July 24, 2003, read twice, and placed on Senate Legislative Calendar under General Orders, Calendar No. 227. Sec. 582 bars the use of funds by the State Department to support an application under FISA for an order requiring the production of library circulation records, library patron lists, library Internet records, bookseller sales records, or bookseller customer lists. Note that H.R. 2673, the Consolidated Appropriations bill

for 2004, which became P.L. 108-199, included appropriations for Foreign Operations, but does not appear to include FISA language.

H.R. 3179. Anti-Terrorism Intelligence Tools Improvement Act of 2003. Introduced September 25, 2003, by Representative James Sensenbrenner, Jr., and referred to House Committee on Judiciary and House Permanent Select Committee on Intelligence. Referred to Subcommittee on Crime, Terrorism, and Homeland Security of House Judiciary Committee on October 22, 2003. Subcommittee hearings held May 18, 2004. Sec. 4 of the bill would amend Sec. 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1) to include in the definition of an “agent of a foreign power” any person other than a U.S. person who “engages in international terrorism or activities in preparation therefor.” Sec. 6 of the bill would create an exception to the FISA provisions regarding notification by the United States of intended use or disclosure of information acquired through a FISA electronic surveillance, FISA physical search, or FISA pen register or trap and trace device; motion to suppress; and in camera and ex parte review by the district court, for civil proceedings or other civil matters under the immigration laws.

H.R. 3352. Security and Freedom Ensured Act of 2003 or SAFE Act. Introduced on October 21, 2003, by Representative C.L. (Butch) Otter, and referred to the House Committee on the Judiciary and House Permanent Select Committee on Intelligence. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee on December 10, 2003. Sec. 2 of the bill would amend the roving wiretap provisions of FISA to require that an order approving such electronic surveillance must specify either the identity of the target or the places and facilities to which the electronic surveillance is to be directed. In cases where the facility or place is not known at the time of the issuance of the order, Sec. 2 of the bill would require that the electronic surveillance only be conducted when the person conducting the surveillance has ascertained that the target is present at a particular facility or place. Sec. 4 of the bill would require that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, must specify that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, and that the court, in issuing its order find that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power and that the application meets the other requirements of 50 U.S.C. § 1861. Sec. 4 of the bill also amends 50 U.S.C. § 1862 to require the Attorney General, on a semi-annual basis, to fully inform the House Permanent Select Committee on Intelligence, the House Judiciary Committee, the Senate Select Committee on Intelligence and the Senate Judiciary Committee concerning all requests for production of tangible things under 50 U.S.C. 1861. The Attorney General’s report to the House and Senate Judiciary Committees is also to include the total number of applications made under 50 U.S.C. § 1861, and the total number of such orders granted, modified or denied.

H.R. 3552. A bill to amend the Foreign Intelligence Surveillance Act of 1978 to cover individuals, other than United States persons, who engage in international terrorism without affiliation with an international terrorist group. Introduced November 20, 2003, by Representative Peter King, and referred to the House Committee on the Judiciary and the House Permanent Select Committee on

Intelligence. Referred to the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee on December 10, 2003. Sec. 1 of the bill would amend the definition of “agent of a foreign power” under FISA to cover any person other than a U.S. person who engages in international terrorism or activities in preparation therefor. Makes this definitional change subject to sunset December 31, 2005, except for any particular foreign intelligence investigations that began before December 31, 2005, or any particular offenses or potential offenses which began or occurred before December 31, 2005. As to those particular investigations or offenses, applicable provisions would continue in effect. Sec. 2 adds additional reporting requirements: the Attorney General is to report annually in April to the House Judiciary Committee, House Permanent Select Committee on Intelligence, Senate Judiciary Committee and Senate Select Committee on Intelligence on (1) the aggregate number of non-U.S. persons targeted for FISA orders during the previous year, broken down by electronic surveillance, physical searches, pen registers, or access to records under 50 U.S.C. § 1861; (2) the number of individual covered by an order issued under FISA who were determined pursuant to activities authorized by FISA to have acted wholly alone in activities covered by the order; (3) the number of times the Attorney General authorized that information obtained under FISA or derivative information may be used in a criminal proceeding; and, (4) in a manner consistent with protection of U.S. national security, redacting the facts of any particular matter, the portions of the documents and applications filed with the Foreign Intelligence Surveillance Court (FISC) or the Foreign Intelligence Court of Review (Court of Review) that include significant construction or interpretation of the provisions of FISA and the portions of opinions or court orders from the FISC or Court of Review which include significant construction or interpretation of FISA provisions.

H.R. 4591. Civil Liberties Restoration Act of 2004. Introduced June 16, 2004, by Representative Howard Berman, and referred to the House Committee on the Judiciary and the House Permanent Select Committee on Intelligence. Referred June 28, 2004, to the Subcommittee on Immigration, Border Security, and Claims and the Subcommittee on Crime, Terrorism, and Homeland Security of the House Judiciary Committee. In the context of electronic surveillance or physical searches under FISA, Sec. 401 of the bill would amend FISA to permit, rather than require, relevant U.S. district courts, upon filing by the Attorney General of an affidavit under oath that disclosure or an adversary hearing would harm U.S. national security, to review in camera and ex parte the application, order, and other pertinent materials necessary to determine whether the surveillance or physical search was lawfully authorized and conducted. In making this determination with respect to an electronic surveillance, the court shall disclose, if otherwise discoverable, to the aggrieved person, his or her counsel, or both, under Classified Information Procedures Act (CIPA) procedures and standards, portions of the application, order, or other materials relating to the surveillance unless the court finds the disclosure would not assist in determining any legal or factual issue pertinent to the case. It applies a similar standard in the context of physical searches, but gives the court the option of requiring the Attorney General to provide the aggrieved person, his or her counsel, or both, a summary of such materials relating to the physical search. In the context of pen registers or trap and trace devices, the bill would require disclosure to the aggrieved person, his or her attorney, or both, under CIPA procedures and standards, if otherwise discoverable, of portions of the application, order, or other materials relating to the use of the pen

register or trap and trace device, or evidence or information obtained or derived from the pen register or trap and trace device, unless such disclosure would not assist in determining any legal or factual issue pertinent to the case. In the context of 50 U.S.C. § 1861, any disclosure of applications, information, or items submitted or acquired pursuant to a FISA order for production of tangible things, if otherwise discoverable, must be conducted under CIPA procedures and standards. Sec. 403 of the bill would require that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, must specify that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, and that the court, in issuing its order find that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power and that the application meets the other requirements of 50 U.S.C. § 1861. Sec. 403 of the bill also amends 50 U.S.C. § 1862 to require the Attorney General, on a semi-annual basis, to fully inform the House Permanent Select Committee on Intelligence, the House Judiciary Committee, the Senate Select Committee on Intelligence and the Senate Judiciary Committee concerning all requests for production of tangible things under 50 U.S.C. 1861. The Attorney General's report to the House and Senate Judiciary Committees is also to include the total number of applications made under 50 U.S.C. § 1861, and the total number of such orders granted, modified or denied.

H.Amdt. 652 to H.R. 4754. An amendment to add a new section to the Commerce-Justice-State appropriations bill prohibiting funds from being made available to make an application under Sec. 501 of FISA, 50 U.S.C. § 1861, for an order requiring production of library circulation records, library patron lists, library internet records, book sales records, or book customer lists. Introduced by Representative Sanders on July 8, 2003. Amendment not agreed to by recorded vote 210-210, 1 present (Roll no. 339).

S. 113. Official title as amended by the Senate: A bill to amend the Foreign Intelligence Surveillance Act of 1978 to cover individuals, other than United States persons, who engage in international terrorism without affiliation with an international terrorist group. Introduced/originated in Senate on January 9, 2003, by Senator Jon Kyl. Referred to Senate Judiciary Committee. On March 11, 2003, reported out of the Senate Judiciary Committee by Senator Orrin Hatch with an amendment in the nature of a substitute and an amendment to the title, without written report Placed on Senate Legislative Calendar under General Orders, Calendar No. 32. On April 29, 2003, Senate Judiciary Committee filed a written report, S.Rept. 108-40; additional views filed. On May 8, 2003, Referred to Senate Committee on Intelligence, pursuant to order of May 7, 2003; Senate Committee on Intelligence discharged same day. On May 8, 2003, passed the Senate with an amendment and an amendment to the title by Yea-Nay vote, 90-4 (Record Vote Number 146). Received in House on May 9, 2003. Referred to the House Judiciary Committee, and in addition to the House Permanent Select Committee on Intelligence, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned. On June 25, 2003, referred to Subcommittee on Crime, Terrorism, and Homeland Security. As passed the Senate and referred to the House, Sec. 1 of the bill amends Section 101(b)(1) of FISA, 50 U.S.C. § 1801(b)(1) to include in the

definition of agent of a foreign power non-U.S. persons who engage in international terrorism or activities in preparation for international terrorism. The new subsection does not require that such persons be affiliated with an international terrorist group, or foreign nation or group. Makes the sunset provision in Sec. 224 of the USA PATRIOT Act, P.L. 107-56 applicable to this amendment. Sec. 2 of the bill creates new annual reporting requirements under FISA to be made by the Attorney General to the House Judiciary Committee, Senate Judiciary Committee, House Permanent Select Committee on Intelligence and Senate Committee on Intelligence.³

S. 123. A bill to exclude United States persons from the definition of “foreign power” under the Foreign Intelligence Surveillance Act of 1978 relating to international terrorism. Introduced by Senator Jon Kyl on January 9, 2003. Referred to Senate Judiciary Committee. Related bill, S. 113. Sec. 1 of the bill would amend the definition of a “foreign power” under Section 101(a)(4), 50 U.S.C. § 1801(a)(4), to include a person, other than a U.S. person, or a group that engages in international terrorism or activities in preparation therefor. Previously this subsection had only covered groups engaged in international terrorism or activities in preparation for international terrorism.

S. 410. Foreign Intelligence Collection Improvement Act of 2003, including Homeland Intelligence Agency Act of 2003 and Foreign Intelligence Surveillance Public Reporting Act. A bill to establish the Homeland Intelligence Agency, and for other purposes. Introduced by Senator John Edwards on February 13, 2003. Referred to Senate Committee on Intelligence. Title III, Subtitle A, amends FISA reporting requirements with respect to electronic surveillance and physical searches. Also would require reporting, within discretion of Attorney General or Director of Homeland Intelligence and in a manner consistent with protection of U.S. national security, of significant interpretations of FISA, including, as appropriate, redacted portions of opinions or orders of FISA court. Title III, Subtitle B, of the bill would amend Title VI of FISA to address participation by an official or agent of a proposed Homeland Intelligence Agency in religious and political groups for foreign intelligence and international terrorism purposes. Subtitle III, Subtitle A, of S. 410 also provides reporting requirements with respect to such undisclosed participation.

S. 436. Domestic Surveillance Oversight Act of 2003. A bill to amend the Foreign Intelligence Surveillance Act of 1978 to improve the administration and oversight of foreign intelligence surveillance, and for other purposes. Introduced by Senator Patrick Leahy on February 25, 2003. Referred to Senate Judiciary Committee. Among other things, authorizes Foreign Intelligence Surveillance Court (FISC) and Foreign Intelligence Court of Review (Court of Review) to establish rules and procedures and to take actions necessary to administer FISA. Requires reporting of such rules and procedures and any modifications thereof to all of the judges of the FISC and the Court of Review, the Chief Justice of the United States, the House Judiciary Committee, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence and the Senate Committee on Intelligence. Establishes

³ For a more detailed discussion of S. 113, see CRS Report RS21472, *Proposed Change to the Foreign Intelligence Surveillance Act (FISA) under S. 113*, by Jennifer Elsea.

certain public reporting requirements with respect to electronic surveillance, physical searches, pen registers, and business records production under FISA.

S. 578. Tribal Government Amendments to the Homeland Security Act of 2002. A bill to amend the Homeland Security Act of 2002 to include Indian tribes among the entities consulted with respect to activities carried out by the Secretary of Homeland Security, and for other purposes. Introduced by Senator Daniel K. Inouye on March 7, 2003. Referred to Senate Governmental Affairs Committee. Hearings held before the Senate Select Committee on Indian Affairs on July 30, 2003, S. Hrg. 108-312. Sec. 12(g)(1) would amend Section 106(k)(1) of FISA, 50 U.S.C. § 1806(k)(1), to permit federal officers who conduct electronic surveillance to acquire foreign intelligence information under FISA to consult, among others, with law enforcement personnel of an Indian tribe. Sec. 12(g)(2) would also amend Section 305(k)(1) of FISA, 50 U.S.C. § 1825(k)(1), to permit federal officers who conduct a physical search under FISA to consult, among others, with law enforcement personnel of an Indian Tribe.

S. 1158. Library and Bookseller Protection Act. A bill to exempt bookstores and libraries from orders requiring the production of tangible things for foreign intelligence investigations, and to exempt libraries from counterintelligence access to certain records, ensuring that libraries and bookstores are subjected to the regular system of court ordered warrants. Introduced by Senator Barbara Boxer on May 23, 2003. Referred to Senate Judiciary Committee. Sec. 2 of the bill amends Section 501 of FISA, 50 U.S.C. § 1861, to preclude an application for an order seeking or having the effect of searching for or seizing records of a bookseller or library documentary materials concerning personally identifiable information regarding a patron of the library or bookstore. Does not preclude a physical search for such documentary materials under another provision of law.

S. 1507. Library, Bookseller, and Personal Records Privacy Act. Introduced July 31, 2003, by Senator Russell Feingold, and referred to the Senate Judiciary Committee. Sec. 2 of the bill would require that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, must specify that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, and that the court, in issuing its order find that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power and that the application meets the other requirements of 50 U.S.C. § 1861. Sec. 2 of the bill also amends 50 U.S.C. § 1862 to require the Attorney General, on a semi-annual basis, to fully inform the House Permanent Select Committee on Intelligence, the House Judiciary Committee, the Senate Select Committee on Intelligence and the Senate Judiciary Committee concerning all requests for production of tangible things under 50 U.S.C. 1861. The Attorney General's report to the House and Senate Judiciary Committees is also to include the total number of applications made under 50 U.S.C. § 1861, and the total number of such orders granted, modified or denied.

S. 1552. Protecting the Rights of Individuals Act. A bill to amend title 18, United States Code, and the Foreign Intelligence Surveillance Act of 1978 to strengthen protections of civil liberties in the exercise of the foreign intelligence surveillance

authorities under Federal law, and for other purposes. Introduced by Senator Lisa Murkowski on July 31, 2003. Referred to Senate Judiciary Committee. Among other things, Sec. 4 of the bill amends Section 501 of FISA, 50 U.S.C. § 1861, the business records provision, to add as an additional requirement for an application for a court order that it “include a statement of the facts and circumstances relied upon by the applicant to justify the applicant’s belief that the person to whom the records pertain is a foreign power or an agent of a foreign power.” Also provides that a judge shall enter an ex parte order as requested or modified approving the release of records if the judge finds reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power; or, in the case of medical records, library records, other records involving purchase or rental of books, video, or music, or accessing of legal and publicly available information through the internet, that there is probable cause that the person to whom the records pertain is a foreign power or an agent of a foreign power. The application must also meet other requirements of the section. Sec. 5 of the bill amends Section 105(c) of FISA, 50 U.S.C. § 1805(c), to eliminate John Doe roving wiretaps under FISA. Sec. 8 of the bill establishes certain public reporting requirements under FISA.

S. 1709. Security and Freedom Ensured Act of 2003 or the SAFE Act. Introduced October 2, 2003, by Senator Larry Craig, and referred to Senate Judiciary Committee. Sec. 2 of the bill would amend the roving wiretap provisions of FISA to require that an order approving such electronic surveillance must specify either the identity of the target or the places and facilities to which the electronic surveillance is to be directed. In cases where the facility or place is not known at the time of the issuance of the order, Sec. 2 of the bill would require that the electronic surveillance only be conducted when the person conducting the surveillance has ascertained that the target is present at a particular facility or place. Sec. 4 of the bill would require that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, must specify that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or agent of a foreign power, and that the court, in issuing its order find that there are specific and articulable facts giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power and that the application meets the other requirements of 50 U.S.C. § 1861. Sec. 4 of the bill also amends 50 U.S.C. § 1862 to require the Attorney General, on a semiannual basis, to fully inform the House Permanent Select Committee on Intelligence, the House Judiciary Committee, the Senate Select Committee on Intelligence and the Senate Judiciary Committee concerning all requests for production of tangible things under 50 U.S.C. 1861.

S. 2528. Civil Liberties Restoration Act of 2004. Introduced June 16, 2004, by Senator Edward Kennedy, and referred to the Senate Judiciary Committee. In the context of electronic surveillance or physical searches under FISA, Sec. 401 of the bill would amend FISA to permit, rather than require, relevant U.S. district courts, upon filing by the Attorney General of an affidavit under oath that disclosure or an adversary hearing would harm U.S. national security, to review in camera and ex parte the application, order, and other pertinent materials necessary to determine whether the surveillance or physical search was lawfully authorized and conducted. In making this determination with respect to an electronic surveillance, the court shall disclose, if otherwise discoverable, to the aggrieved person, his or her counsel, or

both, under Classified Information Procedures Act (CIPA) procedures and standards, portions of the application, order, or other materials relating to the surveillance unless the court finds the disclosure would not assist in determining any legal or factual issue pertinent to the case. The bill applies a similar standard in the context of physical searches, but gives the court the option of requiring the Attorney General to provide the aggrieved person, his or her counsel, or both, a summary of such materials relating to the physical search. In the context of pen registers or trap and trace devices, the bill would require disclosure to the aggrieved person, his or her attorney, or both, under CIPA procedures and standards, if otherwise discoverable, of portions of the application, order, or other materials relating to the use of the pen register or trap and trace device, or evidence or information obtained or derived from the pen register or trap and trace device, unless such disclosure would not assist in determining any legal or factual issue pertinent to the case. In the context of 50 U.S.C. § 1861, any disclosure of applications, information, or items submitted or acquired pursuant to a FISA order for production of tangible things, if otherwise discoverable, must be conducted under CIPA procedures and standards.

S.Amdt. 536 to S. 113. To establish additional annual reporting requirements on activities under FISA. Introduced May 8, 2003, by Senator Feingold. Agreed to the same day by Unanimous Consent. Under the amendment, the Attorney General is to report annually in April to the House Judiciary Committee, House Permanent Select Committee on Intelligence, Senate Judiciary Committee and Senate Select Committee on Intelligence on (1) the aggregate number of non-U.S. persons targeted for FISA orders during the previous year, broken down by electronic surveillance, physical searches, pen registers, or access to records under 50 U.S.C. § 1861; (2) the number of individual covered by an order issued under FISA who were determined pursuant to activities authorized by FISA to have acted wholly alone in activities covered by the order; (3) the number of times the Attorney General authorized that information obtained under FISA or derivative information may be used in a criminal proceeding; and, (4) in a manner consistent with protection of U.S. national security, redacting the facts of any particular matter, the portions of the documents and applications filed with the Foreign Intelligence Surveillance Court (FISC) or the Foreign Intelligence Court of Review (Court of Review) that include significant construction or interpretation of the provisions of FISA and the portions of opinions or court orders from the FISC or Court of Review which include significant construction or interpretation of FISA provisions.