

The information below provides a broad background of the history of the FISA court, national security letter statutes and the overlapping authority enacted with the passage of the [PATRIOT Act](#) in 2001.

### What is the FISA Court?

Government agencies typically must obtain prior authorization from the FISA court to gather foreign intelligence. The FISA court was created by Congress in 1978 by the Foreign Intelligence Surveillance Act (FISA) to deal with national security issues.

To obtain authorization, a significant purpose of an electronic surveillance or a physical search conducted pursuant to FISA **must** be the collection of foreign intelligence information, **and** there must be **probable cause** to believe that (1) the person targeted by the order is a foreign power or its agent **and** (2) the subject of the search is owned, possessed, in transit to or from or is being or is about to be used by the target.

First Amendment protections are included in the statute, including a requirement that investigations must not be based solely on a U.S. citizen's exercise of his First Amendment rights.

Part of the concern surrounding the PATRIOT Act stems from the fact that the Supreme Court has not ruled directly on whether electronic surveillance of foreign powers and their agents are subject to the warrant requirement of the Fourth Amendment. That said, many believe that even if a warrant was not required for electronic surveillance of a foreign power and its agents, the Fourth Amendment's general "reasonableness" test would apply in determining the constitutionality of a search or seizure.

In contrast to surveillance, the Supreme Court has **not** historically applied Fourth Amendment protections to documents held by third parties. In

*United States v. Miller*

in 1976, the court held that financial records held by third parties could be obtained by the government without a warrant. The reasoning of the court was that individuals have a lesser expectation of privacy as it relates to information held by a third party.

### What are National Security Letter Statutes?

Five federal statutes require businesses---namely communication providers, financial institutions and consumer credit entities---to produce records to federal officials in national security investigations. Absent a statutory prohibition or other legal impediment, agencies can request or receive voluntarily access to third party business records. These letters are issued directly by federal officials without approval by a judicial body. However, such a request is solely restricted to these three business categories and the information available under each statute varies. The use of these letters is generally limited to investigations of international terrorism or for clandestine intelligence activities.

### What did the PATRIOT Act do?

The PATRIOT Act, which became law in October 2001, made changes to the FISA court and national security letter statutes. Among other things, these changes included:

1. Improved communications between foreign intelligence and criminal law enforcement agencies
2. Increased the scope of terrorist related activities
3. Eased national security agents' ability to gather foreign intelligence information between persons in the U.S. and others thought to be located outside of the U.S.
4. Increased the maximum duration of search warrants targeting an agent of a foreign power and other targets
5. Expanded authority for national security letters and required certification that the information sought was relevant or was sought for a particular national security investigation.
6. Expanded authority for FISA orders for business records and other tangible items

While much of the PATRIOT Act is permanently enacted, there are three elements of the PATRIOT Act that **must** be reauthorized **periodically** because of their controversial nature. These include:

**(I) Roving Surveillance Authority (Section 206)**

Roving wiretaps have been in use by domestic law enforcement in criminal cases since the 1980s. Such wiretaps allow investigators to track a suspect as he moves from cell phone to cell phone. The wiretap is approved for a specific person, rather than just for a specific phone number.

National security agents did not have such authority until passage of the PATRIOT Act. This provision allows national security agents, **after approval from a FISA court**, to conduct continuous surveillance of national security suspects across modes of communication.

Additional constitutional protections have been added to Section 206 since 2001 including: a requirement that the government **must** show **probable cause** before the FISA court that the target of the surveillance is a foreign power or an agent of a foreign power. Furthermore, section 206 requires continuous monitoring by the FISA court and substantial reporting requirements to the court by the government.

**(II) Business Record Orders under FISA (Section 215)**

Domestic prosecutors often rely on business records to prove a variety of criminal charges. Law enforcement acquires this information through the use of a subpoena.

National security agents did not have such authority prior to passage of the PATRIOT Act. Instead, they had to obtain a court order and were limited to records held by a business that was a “common carrier, public accommodation facility, physical storage facility or vehicle rental facility.”

Section 215 now requires that the records sought must be relevant to an authorized investigation. Furthermore, to obtain such information, **the government must seek prior FISA court approval**. Section 215 also requires congressional oversight and reporting requirements. Should the documentation sought relate to freedom of speech and expression, such as library records, additional approval by the

FISA court is required.

Section 215 also allows law enforcement with approval of the FISA court to require disclosure of documents and records from businesses and other institutions (third parties) without a suspect's knowledge. Third party recipients of 215 orders can appeal the order to the FISA court.

**(III) □□□□□□□□□□ “Lone Wolf” Provision (Section 6001)**

Section 6001 allows law enforcement to track **non-U.S. citizens** acting alone to commit acts of terrorism that are not connected to an organized terrorist group or foreign power. To date, the FBI has not used this authority.

**\*\*These three provisions are set to expire June 1, 2015.\*\***

## **Terrorist Surveillance Program**

A final point must be made as it relates to the Terrorist Surveillance Program that was passed as part of the original PATRIOT Act. In 2005, the *New York Times* reported that the federal government had monitored international phone calls and emails of hundreds of people in the U.S. without warrants under the Terrorist Surveillance Program. This program is now discontinued and was rendered inactive in January 2007.