

A Bill to Permanently Authorize Certain Provisions of the USA PATRIOT Act and Other Matters

Summary of DRAFT WORKING COPY

May 11, 2005

Title I – Repeal of Sunset on Certain Authorities

Section 101 permanently authorizes the information sharing and intelligence collection provisions from the USA PATRIOT Act (P.L. 107-56 (Oct. 26, 2001)).

- Section 203(b) authorizes law enforcement to share foreign intelligence or counterintelligence information derived from Title III (federal criminal wiretap) surveillance with intelligence and certain other national security officials
- Section 203(d) authorizes law enforcement to share foreign intelligence information obtained as part of a criminal investigation with intelligence and certain other national security officials
- Section 204 provides an important exception for certain foreign intelligence activities from requirements governing certain criminal electronic surveillance activities
- Section 206 authorizes the use of Foreign Intelligence Surveillance Act (FISA) “roving” wiretaps when the target’s actions may have the effect of thwarting electronic surveillance
- Section 207 extends the initial period (120 days) and renewal period (one year) for FISA electronic surveillance of certain non-U.S. Person agents of a foreign power; extends the initial period for FISA physical searches (90 days); extends the initial period (120 days) and renewal period (one year) for FISA physical searches of certain non-U.S. Person agents of a foreign power
- Section 214 modifies the FISA pen register/trap and trace provision
- Section 215 modifies the FISA “business records” provision
- Section 218 tore down the “wall” between law enforcement and intelligence officials by clarifying the standard for a FISA electronic surveillance or physical search (“the purpose” to “a significant purpose”)
- Section 225 provides immunity for entities that comply with a FISA order

Section 102 repeals the “sunset” applicable to the FISA “lone wolf” provision (Intelligence Reform and Terrorism Prevention Act, Sec. 6001, P.L. 108-458 (Dec. 17, 2004)).

Title II – Foreign Intelligence Surveillance Matters

Subtitle A – Definitional Matters

Section 201 permits surveillance of non-U.S. Persons that “knowingly aid, abet, or conspire” with an international terrorist group (permitting extended initial (120 days) and renewal periods (one year)).

Section 202 harmonizes the FISA definition of “contents” with the definition found in Title III, by clarifying that the acquisition of the “identities of the parties” to a communication or the “existence” of the communication does not require a FISA electronic surveillance order, consistent with Supreme Court precedent (*Smith v. Maryland*, 442 U.S. 735 (June 20, 1979)).

Section 203 clarifies that foreign intelligence information for purposes of FISA includes information that is necessary to protect against certain crimes using law enforcement methods such as prosecution (international terrorism, sabotage, clandestine intelligence activities, and other “grave hostile acts”), consistent with the opinion of the Foreign Intelligence Surveillance Court of Review opinion (*In re: Sealed Case 02-001*, 310 F.3d 717 (FISA Ct. Rev. 2002)). The modification in Section 203 buttresses the “significant purpose” modification in Section 218 of the USA PATRIOT Act to ensure that the “walls” are not rebuilt.

Subtitle B – Other Matters

Section 211 modifies the FISA “business records” provision.

- adds an explicit “relevance” requirement
- provides additional categories of individuals to which disclosure of order may be made
- requires the Attorney General to issue minimization procedures applicable to FISA “business records” orders
- mandates semi-annual reports for “business records” orders that relate to libraries, “booksellers,” firearm purchases, medical records, and tax information

Section 212 codifies in the FISA an existing United States Postal Service regulation authorizing the FBI to acquire “mail covers” for a national security investigation.

- brings parity to criminal and national security investigations by permitting Special Agents in Charge (SACs) to issue “mail cover” requests when “relevant” to an authorized national security investigation
- mandates that the United State Postal Service comply with the request
- permits disclosure of the “mail cover” request only to specified individuals
- requires the Attorney General to issue minimization procedures applicable to FISA mail covers
- improves Congressional oversight of national security “mail covers” through a semi-annual reporting requirement

Section 213 codifies in the FISA a new authority to issue administrative subpoenas for national security investigations. The President, the Attorney General, and the Director of the Federal Bureau of Investigation (FBI) have requested this authority.

- similar to authority already provided for health care fraud, child pornography, drug enforcement, and certain other criminal matters
- consistent with existing criminal investigative administrative subpoenas, sets standard for issuance of an administrative subpoena at “relevance” to the national security investigation, permits issuance by Special Agents in Charge (SACs), and provides enforcement mechanisms to ensure compliance with subpoenas
- requires certification by Director of the FBI or designee to impose nondisclosure requirement
- once certification by Director of the FBI or designee is made, disclosure limited to certain individuals (including an attorney to obtain legal advice) and criminal penalties imposed for violations of the nondisclosure requirement
- administrative subpoena is subject to judicial review if the recipient of a subpoena files a challenge, under seal, with the Foreign Intelligence Surveillance Court or a local Federal district court (Court may also require recertification by Director of the FBI to maintain nondisclosure limitations)
- provides civil immunity for individuals or entities that comply with administrative subpoena

- requires the Attorney General to issue minimization procedures applicable to FISA administrative subpoenas
- provides for substantial Congressional oversight via comprehensive semi-annual report, including additional semi-annual reports for “business records” orders that relate to libraries, “booksellers,” firearm purchases, medical records, and tax information

Section 214 deletes a semi-annual reporting requirement the Department of Justice has found administratively impossible to comply with, namely the number of times information derived from FISA electronic surveillance is “passed” to law enforcement, but retains the requirement for the Attorney General to report the number of times such information is authorized for use in a criminal trial.

Section 215 permits disclosure of certain “subscriber information” under a FISA pen register/trap and trace order, consistent with similar authority provided under the criminal pen register/trap and trace statute.

Section 216 extends, for non-U.S. Persons, period of an initial electronic surveillance order (120 days) and for renewals of such orders (1 year); extends, for non-U.S. Persons, period of initial pen register/trap and trace order (120 days) and for renewals of such orders (1 year). With respect to extended time periods for initiation and renewal of electronic surveillance orders, Section 216 has a broader application (all non-U.S. persons) than Section 201 (and would obviate the need for Section 201).