

Organizational cultures are notoriously hard to change, and it remains to be seen how well the legal and policy changes of the post-September 11 period will become part of the institutional fabric of the Justice Department and the FBI. In the interest of ensuring that sustained progress is made in this regard, Congress probably made a mistake in subjecting the broad “notwithstanding any other provision of law” sharing provision and the “significant purpose” FISA amendment in the USA PATRIOT Act to that bill’s “sunset” clause – which will cause these important provisions to expire in December 31, 2005.¹²² If it wishes to see these improvements in information-sharing and law enforcement-intelligence coordination succeed in the long term, the 108th Congress should consider exempting them from the “sunset” provision.¹²³

The 108th Congress should also reintroduce and promptly approve the amendment to FISA proposed in June 2002 by Senators Kyl and Schumer. This legislation – which was introduced during the 107th Congress as S.2586 – would modify the “foreign power” definition in the FISA statute to permit the issuance of surveillance or search orders against *non*-U.S.

¹²² See *id.* at § 224(a) (providing for expiration of certain provisions).

¹²³ Congress should also closely monitor the Intelligence Community’s use of grand jury and other protected law enforcement information. Such information is quite properly subject to oversight by federal judges while it remains within law enforcement channels. When passed to the Intelligence Community, however, it leaves the courts’ control and oversight. Since the Department of Justice has taken the position that the intelligence oversight committees of Congress should not be permitted to see any grand jury information, this means that there is *no* oversight of what use is made of grand jury material passed to the Intelligence Community. The Senate Select Committee on Intelligence tried to provide for such oversight in its FY03 authorization bill, see S.2506 (107th Cong., 2d Sess.), at § 306, but this provision was removed in conference at the insistence of the Administration. The 108th Congress would do well to consider the civil liberties implications of passing grand jury information to the Intelligence Community without effective oversight – as well as the implications for the oversight prerogatives of Congress more generally, as such information is incorporated over time into intelligence products denied to the committees because they contain such material.