

Amendments to the Foreign Intelligence Surveillance Act (FISA)

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| P.L. 103-359 | 10/14/1994 | Counterintelligence and Security Enhancements Act of 1994 | <p>Physical Searches under FISA. Sec. 807(a) amends FISA to redesignate former title III as title IV and former Section 301 as Section 401. The new title III of FISA, 50 U.S.C. § 1821 <i>et seq.</i>, provides for physical searches for foreign intelligence purposes. The new title:</p> <ul style="list-style-type: none"> - provides pertinent definitions (Sec. 301 of FISA). <p><u>Physical searches without a court order of property used exclusively by certain foreign powers.</u></p> <ul style="list-style-type: none"> - authorizes the President, acting through the Attorney General, to authorize physical searches for foreign intelligence purposes without a court order for periods of up to 1 year upon Attorney General certification that <ol style="list-style-type: none"> (1) the search is directed solely at premises, information, material, or property used exclusively by, or under the open and exclusive control of a foreign government or any component thereof, whether or not recognized by the United States; a faction of a foreign nation or nations, not substantially composed of United States persons; or an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments; (2) that there is no substantial likelihood that the physical search will involve the premises, information, material, or property of a U.S. person; and (3) that the proposed minimization procedures with respect to the search meet the definition of minimization procedures in new section 301(4) of FISA. <p>A copy of the certification must be provided to the FISA court immediately. This section also requires the Attorney General to report any minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (Intelligence Committees) 30 days in advance, unless the Attorney General determines that immediate action is required and notifies the committees immediately of the minimization procedures and the</p> |

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| | | | <p>reasons for their going into effect immediately. The Attorney General must assess compliance with these procedures and report on compliance to the Intelligence Committees. (Sec. 302(a) of FISA.)</p> <p><u>Physical searches pursuant to court order</u></p> <ul style="list-style-type: none"> - sets out the requirements for an application to the Foreign Intelligence Surveillance Court (FISA court) for an ex parte order approving a physical search for foreign intelligence purposes (Sec. 303 of FISA); - establishes requirements for issuance of such an order or an extension of an order; generally, an order may be issued for a period necessary to achieve its purpose or for 45 days, whichever is less; however, an order targeted on a foreign power as defined in section 101(a)(1), (2), or (3) of FISA (a foreign government or any component thereof, whether or not recognized by the United States; a faction of a foreign nation or nations, not substantially composed of United States persons; or an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments) may be for the period specified in the application or for 1 year, whichever is less (Sec. 304(a)-(c) of FISA); and - gives the FISA court jurisdiction to hear applications and grant orders for physical searches to obtain foreign intelligence information within the U.S. (Sec. 302(c) of FISA). The government may seek review by the Foreign Intelligence Surveillance Court of Review (Court of Review) of a denial of an application for a court order. (Sec. 302(d) of FISA). <p><u>Emergency physical searches upon Attorney General certification.</u></p> <ul style="list-style-type: none"> - Authorizes the Attorney General to authorize execution of an emergency physical search, based upon a determination that an emergency situation exists with respect to the execution of a physical search to obtain foreign intelligence information before an order authorizing such search can with due diligence be obtained and that the factual basis for an order to approve the search exists, if he notifies a FISA court judge at the time of the execution and if an application to that judge is made as soon as practicable but not later than 24 hours after the Attorney General authorizes the search. Minimization procedures must be |

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| | | | <p>followed. If the application for an order is denied, or if the physical search is terminated and no order authorizing it is obtained, no information obtained or evidence derived from the search may be used in a federal, state, or local proceeding; and no information concerning a U.S. person may subsequently be used or disclosed in any other manner by federal officers or employees without the consent of the U.S. person, except with Attorney General approval if the information indicates a threat of death or serious bodily harm to any person. A denial may be reviewed by the Foreign Intelligence Surveillance Court of Review (Court of Review) under section 302 of FISA. (Sec. 304(d) of FISA).</p> <p><u>Use of information obtained by or derived from a physical search under FISA.</u></p> <ul style="list-style-type: none"> - establishes limitations and notification requirements regarding the use of information acquired from a physical search pursuant to this title (Sec. 305 of FISA). <p><u>Congressional oversight.</u></p> <ul style="list-style-type: none"> - provides for semiannual reports to the Intelligence Committees concerning all searches conducted under this title; and requires semiannual reports to the Intelligence Committees and the House and Senate Judiciary Committees on the number of applications for physical searches; the total number of orders granted, modified, or denied; the number of physical searches; the number of physical searches which involved U.S. persons; and the number of occasions, if any, where the Attorney General, in the context of a search of the residence of a U.S. person, determined that no national interest required continued secrecy of the search and provided notice to that U.S. person of the search and identified the property of that U.S. person seized, altered or reproduced (Sec. 306 of FISA). <p><u>Criminal penalties.</u></p> <ul style="list-style-type: none"> - imposes criminal penalties for intentionally engaging in physical searches for foreign intelligence purposes under color of law except as authorized by statute, or for intentional disclosure or use of information obtained under color of law by physical search within the United States for the purpose of obtaining intelligence information, knowing or having reason to know that the |

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| | | | <p>information was gathered through a physical search not authorized by statute (Sec. 307 of FISA).</p> <p><u>Civil liability.</u></p> <ul style="list-style-type: none"> – provides a civil right of action for actual and punitive damages, plus reasonable attorneys fees, to U.S. persons aggrieved by violations of the criminal provision in Sec. 307 of FISA (Sec. 308 of FISA). <p><u>Physical searches without court order under FISA for up to 15 days after congressional declaration of war.</u></p> <ul style="list-style-type: none"> – authorizes the President, through the Attorney General, to authorize physical searches without a court order under this title to acquire foreign intelligence information for up to 15 calendar days following a declaration of war by Congress (Sec. 309 of FISA). <p><u>Clerical amendments and effective dates.</u></p> <ul style="list-style-type: none"> – Section 807(b) makes pertinent clerical amendment to the FISA table of contents. – Section 807(c) makes these amendments effective 90 days after the date of enactment, but provides that any physical search conducted within 180 days after date of enactment pursuant to regulations issued by the Attorney General which were in possession of the Intelligence Committees before the date of enactment shall not be deemed unlawful. |
| P.L.105-272 | 10/20/1998 | Intelligence Authorization Act for Fiscal Year 1999 | <p><u>Pen Register or Trap and Trace Devices under FISA.</u> Title VI, section 601, amends FISA to redesignate former title IV as title VI and to insert a new title IV in FISA, 50 U.S.C. § 1841 <i>et seq.</i>, to provide for the use of pen registers and trap and trace devices in foreign intelligence and international terrorism investigations. Under the new title:</p> <ul style="list-style-type: none"> – it provides pertinent definitions (Sec. 401 of FISA). <p><u>Pen registers or trap and trace devices pursuant to court order.</u></p> <ul style="list-style-type: none"> – it authorizes the Attorney General or a designated government attorney to apply for an order or an extension of an order from a FISA court judge, or a U.S. magistrate judge publicly designated to hear such applications and grant such orders on behalf of a |

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| | | | <p>FISA court judge, authorizing or approving installation and use of a pen register or trap and trace device for any FBI investigation to gather foreign intelligence information or information concerning international terrorism conducted under applicable Attorney General guidelines pursuant to E.O. 12333 or a successor order (Sec. 402(a)-(b) of FISA);</p> <ul style="list-style-type: none"> - it sets out requirements for an application for an order authorizing installation and use of a pen register or trap and trace device under FISA, and for an application for extension of such an order (Sec. 402(b) of FISA); - each application, approved by the Attorney General or his designee, shall include the identity of the federal officer seeking to use the pen register or trap and trace device; a certification by the applicant that the information likely to be obtained is relevant to an ongoing foreign intelligence or international terrorism investigation by the FBI under Attorney General guidelines; information demonstrating reason to believe that the telephone line to which the pen register or trap and trace device is to be attached or communication device covered by it has been or is about to be used in communications with an individual who is engaging in or has engaged in terrorism or clandestine intelligence activities that involve or may involve a violation of U.S. criminal laws; or a foreign power or agent of a foreign power giving reason to believe that the communication concerns or concerned international terrorism or clandestine intelligence activities that involve or may involve a violation of U.S. criminal laws. (Sec. 402(c) of FISA). - it establishes requirements for ex parte order or extension of an order authorizing installation or use of pen register or trap and trace device under FISA; an order may be for up to 90 days; any extension of an order may be for no more than 90 days (Sec. 402(d)-(e) of FISA). - it provides immunity from suit to any wire or electronic communication providers, landlord, custodian, or other person that provides information, facilities or technical assistance pursuant to a court order under this title (Sec. 402(f) of FISA). <p><u>Emergency authorization of pen register or trap and trace device.</u></p> <ul style="list-style-type: none"> - the new title authorizes the Attorney General to authorize installation and use of a pen register or trap and trace device on an |

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| | | | <p>emergency basis to gather foreign intelligence information or information concerning international terrorism if notice is given to a FISA court judge or his designee at the time of the authorization and if an application for a court order is made as soon as practicable, but within 48 hours after the Attorney General's emergency authorization. Authorization must be based upon a reasonable determination by the Attorney General that an emergency requires installation and use of a pen register or trap and trace device to obtain foreign intelligence information or information concerning international terrorism before a court order with due diligence can be obtained under Sec. 402 of FISA, and that the factual basis for issuance of such an order exists. If the application is denied, or if the installation and use of a pen register or trap and trace device is terminated and no order is issued approving it, no information or evidence obtained or derived from the use of the pen register or trap and trace device may be disclosed in a federal, state, or local proceeding; and no information concerning a U.S. person may be subsequently used or disclosed by any federal officer or employee without the consent of the person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. (Sec. 403 of FISA).</p> <p><u>Pen register or trap and trace device without court order for up to 15 days following congressional declaration of war.</u></p> <ul style="list-style-type: none"> - it authorizes the President, through the Attorney General, to authorize the use of a pen register or trap and trace device without a court order to acquire foreign intelligence information for up to 15 calendar days following a declaration of war by Congress (Sec. 404 of FISA); <p><u>Use of information obtained or derived from pen register or trap and trace device.</u></p> <ul style="list-style-type: none"> - it provides limitations and notification requirements regarding the use of information obtained or derived from the use of a pen register or trap and trace device under this title (Sec. 405(a)-(d) of FISA). - it provides that an aggrieved person, against whom evidence gathered through use of a FISA pen register or trap and trace device is to be or has been introduced, may move to suppress |

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| | | | <p>information from a pen register or trap and trace device which is unlawfully acquired or not obtained in conformity with the order. The U.S. district court in which the motion is filed or in the district in which the information is sought to be used has jurisdiction. If the Attorney General files an affidavit under oath that disclosure or any adversary hearing would harm U.S. national security, the court shall provide ex parte review (Sec. 405(e)-(g) of FISA).</p> <p><u>Congressional oversight.</u></p> <ul style="list-style-type: none"> - it provides for semiannual reports by the Attorney General to the Intelligence Committees concerning the use of pen registers and trap and trace devices under FISA. Also provides for semiannual statistical reports to the Intelligence Committees and the House and Senate Judiciary Committees regarding total numbers of applications for installation and use of pen registers or trap and trace devices under FISA and total number of orders granted, modified, or denied (Sec. 406 of FISA). <p>Access to Certain Business Records for Foreign Intelligence and International Terrorism Investigations under FISA. Section 602 inserts a new title V to FISA, authorizing access to certain types of business records for foreign intelligence and international terrorism investigations. The new title:</p> <ul style="list-style-type: none"> - includes pertinent definitions (sec. 501 of FISA); <p><u>Access to certain business records pursuant to court order.</u></p> <ul style="list-style-type: none"> - authorizes the Director of the FBI or his designee no lower in rank than Assistant Special Agent in Charge to apply for an order from a FISA court judge or a U.S. magistrate judge publicly designated by the Chief Justice of the U.S. to hear applications and grant orders on behalf of a FISA court judge authorizing a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility to release records in its possession for an investigation to gather foreign intelligence information or an investigation concerning international terrorism conducted by the FBI under Attorney General guidelines approved pursuant to E.O. 12333 or a successor order. An application must specify that the records are sought for such an investigation and that there are specific and articulable facts |

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| | | | <p>giving reason to believe that the person to whom the records pertain is a foreign power or an agent of a foreign power (Sec. 502(a)-(b) of FISA.)</p> <ul style="list-style-type: none"> - provides that, if the judge finds the application satisfies the requirements of the section, he or she shall enter an ex parte order as requested or as modified approving release of the records requested. The order may not disclose that it is issued for purpose of such an investigation. (Sec. 502(c) of FISA.) - mandates compliance with the order by any common carrier, public accommodation facility, physical storage facility, or vehicle rental facility, and prohibits disclosure by a common carrier, public accommodation facility, physical storage facility, or vehicle rental facility, or any officer, employee or agent thereof (except to the extent needed to comply with the order), from disclosing that the FBI has sought or obtained records under such an order. (Sec. 502(d) of FISA.) <p><u>Congressional oversight.</u></p> <ul style="list-style-type: none"> - requires a semiannual report to the Intelligence Committees by the Attorney General concerning such records requests. Also requires a semiannual report by the Attorney General to the Intelligence Committees and the House and Senate Judiciary Committees on the total number of applications for such business records and the total number of orders granted, modified, or denied. (Sec. 503 of FISA.) |
| P.L. 106-120 | 12/03/1999 | Intelligence Authorization Act for Fiscal Year 2000 | <p><u>Amendment to definition of agent of a foreign power.</u> Title VI amends Section 101(b)(2) of FISA (50 U.S.C. § 1801(b)(2)) by expanding the statutory definition of an "agent of a foreign power" to include anyone who:</p> <ul style="list-style-type: none"> - knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power. |
| P.L. 106-567 | 12/27/2000 | Intelligence Authorization for Fiscal Year 2001 (Title VI, Counterintelligence Reform Act of 2000) | <p><u>Attorney General review, upon request, of applications for court orders to authorize electronic surveillance where the target may be an agent of a foreign power who is a U.S. person.</u> Title VI, Section 602(a) amends the Section 104 of FISA (50 U.S.C. 1804)) by adding subsection (e), providing that upon written request</p> |

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| | | | <p>of the FBI Director, the Secretary of Defense, the Secretary of State, or the CIA Director, the Attorney General shall personally review the application for a FISA court order authorizing electronic surveillance of an agent of a foreign power, as defined in 50 U.S.C. § 1801(b)(2), which covers any person, including a U.S. person, who knowingly engages in clandestine intelligence gathering activities for or on behalf of a foreign power, which activities involve or may involve a violation of the criminal statutes of the United States; pursuant to the direction of an intelligence service or network of a foreign power, knowingly engages in any other clandestine intelligence activities for or on behalf of such foreign power, which activities involve or are about to involve a violation of the criminal statutes of the United States; knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power; knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States, knowingly assumes a false or fraudulent identity for or on behalf of a foreign power; or knowingly aids or abets any person in the conduct of activities described above, except that involving use of a false identity, or knowingly conspires with any person to engage in such activities. Except in the case of disability or unavailability, the authority to make such a request may not be delegated. If, as a result of such a request, the Attorney General does not approve the application, he must give notice of his determination to the requesting official, noting modifications, if any, necessary for the Attorney General to approve the application.</p> <p><u>In deciding whether to issue an order authorizing electronic surveillance, FISA court judge’s probable cause determination may take into account target’s past activities.</u></p> <p>Section 105 of FISA (50 U.S.C. § 1805) describes the procedures with which a FISA judge must comply in issuing an order for electronic surveillance. Among other things, the FISA judge must find that, on the basis of the facts submitted by the applicant, there is probable cause to believe that (A) the target of the electronic surveillance is a foreign power or agent of a foreign power (provided that no United States person may be considered a foreign power or an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the U.S. Constitution); and (B) each of the facilities or places at which the electronic surveillance is directed is being used, or</p> |

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| | | | <p>is about to be used, by a foreign power or an agent of a foreign power. Title VI, Section 602(b) amends Sec. 105 of FISA to permit a judge, in determining whether such probable cause exists, to consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.</p> <p><u>Attorney General review, upon request, of applications for court orders to authorize physical search where the target may be an agent of a foreign power who is a U.S. person.</u> Section 603(a) amends the FISA physical search authority (Section 303 of FISA (50 U.S.C. § 1823) by adding subsection (d), providing that upon written request of the FBI Director, the Secretary of Defense, the Secretary of State, or the CIA Director, the Attorney General shall personally review the application for such physical search of an agent of a foreign power as defined in 50 U.S.C. § 1801(b)(2), which may include U.S. persons. Such requesting authority may not be delegated, except in cases of disability or unavailability. If the Attorney General, in reviewing an application upon such request, determines not to approve the application, he shall give the requesting official notice, noting modifications, if any, necessary for the Attorney General to approve the application.</p> <p><u>In deciding whether to issue an order authorizing a physical search, FISA court judge’s probable cause determination may take into account target’s past activities.</u> Section 603(b) amends Section 304 of FISA (50 U.S.C. § 1824) to provide that a FISA judge, in determining whether or not such probable cause exists to believe that the target of the physical search is a foreign power or an agent of a foreign power (except that no United States person may be considered an agent of a foreign power solely upon the basis of activities protected by the First Amendment to the U.S. Constitution) and that the premises or property to be searched is owned, used, possessed by, or is in transit to or from an agent of a foreign power or a foreign power– may consider past activities of the target, as well as facts and circumstances relating to current or future activities of the target.</p> <p><u>Congressional oversight.</u> Section 604(a) expands the types of information that the Attorney General must include in his semiannual report to Congress concerning</p> |

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| | | | <p>FISA electronic surveillance (Section 108(a) of FISA (50 U.S.C. § 1808(a)), to include a description of each criminal case in which information acquired under FISA has been passed for law enforcement purposes, and each criminal case in which information acquired under FISA has been authorized for use at trial during the reporting period.</p> <p>Section 604(b) requires the Attorney General to submit a report to the Intelligence Committees and to the House and Senate Judiciary Committees, describing the authorities and procedures used by the Department of Justice for determining whether or not to disclose information acquired under FISA for law enforcement purposes.</p> |
| P.L. 107-56 | 10/26/2001 | Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001 | <p><u>Roving wiretaps under FISA.</u> Section 206 amends Sec. 105(c)(2)(B) of FISA to permit roving or multipoint wiretaps where the court finds that the actions of the target of the application for electronic surveillance under FISA may have the effect of thwarting the identification of a specified communication or other common carrier, landlord, custodian, or other specified person to whom the order to furnish information, facilities or technical assistance should be directed.</p> <p><u>Duration of FISA wiretaps or physical searches and extensions thereof.</u> Sec. 207(a)(1) amends section 105(e)(1) of FISA to provide that an order for electronic surveillance targeted against an agent of a foreign power who is non-U.S. person acting within the U.S. as an officer or employee of a foreign power or as a member of a group engaged in international terrorism or in activities in preparation therefor may be for the period specified in the application or for 120 days, whichever is less. Prior to the amendment, all orders for electronic surveillance were for 90 days.</p> <p>Extensions of orders for electronic surveillance under FISA are available under the same conditions as the original orders, with certain exceptions. Section 207(b)(1) amended Sec. 105(d)(2) of FISA [this was an error in P.L. 107-56, Sec. 207(b)(1), which should read Sec. 105(e)(2) of FISA] to provide that an extension of an order for surveillance targeted against an agent of a foreign power who is non-U.S. person acting within the U.S. as an officer or employee of a foreign power or as a member of a group engaged in international</p> |

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| | | | <p>terrorism or in activities in preparation therefor may be for a period of up to 1 year.</p> <p>Sec. 207(a)(2) amends section 304(d)(1) of FISA to extend the period during which an order for a physical search from the period necessary to achieve its purpose or 45 days, whichever is less, to the period necessary to achieve its purpose or 90 days, whichever is less. It also added a new exception to this, which provided that an order for a physical search against an agent of a foreign power who is non-U.S. person acting within the U.S. as an officer or employee of a foreign power or as a member of a group engaged in international terrorism or in activities in preparation therefor may be for the period specified in the application or for 120 days, whichever is less.</p> <p>Extensions of orders for FISA physical searches may be granted on the same basis as the original order, with certain exceptions. Section 207(b)(2) amended Sec. 304(d)(2) to add a new exception, which provided that extensions of an order against an agent of a foreign power who is non-U.S. person acting within the U.S. as an officer or employee of a foreign power or as a member of a group engaged in international terrorism or in activities in preparation therefor may be for a period not to exceed 1 year, if the judge finds probable cause to believe that no property of any individual U.S. person will be acquired during that period.</p> <p><u>Increase in number of FISA court judges.</u> Section 208 increases the number of FISA court judges from 7 to 11, three of whom must reside within 20 miles of the District of Columbia.</p> <p><u>Pen register and trap and trace authority under FISA.</u> Section 214(a)(1) amends Sec. 402(a)(1) of FISA to replace authority to make an application to the FISA court for an order authorizing the installation and use of a pen register or trap and trace device “for any investigation to gather foreign intelligence information or information concerning international terrorism” with authority to make an application to the FISA court for such an order “for any investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a</p> |

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| | | | <p>United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”</p> <p><u>Certification requirements for application for court order.</u> Section 214(a)(2) amends Sec. 402(c)(2) amended the certification requirements for an application for a court order authorizing the installation and use of a pen register or trap and trace device under FISA to require that an applicant for such an order certify that the information likely to be obtained is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely upon the basis of activities protected by the first amendment of the Constitution.</p> <p><u>Deletion of former Sec. 402(c)(3) of FISA.</u> Section 214(a)(3) struck out former Sec. 402(c)(3), which read:</p> <p>“(3) information which demonstrates that there is reason to believe that the telephone line to which the pen register or trap and trace device is to be attached, or the communication instrument or device to be covered by the pen register or trap and trace device, has been or is about to be used in communication with—</p> <ul style="list-style-type: none"> (A) an individual who is engaging or has engaged in international terrorism or clandestine intelligence activities that involve or may involve a violation of the criminal laws of the United States; or (B) a foreign power or agent of a foreign power under circumstances giving reason to believe that the communication concerns or concerned international terrorism or clandestine intelligence activities that involve or may involve a violation of the criminal laws of the United States.” <p><u>Pen registers and trap and trace devices may be used to track electronic communications, such as e-mail, in addition to telephone communications.</u> Section 214(a)(3) rewrote Sec. 402(d)(2)(A) of FISA, to permit the use of pen registers or trap and trace devices for electronic communications, such as e-mail, as well as telephone</p> |

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| | | | <p>communications. The new Sec. 402(d)(2)(A) provides that, if the FISA court judge or U.S. magistrate judge finds that the application satisfies the requirements of this section, an order issued under this shall specify “the identity, if known, of the person who is the subject of the investigation;” “the identity, if known, of the person to whom is leased or in whose name is listed the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied;” and “the attributes of the communications to which the order applies, such as the number or other identifier, and, if known, the location of the telephone line or other facility to which the pen register or trap and trace device is to be attached or applied and, in the case of a trap and trace device, the geographic limits of the trap and trace order.”</p> <p><u>Emergency authorization of pen register or trap and trace device under FISA.</u> Section 214(b) amends Sec. 403(a) and (b)(1) of FISA to permit the Attorney General, while pursuing a court order, to authorize the installation and use of a pen register or trap and trace device on an emergency basis, to gather “foreign intelligence information not concerning a United States person or information to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution” before an order authorizing the installation and use of the pen register or trap and trace device, as the case may be, can with due diligence be obtained under Sec. 402 of FISA can be obtained. This language indicates that requests for pen register or trap and trace devices under FISA, like those for electronic surveillance or physical searches under FISA, may not be pursued based solely on first amendment protected activities of U.S. citizens or permanent resident aliens.</p> <p><u>Former business records provisions replaced with new provisions dealing with access to records and other tangible things in foreign intelligence and international terrorism investigations.</u> Section 215 replaces former Sec. 501 through Sec. 503 in title V of FISA with new Sec. 501 and Sec. 502 of FISA. Under the new Sec. 501, the FBI Director or his designee, whose rank shall be no lower</p> |

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| | | | <p>than Assistant Special Agent in Charge, may apply for a court order requiring production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a U.S. person is not conducted solely on the basis of first amendment protected activities. An investigation under this section must be conducted pursuant to Attorney General guidelines pursuant to E.O. 12333 or a successor order. The application shall be made to a FISA court judge or a U.S. magistrate judge publicly designated by the Chief Justice to hear applications and grant orders on behalf of a FISA court judge. The application must specify that the records concerned are sought for an authorized investigation to obtain foreign intelligence information not concerning a U.S. person or to protect against international terrorism of clandestine intelligence activities. If the judge finds that the application meets the requirements of this section, he or she shall enter an ex parte order as requested or as modified. The order shall not disclose that it is issued for purposes of such an investigation. (Sec. 501(a)-(c).)</p> <p><u>Congressional oversight.</u> Sec. 502 of FISA requires the Attorney General, on a semiannual basis, to fully inform the Intelligence Committees concerning all requests for production of tangible things under Sec. 402 [sic, should be Sec. 501], and to report to the Intelligence Committees and the House and Senate Judiciary Committees semi-annually on the total number of applications made for orders approving requests for production of tangible things under Sec. 402 [sic, should be Sec. 501], and the total number of such orders granted, modified or denied.</p> <p><u>Non-disclosure requirement.</u> Sec. 501(d) of FISA prohibits any person from disclosing to any other person, other than those necessary to production of the tangible things required, that the FBI has sought or obtained tangible things under Sec. 501 of FISA.</p> <p><u>Immunity from liability for those who, in good faith, produce tangible things pursuant to an order under this section.</u> Sec. 501(e) of FISA immunizes persons who, in good faith, produce tangible things pursuant to an order under Sec. 501 of FISA, from</p> |

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| | | | <p>liability to any other person. Production does not constitute a waiver of any privilege in any other proceeding or context.</p> <p><u>Change in certification requirement for electronic surveillance and physical searches under FISA from “the purpose” being gathering of foreign intelligence information to “a significant purpose” being gathering of foreign intelligence information.</u></p> <p>Under Section 218, Sec. 104(a)(7)(B) and Sec. 303(a)(7)(B) of FISA, 50 U.S.C. §§ 1804(a)(7)(B) and 1823(a)(7)(B) respectively, are amended to strike “the purpose” and to replace it with “a significant purpose.” As amended, under Sec. 104(a)(7)(B), in an application for a FISA court order authorizing electronic surveillance, a national security official must certify that “a significant purpose” of the surveillance is to gather foreign intelligence information. Similarly, in an application for an order authorizing a physical search under FISA, a national security official must certify, under the amended Sec. 303(a)(7)(B), that “a significant purpose” of the search is to gather foreign intelligence information. This has been interpreted to mean that the primary purpose of the electronic surveillance or physical search may be criminal investigation, as long as a significant purpose of the surveillance or search is to gather foreign intelligence information.</p> <p><u>Sunset.</u></p> <p>Section 224 provides in pertinent part that, except with respect to any foreign intelligence investigation that began before the date on which the provisions are to sunset, all provisions of title II of the USA PATRIOT Act, other than sections 203(a), 203(c), 205, 208, 211, 213, 216, 219, 221, and 222, and amendments to those sections, would cease to have effect on December 31, 2005. The provisions pertinent to FISA that would sunset are addressed in sections 206, 207, 214, 215, 218, 223, and 225 of the USA PATRIOT Act.</p> <p><u>Immunity from liability for those providing assistance with a FISA court order authorizing electronic surveillance or with an emergency electronic surveillance.</u></p> <p>Section 225 amends Sec. 105 of FISA, 50 U.S.C. § 1805, to add a new subsection (h) which provides that no cause of action shall lie against any wire or electronic service provider, custodian, landlord, or other</p> |

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| | | | <p>person that furnishes information, facilities, or technical assistance pursuant to a court order under FISA or a request for emergency assistance under FISA.</p> <p><u>Coordination with law enforcement.</u> Section 504 amends Sec. 106 of FISA, 50 U.S.C. § 1806, and Sec. 305 of FISA, 50 U.S.C. § 1825, to add a new subsection (k) to each section. Under this new subsections, federal officials conducting electronic surveillance or physical searches under FISA may consult with federal law enforcement officers to coordinate efforts to investigate or protect against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, sabotage or international terrorism by a foreign power or an agent of a foreign power, or clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power. Such coordination does not preclude a certification under Sec. 104(a)(7)(B) of FISA or Sec. 303(a)(7) of FISA by a national security official that “a significant purpose” of the electronic surveillance or the physical search at issue is to obtain foreign intelligence information. Nor does such coordination preclude entry of an order authorizing electronic surveillance or a physical search under FISA.</p> <p><u>Amendment to definition of “electronic surveillance” under FISA.</u> Section 1003 amends the definition of “electronic surveillance” under Sec. 101(f)(2) of FISA, 50 U.S.C. § 1801(f)(2), to indicate that it does not include “the acquisition of those communications of computer trespassers that would be permissible under [18 U.S.C. §] 2511(2)(i).”</p> <p><u>Other FISA-Related Provisions of P.L. 107-56.</u> <u>Civil liability for certain unauthorized disclosures.</u> Section 223 adds a new 18 U.S.C. § 2712, which establishes a claim against the United States in U.S. district court for not less than \$10,000 plus costs for violations of FISA, among other provisions. It also notes the possibility of administrative sanctions for federal officials who engage in such violations.</p> <p><u>Responsibilities of the Director of Central Intelligence (DCI) regarding foreign intelligence collected under FISA.</u> Section 901 amends Sec. 103(c) of the National Security Act of 1947, as amended, to reflect the responsibility of the DCI to establish</p> |

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| | | | <p>requirements and priorities for foreign intelligence information to be collected under FISA and to 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 DCI has no authority to direct, manage, or undertake electronic surveillance or physical search operations under FISA unless otherwise authorized by statute or executive order.</p> |
| P.L. 107-108 | 12/28/2001 | Intelligence Authorization Act for FY 2002 | <p><u>Technical amendments.</u></p> <p>Section 314(a)(1) amends the definition of “minimization procedures” under Sec. 101(h)(4) of FISA to mean, in pertinent part, with respect to any electronic surveillance approved pursuant to Sec. 102(a) of FISA, “procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.” The amendment replaced “24 hours” with “72 hours.”</p> <p>Section 314(a)(2)(A) amends Sec. 105 of FISA to insert “, if known” in Sec. 105(c)(1)(B), so that an order authorizing electronic surveillance under FISA must specify, in pertinent part, the nature and location of each of the facilities or places at which the electronic surveillance will be directed, if known.</p> <p>Section 314(a)(2)(B) amends Sec. 105(f) of FISA to replace “24 hours” with “72 hours” in each place it appears, so that the Attorney General would have a 72 hour window after he authorizes an emergency electronic surveillance to obtain foreign intelligence information in which to make an application for a FISA court order authorizing such electronic surveillance. In the absence of a judicial order approving the electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest.</p> |

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| | | | <p>Section 314(a)(2)(C) redesignates Sec. 105(h) of FISA as added by P.L. 107-56, Section 225, as Sec. 105(i) of FISA.</p> <p>Section 314(a)(2)(D) amends Sec. 105(i) of FISA, dealing with release from liability to add “for electronic surveillance or physical search” before the period, so that the provision would read:</p> <p style="padding-left: 40px;">No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance in accordance with a court order or request for emergency assistance under this chapter for electronic surveillance or physical search.</p> <p>Section 314(a)(3) amends the definition of “minimization procedures” for physical searches under FISA in Sec. 301(4)(D) to replace “24 hours” with “72 hours.” In pertinent part, the definition, as amended, reads:</p> <p style="padding-left: 40px;">(D) notwithstanding subparagraphs (A), (B), and (C), with respect to any physical search approved pursuant to section 1822(a) of this title, procedures that require that no information, material, or property of a United States person shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1824 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.</p> <p>Section 314(a)(4) amends Sec. 304(e) of FISA to replace “24 hours” with “72 hours.” This would provide the Attorney General a 72 hour window, instead of a 24 hour window, after he authorizes an emergency physical search to obtain foreign intelligence information, in which to make an application for a FISA court order authorizing such search. In the absence of a judicial order approving the search, it shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest.</p> |

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| | | | <p>Section 314(a)(5) amends Sec. 402(c)(1) to add “and” at the end of the paragraph, and Sec. 402(f) of FISA to replace “of a court” with “of an order issued.” The first of these amendments simply connects the two subsections that the requirements for an application for a court order to authorize installation and use of a pen register or trap and trace device under FISA. Sec. 402(f) of FISA, which bars a right of action, then reads:</p> <p style="padding-left: 40px;">No cause of action shall lie in any court against any provider of a wire or electronic communication service, landlord, custodian, or other person (including any officer, employee, agent, or other specified person thereof) that furnishes any information, facilities, or technical assistance under subsection (d) of this section in accordance with the terms of an order issued under this section.</p> <p>Section 314(a)(6) amends Section 501(a) of FISA to insert “to obtain foreign intelligence information not concerning a United States person or” after “an investigation” so that the provision reads:</p> <p style="padding-left: 40px;">(a)(1) Subject to paragraph (3), the Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.</p> <p>Section 314(a)(7) amends Sec. 502 of FISA to replace “section 402” with “section 501,” correcting the error noted above.</p> <p>Section 314(a)(8) amends the table of contents.</p> |

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| P.L. 107-296 | 11/25/2002 | Homeland Security Act of 2002 | <p><u>Amendments to Sec. 106(k)(1) of FISA and Sec. 305(k)(1) of FISA to permit those who conduct electronic surveillance or physical searches under FISA to consult with certain state and local law enforcement officers, as well as federal law enforcement officers.</u></p> <p>Sections 898 and 899 amend Sec. 106(k)(1) and Sec. 305(k)(1) of FISA dealing with coordination with law enforcement by those who conduct electronic surveillance or physical searches under FISA, respectively. As amended, the provision would permit those who conduct electronic surveillance or physical searches under FISA, respectively, to consult, not only with federal law enforcement officers, but with law enforcement personnel of a State or political subdivision of a State (including the chief executive officer of that State or political subdivision who has the authority to appoint or direct the chief law enforcement officer of that State or political subdivision) to coordinate efforts to investigate or protect against actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power, sabotage or international terrorism by a foreign power or an agent of a foreign power, or clandestine intelligence activities by an intelligence service or network of a foreign power or by an agent of a foreign power.</p> |
| P.L. 108-458 | 12/17/2004 | Intelligence Reform and Terrorism Prevention Act of 2004 | <p><u>Conforming amendments regarding role of Director of National Intelligence (DNI).</u></p> <p>SEC. 1071(e) makes conforming amendments to FISA related to roles of the DNI by striking "Director of Central Intelligence" each place it appears and inserting "Director of National Intelligence".</p> <p><u>“Lone wolf” amendment to definition of “agent of a foreign power.”</u></p> <p>Section 6001 amends the definition of “agent of a foreign power” in Sec. 101(b)(1) of FISA to add a new subsection 101(b)(1)(C). Under this new language, any person other than a U.S. person who “engages in international terrorism or activities in preparation therefore [sic]” is deemed to be an agent of a foreign power under FISA.</p> <p><u>Congressional oversight.</u></p> <p>Section 6002, redesignates title VI as title VII, and adds a new title VI providing additional semiannual reporting requirements by the Attorney General to the Intelligence Committees and the House and</p> |

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| | | | <p>Senate Judiciary Committees. New Sec. 601 directs the Attorney General, on a semiannual basis, to report to these four committees, in a manner consistent with the protection of the national security, with respect to the preceding 6-month period, the aggregate number of persons targeted for orders issued under this Act, including a breakdown of those targeted for electronic surveillance under section 105, physical searches under section 304, pen registers under section 402, and access to records under section 501. The report shall also address the number of individuals covered by an order issued pursuant to section 101(b)(1)(C), the number of times that the Attorney General has authorized that information obtained under this Act may be used in a criminal proceeding or any information derived therefrom may be used in a criminal proceeding, a summary of significant legal interpretations of this Act involving matters before the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review, including interpretations presented in applications or pleadings filed with the Foreign Intelligence Surveillance Court or the Foreign Intelligence Surveillance Court of Review by the Department of Justice; and copies of all decisions (not including orders) or opinions of the Foreign Intelligence Surveillance Court or Foreign Intelligence Surveillance Court of Review that include significant construction or interpretation of the provisions of this Act.</p> <p>Clerical amendments were also to be made to the table of contents of FISA.</p> |
| P.L. 109-160 | 12/30/2005 | Extension of Sunset of Certain Provisions of the USA Patriot Act (extending sunset provisions of USA Patriot Act, including certain FISA provisions, until February 3, 2006 (as codified as a note under 18 U.S.C. §2510)) | Extension of sunset of certain FISA provisions (among others) to February 3, 2006. |
| P.L. 109-170 | 02/03/2006 | Extension of Sunset of Certain Provisions of the | Extension of sunset of certain FISA provisions (among others) to March 10, 2006. |

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| | | USA Patriot Act (extending sunset provisions of USA Patriot Act, including certain FISA provisions, until March 10, 2006 (as codified as a note under 18 U.S.C. §2510)) | |
| P.L.109-177 | 03/09/2006 | USA PATRIOT Improvement and Reauthorization Act of 2005 | <p><u>Extension of Sunsets.</u> Section 102 adopts a sunset of December 31, 2009, for FISA court orders for multipoint, or "roving," wiretaps under Sec. 105 of FISA, 50 U.S.C. § 1805(a), and for FISA court orders for access to business records under Sec. 501 of FISA, 50 U.S.C. § 1861.</p> <p><u>Duration of FISA Surveillance Orders.</u> Section 105 extends the maximum duration of FISA surveillance and physical search orders against any agent of a foreign power who is not a U.S. person by amending Sec. 105(e) and Sec. 304 of FISA to provide the following:</p> <ul style="list-style-type: none"> – Initial orders authorizing such searches may be for a period of up to 120 days, with renewal orders permitted to extend the period for up to one year. – The tenure for both initial orders and extension orders authorizing installation and use of FISA pen registers and trap and trace devices is extended from a period of 90 days to one year in cases where the government has certified that the information likely to be obtained is foreign intelligence information not concerning a U.S. person. <p><u>FISA Business Record Orders.</u> Section 106(a)(2) amends Section 501 of FISA (50 U.S.C. § 1861) to add 50 U.S.C. § 1861(a)(3), requiring that an application for the production of certain sensitive categories of business records, such as library, bookstore, firearm sales, tax return, educational, and medical records, must be personally approved by one of the following three high-level officials: the FBI Director, the FBI Deputy Director, or the Executive Assistant Director for National Security.</p> |

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| | | | <p>Section 106(b) amends 50 U.S.C. § 1861(b)(2) to require that an application for a business record must include a "statement of facts" demonstrating that there are reasonable grounds to believe that the tangible things sought are "relevant" to an authorized or preliminary investigation to protect against international terrorism or espionage, or to obtain foreign intelligence information not concerning a U.S. person. Section 106(b)(2)(A) also provides that certain tangible items are "presumptively relevant" to an investigation if the application's statement of facts shows that the items sought pertain to:</p> <ul style="list-style-type: none"> – a foreign power or an agent of a foreign power, – the activities of a suspected agent of a foreign power who is the subject of such authorized investigation, or – an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation. <p>50 U.S.C. § 1861(c)(1) provides that a FISA court judge shall approve an application for a FISA business record order as requested or as modified, upon a finding that the application complies with statutory requirements. Section 106(d) of P.L. 109-177 requires that such ex parte order must contain a particularized description of the items sought, provide for a reasonable time to assemble them, notify recipients of nondisclosure requirements, and be limited to things subject to a grand jury subpoena or order of a U.S. court for production.</p> <p>Section 106(e) adds 50 U.S.C. § 1861(d)(1)(B), (C), to expressly permit that a recipient of a FISA business record order may disclose its existence to an attorney to obtain legal advice, as well as to other persons approved by the FBI. However, Section 106(e) adds 50 U.S.C. § 1861(d)(2)(C), providing that upon the request of the FBI Director (or his designee), the recipient must disclose to the FBI the identity of the person to whom the disclosure will be or was made—unless that individual is the attorney sought to obtain legal advice (this exception was created by Section 4 of P.L. 109-178, discussed <i>infra</i>).</p> <p>Section 106(f) amends Section 501 of FISA (50 U.S.C. § 1861) to establish a detailed judicial review process for recipients of FISA business record orders to challenge their legality before a judge selected from a pool of FISA court judges:</p> |

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| | | | <ul style="list-style-type: none"> – If the judge determines that the petition is not frivolous after an initial review, the judge has discretion to modify or set aside a FISA order upon a finding that it does not comply with the statute or is otherwise unlawful. – However, if the judge does not modify or rescind the business record production order, then the judge must immediately affirm the order and direct the recipient to comply with it. – The FISA Court of Review and the Supreme Court are granted jurisdiction to consider appeals of the FISA court judge's decision to affirm, modify, or set aside a the order. <p>Section 106(g) amends Section 501 of FISA (50 U.S.C. § 1861) to add a new subsection (g), directing the Attorney General to promulgate “minimization procedures” that apply to the collection and dissemination of information obtained through the use of FISA business record authority, in order to limit the retention, and regulate the dissemination, of nonpublicly available information concerning unconsenting U.S. persons. Federal authorities are directed to observe these minimization procedures regarding the use or disclosure of information received under a FISA business record order; furthermore, they may not use or disclose such information except for lawful purposes.</p> <p>Section 106(h) amends Section 502 of FISA (50 U.S.C. § 1862) to direct the Attorney General to submit to Congress an annual report regarding the use of FISA business record authority. The annual report, due every April, must contain the following information regarding the preceding year:</p> <ul style="list-style-type: none"> – the total number of applications made – the total number of business record orders granted as requested, granted as modified, or denied, and – the number of orders either granted, modified, or denied for the production of each of the following: library circulation records, library patron lists, book sales records, or book customer lists; firearms sales records; tax return records; educational records; and medical records containing information that would identify a person. |

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| | | | <p>Section 106A provides for the Inspector General of the Department of Justice to conduct a comprehensive audit to determine the effectiveness, and identify any abuses, concerning the use of FISA business record authority, for calendar years 2002-2006. The results of the audit are to be submitted in an unclassified report to the House and Senate Committees on the Judiciary and Intelligence.</p> <p><u>Multipoint Electronic Surveillance (Roving Wiretaps)</u></p> <p>Section 108(a)(1) amends the FISA roving surveillance authority (Section 104(a)(3) of FISA, codified at 50 U.S.C. § 1804(a)(3)) to require that an application for an order, as well as the wiretap order itself, describe the <i>specific</i> target of the electronic surveillance if the target's identity is not known. Section 108(a)(2) also clarifies that the FISA court must find that the prospect of a target thwarting surveillance is based on specific facts in the application. Section 108(b) provides that if the government begins to direct surveillance at a new facility or place, the nature and location of which were unknown at the time the original surveillance order was issued, the government must notify the FISA court within 10 days after such change, of the following information:</p> <ul style="list-style-type: none"> – the nature and location of each new facility or place at which the surveillance is directed, – the facts and circumstances relied upon by the applicant to justify the applicant's belief that each new facility or place is or was being used, or is about to be used, by the target of the surveillance, – an explanation of any proposed minimization procedures that differ from those contained in the original application or order, if such change is necessitated by the new facility or place, and – the total number of electronic surveillances that have been or are being conducted under the roving surveillance order. <p>Section 108(c) enhances congressional oversight over the use of all foreign intelligence electronic surveillance authority, by adding the Senate Judiciary Committee as a recipient of the semi-annual FISA reports that the Attorney General currently must submit to the House and Senate Intelligence committees, and by modifying the FISA report requirements to include a description of the total number of applications made for orders approving roving electronic surveillance.</p> |

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| | | | <p><u>Other Enhancement of Congressional Oversight over Certain FISA Authority</u></p> <p>Section 109(a) enhances congressional oversight over the use of emergency physical searches under Section 306 of FISA (50 U.S.C. § 1826), by requiring, on a semi-annual basis, the Attorney General:</p> <ul style="list-style-type: none"> – to make full reports concerning all physical searches to the Senate Judiciary Committee in addition to the House and Senate Intelligence committees, and – to submit to the House Judiciary Committee a report with statistical information concerning the number of emergency physical search orders authorized or denied by the Attorney General. <p>Section 109(b) requires that the report the Attorney General submits to the House and Senate Judiciary Committees semi-annually concerning the number of applications and orders for the FISA use of pen registers or trap and trace devices (Section 406(b) of FISA, 50 U.S.C. § 1846(b)), must include statistical information regarding the emergency use of such devices.</p> <p>Section 109(d) amends Section 103 of FISA (50 U.S.C. § 1803) by adding subsection (f), requiring the FISA court to publish its rules and procedures and transmit them in unclassified form to all judges on the FISA court, the FISA Court of Review, the Chief Justice of the United States, and the House and Senate Judiciary and Intelligence Committees.</p> <p>Section 128(a) amends Section 402(d)(2) of FISA (50 U.S.C. § 1842(d)(2)) to permit the FISA court, in its pen register/trap and trace order, to direct a communications service provider to supply customer information relating to use of the device. Such information may include the name and address of the customer or subscriber; the telephone number or other subscriber number or identifier, including any temporarily assigned network address or associated routing or transmission information; the length of the provision of service by such provider to the customer or subscriber and the types of services utilized by the customer or subscriber; any local or long distance telephone records of the customer or subscriber; any records reflecting</p> |

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| | | | <p>period of usage (or sessions) by the customer or subscriber; and any mechanisms and sources of payment for such service, including the number of any credit card or bank account utilized for payment for such service.</p> <p>Section 128(b) amends Section 406(a) of FISA (50 U.S.C. § 1846(a)) to provide that the House and Senate Judiciary Committees receive full reports on the use of the FISA's pen register and trap and trace authority every six months.</p> <p>Section 506 amends Section 101(g) of FISA (50 U.S.C. § 1801(g)) to authorize the Attorney General to delegate authority to the Assistant Attorney General for National Security (as designated under 28 U.S.C. § 507A(a)) to perform the Attorney General's duties under FISA.</p> |
| P.L.109-178 | 03/09/2006 | USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 | <p><u>Judicial Review for Nondisclosure Requirement of a FISA Business Record Order</u></p> <p>Section 3 amends subsection (f) of section 501 of FISA (50 U.S.C. § 1861), to establish a judicial review procedure for the nondisclosure order that accompanies a FISA business record order:</p> <ul style="list-style-type: none"> – For one year after the date of the issuance of a FISA order for the production of tangible items, the nondisclosure requirement remains in full effect and may not be challenged. – After the one-year waiting period has expired, the recipient of the production order may petition the FISA court to modify or set aside the nondisclosure requirement. Within 72 hours, if the judge assigned to consider the petition determines after an initial review that the petition is frivolous, the judge shall immediately deny the petition and affirm the nondisclosure order. If, after the initial review, the judge determines that the petition is not frivolous, the judge shall promptly consider the petition under procedural measures that the FISA court has established to protect national security, including conducting the review in camera. – The FISA court judge has discretion to modify or set aside a nondisclosure order upon a finding that there is no reason to believe that disclosure may endanger the national security of the United States; interfere with a criminal, counterterrorism, or counterintelligence investigation; interfere with diplomatic |

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| | | | <p>relations; or endanger the life or physical safety of any person.</p> <ul style="list-style-type: none"> – If, at the time the individual files the petition for judicial review of a nondisclosure order, the Attorney General, Deputy Attorney General, an Assistant Attorney General, or the Director of the FBI certifies that disclosure may endanger the national security of the United States or interfere with diplomatic relations, then the FISA judge must treat such government certification as conclusive unless the judge finds that the certification was made in bad faith. – If the judge grants a petition to quash the nondisclosure requirement, upon the request of the government, such order is stayed pending review of the decision to the FISA Court of Review. If the judge denies the petition to modify or set aside the nondisclosure requirement, the recipient of the 215 order is precluded from filing another such petition for one year. – The FISA Court of Review has jurisdiction to consider a petition by the government or by the recipient of a 215 order and to review a FISA judge's decision to affirm, modify, or set aside such production order or the nondisclosure order imposed in connection with it. The U.S. Supreme Court has jurisdiction to review a decision of the FISA Court of Review concerning this matter. <p>Under 50 U.S.C. § 1861(d)(1), a recipient of a FISA production order may disclose its existence to persons to whom disclosure is necessary to comply with such order, an attorney to obtain legal advice, as well as to other persons approved by the FBI. Section 4 of P.L. 109-178 amends 50 U.S.C. § 1861(d)(2)(C) to exempt explicitly from the identification disclosure requirement the name of the attorney sought to obtain legal advice with respect to the FISA production order.</p> |