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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 *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks upon the United States* (W. W. Norton 2004) (*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 number of intelligence reform bills were introduced, including some which pre-dated the release of the *Final Report* of the 9/11 Commission, while others emerged after its release. On December 17, 2004, the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458 (S. 2845), was signed into law. It included several provisions related to FISA. In addition to P.L. 108-458, a variety of other bills were introduced with FISA-related provisions. The FISA provisions of some of these measures were part of larger intelligence reform proposals. Still others were more narrowly focused measures that would also have impacted FISA investigations in the post-9/11 environment. This report briefly discusses the FISA-related aspects of these proposals. For purposes of this report, the bills addressed are divided generally into two categories: intelligence reform or reorganization proposals that have FISA provisions, including P.L. 108-458 (S. 2845), H.R. 10, H.R. 4104, H.R. 5040, H.R. 5150, S. 6, S. 190, S. 1520, S. 2811, S. 2840, 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*, while a discussion of the amendment in P.L. 108-458 to the FISA definition of “agent of a foreign power may be found in CRS Report RS22011, *Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act.*

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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 *The 9/11 Commission Report, Final Report of the National Commission on Terrorist Attacks Upon the United States* (W. W. Norton 2004) (*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 closing days of the 108th Congress, intense activity resulted in passage of the Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, enacted into law on December 17, 2004. This measure, the conference version of S. 2845, was one of several bills which included FISA provisions as part of larger intelligence reform proposals. Some of these pre-dated the release of the 9/11 Commission’s *Final Report*, while others emerged after its release. Still others were more narrowly focused measures that would also have impacted FISA investigations in the post-9/11 environment. This report briefly discusses these proposals. For purposes of this report, the bills addressed are 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 addressed FISA, a number had FISA provisions, including:

P.L. 108-458 (S. 2845). Intelligence Reform and Terrorism Prevention Act of 2004, enacted into law December 17, 2004. Originally introduced on September 23, 2004, as the National Intelligence Reform Act of 2004, by Senator Susan Collins, for herself and Senator Joseph Lieberman, reporting an original bill from the Committee on Governmental Affairs. It passed the Senate with amendments on October 6, 2004 by Yea-Nay Vote, 96-2 (Record Vote Number 199). After H.R. 10 was passed by the House of Representatives, Section 2 of H.Res. 827 provided that, when S. 2845 was received from the Senate by the House, the latter bill was to be considered to have been taken from the Speaker's table, all but its enacting clause was to be deemed stricken and the text of H.R. 10 as passed by the House inserted in lieu thereof, and as so amended, S. 2845 was to be considered passed by the House. H. Res. 827 provided further that the House was to be deemed to have insisted on its amendment and to have requested a conference with the Senate thereon. S. 2845 passed the House as amended on October 16, 2004. The conference report, H.Rept. 108-796, was filed on December 7, 2004. It was agreed to in the House by recorded vote, 336-75 (Roll no. 544) the same day, and passed the Senate by Yea-Nay Vote, 89-2 (Record Vote Number 216) the following day. The President signed the measure into law on December 17, 2004, P.L. 108-458, entitled the Intelligence Reform and Terrorism Prevention Act of 2004.

As enacted, Section 1011 of the measure amended Title I of the National Security Act of 1947, 50 U.S.C. § 402 *et seq.*, to strike the previous Sections 102 through 104 of the act 50 U.S.C. §§ 403, 403-1, 403-3, and 403-4, and insert new Sections 102 through 104A. The new Section 102 created the position of Director of National Intelligence (DNI). Section 102A outlined authorities and responsibilities of the position. Under the new Section 102A(f)(6) of the National Security Act, the DNI was 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.” New Section 102A(f)(8) of the National Security Act, as enacted by P.L. 108-458, Section 1011, provided 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.”

Section 1071(e) of P.L. 108-458, amended FISA to insert “Director of National Intelligence” in lieu of “Director of Central Intelligence” in each place in which it appeared.

Section 6001 of P.L. 108-458 amended 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. 6001, any person, other than a U.S. person, who “engages in international terrorism or activities in preparation thereof”² is considered an agent of a foreign power. This language does not require the government to establish that the person was connected with an international terrorist organization, foreign government or group. The new language is 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. 6001 as amended will 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.³

Section 6002 created additional semiannual reporting requirements under FISA. Under the new language, the Attorney General, on a semiannual basis, must submit to the House Permanent Select Committee on Intelligence, the Senate Select Committee on Intelligence, the House Judiciary Committee and the Senate Judiciary Committee, in a manner consistent with protection of national security, reports setting forth with respect to the preceding six month period: “(1) the aggregate number of persons targeted for orders issued under this act, including a breakdown of those targeted for—(A) electronic surveillance under section 105 [50 U.S.C. § 1805]; (B) physical searches under section 304 [50 U.S.C. § 1824]; (C) pen registers under section 402 [50 U.S.C. § 1842]; and (D) access to records under section 501 [50 U.S.C. § 1861]; (2) the number of individuals covered by an order issued pursuant to section 101(b)(1)(C) [50 U.S.C. § 1801(b)(1)(C)]; (3) 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; (4) 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 Court of Review by the Department of Justice; and (5) 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.”

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

² It seems likely that “therefore” was intended to be “therefor,” in view of the phrasing of the definition of “foreign power” in 50 U.S.C. § 1801(a)(4) and of the definition of “agent of a foreign power” in 50 U.S.C. § 1801(b)(1).

³ For more information on this provision of P.L. 108-458, see CRS Report RS22011, *Intelligence Reform and Terrorism Prevention Act of 2004: “Lone Wolf” Amendment to the Foreign Intelligence Surveillance Act*, by Elizabeth B. Bazan (December 29, 2004).

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. On October 4, 2004, reported out of: House Permanent Select Committee on Intelligence, amended, H.Rept. 108-724, Part I; House Committee on Armed Services, amended, H. Rept.108-724, Part II; and House Committee on Financial Services, amended, H.Rept. 108-724, Part III. On October 5, 2004, reported out of House Committee on Government Reform, amended, H.Rept. 108-724, Part IV; and House Judiciary Committee, amended, H.Rept. 108-724, Part V. Also on October 5, 2004, the House Committees on Education and the Workforce, Energy and Commerce, International Relations, Rules, Science, Transportation, and Ways and Means, and the House Select Committee on Homeland Security were discharged. The measure passed the House on October 8, 2004, by recorded vote, 282-134 (Roll no. 523). A supplemental report was filed by the House Judiciary Committee on November 16, 2004, H.Rept. 108-274, Part VI. As per H.Res. 827, Section 2, the House was considered to have stricken all but the enacting clause of S. 2845 as received from the Senate and inserted the text of H.R. 10 as passed by the House in lieu thereof, to have insisted on its amendment, and to have requested a conference. For further action, see discussion of P.L.108-458 (S. 2845).

Sec. 1011 of the H.R. 10, among other things, created 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) stated, 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” was replaced with “National Intelligence Director” in each place in which it appears in FISA. Sec. 2001 of the bill as introduced would have amended 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 have required 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 have created a new Sec. 101A of FISA, 50 U.S.C. § 1801A, which would have provided, “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 have made 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 have been subject to 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, have amended 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 had 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” was to be replaced with “Director of National Intelligence” in each place in FISA in which it appeared.

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. Referred to House Subcommittee on Aviation; House Subcommittee on Coast Guard and Maritime Transportation; House Subcommittee on Economic Development, Public Buildings and Emergency Management; House Subcommittee on Railroads; House Subcommittee on Highways, Transit and Pipelines; and House Subcommittee on Water Resources and Environment of House Transportation and Infrastructure Committee on September 10, 2004. Referred to the House Energy and Commerce Committee’s Subcommittee on Telecommunications and the Internet for a period subsequently determined by the Chairman on October 8, 2004. Under Sec. 132(a)(6), the National Intelligence Director established by the bill would have had 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” was to replace “Director of Central Intelligence” in every place where it appeared in FISA.

H.R. 5150. 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 had 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 have replaced “Director of Central Intelligence” in each place in which it appeared in FISA.

S. 6. Comprehensive Homeland Security Act of 2003. Introduced January 7, 2003, by Senator Thomas Daschle, and referred to Senate Committee on the Judiciary. Sec. 10002 of the bill created a new Sec. 103(b)(6) of the National Security Act of 1947, pursuant to which a newly established Director of National Intelligence would have had 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 to Sec. 10005(f) of the bill, “Director of Central Intelligence” would have been replaced with “Director of National Intelligence” in every place it appeared 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 have replaced the existing Sec. 103 of the National Security Act of 1947 with a new Sec. 103, subsection 103(b)(6) of which would have given 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 have been replaced with “Director of National Intelligence” in each place in FISA in which it appeared.

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 had 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 have directed 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) required 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 were required to “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 directed 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 would have had 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” was to replace “Director of Central Intelligence” in each place it appeared in FISA.

S. 2840. National Intelligence Reform Act of 2004. Introduced September 23, 2004, by Senator Susan Collins, reporting an original bill from the Senate Committee on Governmental Affairs. On September 27, 2004, the Senate Committee on Governmental Affairs filed a written report, S.Rept. 108-359, with additional views. In Sec. 112, the bill outlined the responsibilities of the new National Intelligence Director. In Sec. 112(a)(7), the Director was 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” replaced “Director of Central Intelligence” in each place in which it appeared 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 had 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 have replaced “Director of Central Intelligence” in each place where it appeared in FISA.

Other FISA-Related Bills in the 108th Congress

The FISA-related measures in the 108th Congress which did not involve intelligence reform or reorganization appear to have been more varied in their focus and approach. These included 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 amended 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 did not preclude a physical search for such documentary materials under another provision of law. Sec. 3 of the bill amended 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. It also required 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 House 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 have amended 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 have amended 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, this measure would have authorized the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Court of Review (Court of Review) to establish rules and procedures and to take actions necessary to administer FISA. It would have required 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. In addition, it would have established 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 barred 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 have included 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 have amended 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 have created 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 have amended 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 have required 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 have required 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 must 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 would have amended 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 would also have been required 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 have amended 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. It would have made 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 criminal 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 added additional reporting requirements: the Attorney General would have been required 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 have amended 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 would have been required to 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 would have applied a similar standard in the context of physical searches, but would have given 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 have required 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, would have had to be conducted under CIPA procedures and standards. Sec. 403 of the bill would have required that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, 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 would have amended 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 would also have had 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 amended 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 did not require that such persons be affiliated with an international terrorist group, or foreign nation or group. It made the sunset provision in Sec. 224 of the USA PATRIOT Act, P.L. 107-56 applicable to this amendment. Sec. 2 of the bill created 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.

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 have amended 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, amended FISA reporting requirements with respect to electronic surveillance and physical searches. It also would have required 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 have amended 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 provided 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, the bill authorized 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. It required 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. It also established 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 have amended 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 have amended 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 would have amended 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 did 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 have required that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, 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 amended 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 would also have included 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 amended 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.” It also provided that a judge 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, if the judge finds 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 would also have had to meet other requirements of the section. Sec. 5 of the bill amended Section 105(c) of FISA, 50 U.S.C. § 1805(c), to eliminate John Doe roving wiretaps under FISA. Sec. 8 of the bill established 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 have amended the roving wiretap provisions of FISA to require that an order approving such electronic surveillance 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 have required 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 have required that applications for FISA orders for production of books, records, papers, documents, or other tangible things under 50 U.S.C. § 1861, 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 amended 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 have amended 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 would have been required to 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 applied a similar standard in the context of physical searches, but gave 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 have required 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, would have had to 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 was 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.