

TITLE III and FISA

- 1968 In response to *Katz v. United States*, 389 U.S. 347 (1967), Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. _ 2510 et seq.) - has also been referred to as “the Wiretap Statute”
- 1975 Church Committee (US Senate) hearings began to investigate allegations of federal government abuse of surveillance powers including CIA-sponsored assassinations, FBI spying on the civil rights movement, the opening of mail by those agencies, NSA activities that were in contravention of the Fourth Amendment, and other operations.
- 1978 The Foreign Intelligence Surveillance Act of 1978 (FISA) was enacted (50 U.S.C. _ 1801 et seq.) to produce legal guidelines for federal investigations of foreign intelligence targets.
- 1986 Electronic Communications Privacy Act of 1986 (Public Law No. 99-508) substantially revised Title III to provide coverage for the technological advances developed in the area of electronic communications since the passage of the original act. Minor amendments have been made to the 1986 Act.
- 1995 FISA expanded by Congress to include physical searches as well as electronic surveillance. That authority permits the FISC, upon the requisite probable cause showings, to enter an order permitting the physical search of certain premises upon a probable cause showing that:
1. The target of such search is a foreign power or an agent of a foreign power;
 2. The premises to be searched contains foreign intelligence information; and
 3. The premises to be searched is owned, used, possessed by, or is in transit to or from a foreign power or agent of a foreign power.
- 1998 Congress amended FISA to permit the installation and use of pen register and trap and trace devices in the investigation of international terrorism and clandestine intelligence activities. Applications for the installation and use of such devices must be made by the Attorney General or a designated attorney for the government and must include the applicant’s certification that the information likely to be produced through the use is relevant to an ongoing investigation to protect against international terrorism or clandestine intelligence activities. The new authority extends not only to the tracking of telephone calls but also to the tracking of any form of electronic communication, such as e-mails. The new section includes an admonishment, however, that specifically prohibits the investigation of U.S. persons for activities that are protected by the first amendment to the U.S. Constitution.
- 2001 FISA amended to permit roving or multipoint wiretaps.

2004 “Lone wolf” amendment to definition of “agent of a foreign power” under FISA.

FISA establishes a separate legal regime for "foreign intelligence" surveillance. Title III (the "Wiretap Statute") outlines the strict guidelines regulating ordinary law enforcement surveillance, while FISA regulates the government's collection of "foreign intelligence" information in furtherance of U.S. counterintelligence. FISA does not regulate the use of electronic surveillance outside of the US.

Both Title III and FISA prescribe authorization procedures which must be followed before the electronic surveillance can be conducted. *Compare* 18 U.S.C. __ 2516 to 2517 *with* 50 U.S.C. __ 1802 to 1805. These procedures include judicial approval of surveillance applications; minimization of interceptions by surveilling officials; and limitations on the use of intercepted information.

Both statutes impose civil and criminal sanctions on unauthorized surveillance activities. *Compare* 18 U.S.C. __ 2511 (criminal penalties) *and* 2520 (civil sanctions) *with* 50 U.S.C. __ 1809 (criminal penalties) *and* 1810 (civil sanctions).

The 9th circuit has distinguished between these regimes, holding that “FISA regulates both aural and visual electronic surveillance conducted for foreign intelligence purposes, and [Title III] regulates aural electronic surveillance conducted for domestic purposes.” *United States v. Koyomejian*, 970 F. 2d 536, 540 (9th Cir.) (En banc), *cert. Denied*, 506 U.S. 1005 (1992).

Checks and balances comparison between Title III and FISA

- I. Review by a Neutral and Detached Magistrate
- II. Probable cause
- III. Particularity
- IV. Necessity
- V. Period of Surveillance Order
- VI. Minimization
- VII. Sealing
- VIII. Notice to the Target
- IX. Suppression Remedy

X. FISA's Unique Safeguards

FISA applies to foreign powers and agents of foreign powers

(a) "Foreign power" means -

- (1) a foreign government or any component thereof, whether or not recognized by the United States;
- (2) a faction of a foreign nation or nations, not substantially composed of United States persons;
- (3) an entity that is openly acknowledged by a foreign government or governments to be directed and controlled by such foreign government or governments;
- (4) a group engaged in international terrorism or activities in preparation therefor;
- (5) a foreign-based political organization, not substantially composed of United States persons; or
- (6) an entity that is directed and controlled by a foreign government or governments.

(b) "Agent of a foreign power" means -

- (1) any person other than a United States person, who -
 - (A) acts in the United States as an officer or employee of a foreign power, or as a member of a foreign power as defined in subsection (a)(4) of this section;
 - (B) acts for or on behalf of a foreign power which engages in clandestine intelligence activities in the United States contrary to the interests of the United States, when the circumstances of such person's presence in the United States indicate that such person may engage in such activities in the United States, or when such person knowingly aids or abets any person in the conduct of such activities or knowingly conspires with any person to engage in such activities; or
 - (C) engages in international terrorism or activities in preparation therefore; or
- (2) any person who -
 - (A) 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;
 - (B) 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;
 - (C) knowingly engages in sabotage or international terrorism, or activities that are in preparation therefor, for or on behalf of a foreign power;
 - (D) 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
 - (E) knowingly aids or abets any person in the conduct of activities described in subparagraph (A), (B), or (C) or knowingly conspires with any person to engage in activities described in subparagraph (A), (B), or (C).